SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0100-15T1

IN THE MATTER OF THE ESTATE
OF KATHRYN PARKER BLAIR,
deceased.

Submitted October 6, 2016 – Decided February 22, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. P-300-13.

Lori Ann Parker, appellant pro se.

Frank T. Luciano, attorney for respondents Harry Parker, Jr. and the Estate of Kathryn Parker Blair.

PER CURIAM

Petitioner Lori Ann Parker appeals from two Chancery Division orders. The first, entered on July 10, 2015, denied petitioner's motion to vacate a previous dismissal order. The second order, entered on August 6, 2015, imposed a $750 sanction against petitioner for frivolous litigation, pursuant to Rule 1:4-8(b). For the reasons that follow, we affirm the first order and vacate the second.

Petitioner previously appealed from an April 29, 2014 Chancery Division order, and a June 24, 2014 order denying reconsideration, which dismissed her verified complaint contesting the will of her aunt, Kathryn Parker Blair, who died in October 2012. Petitioner appealed, and we affirmed. In re Estate of Blair, No. A-5482-13 (App. Div. Feb. 1, 2016) (slip op. at 1).

On April 21, 2015, while her appeal was pending, petitioner filed a Rule 4:50-1 motion to vacate the orders under appeal, asserting she discovered "new evidence" in the form of alleged misconduct in the surrogate's office regarding various filings, warranting relief from the April 29, 2014 dismissal order. On June 12, 2015, defendants[1] filed a cross-motion, seeking (1) to bar petitioner from filing any further pleadings in the case and (2) to impose financial sanctions against petitioner.

On July 10, 2015,[2] the trial court denied petitioner's April 21, 2015 motion to vacate, finding no basis for such relief. Addressing defendants' cross-motion, the court ordered the application to bar petitioner's future filings, must be directed

[1] We refer to the Estate of Kathryn Parker Blair and its executor, Harry Parker Jr., as defendants.

[2] The copy of this order in the record includes a hand-written date of June 10, 2015, but bears a stamp with a July 10, 2015 filing date. The briefs of both parties identify the proper date as July 10, 2015.

to the Assignment Judge. The court also carried the request for sanctions to July 31, 2015, with instructions for defendants to "submit a [sanction] certification" by July 15, with "any opposition" filed by July 20, and any reply filed by July 24. On August 6, 2015, the court ruled on the sanction request, entering an order requiring petitioner pay $750 in attorney's fees and costs to the estate, pursuant to Rule 1:4-8(b). This appeal followed.

I.

Because the essential background facts were set forth in our earlier opinion, a brief summary will suffice here. On June 25, 1987, the decedent Kathryn Parker Blair executed a will stating her estate would pass to her siblings in equal shares, unless they predeceased her, in which case that sibling's share would pass to his or her surviving children. Estate of Blair, supra, (slip op. at 2). In 2002, the decedent's brother passed away. Ibid. Petitioner is his daughter. Ibid.

On October 11, 2012, the decedent executed a new will, which did not name petitioner as a beneficiary. Ibid. Two days later, the "decedent, then eighty years of age, died of ovarian cancer." Id. at 2. On October 24, 2012, the court admitted this revised will to probate. Ibid. Upon admittance, petitioner challenged the will's validity on a number of grounds, including undue

influence and lack of testamentary capacity; however, petitioner failed to provide adequate evidence in support of her claims, while defendants produced decedent's friends who testified to decedent's clear mind, strong will, and lucidity. Id. at 2-4.

On April 29, 2014, the court granted summary judgment to defendants and affirmed the probate of the new will, finding petitioner had "failed to present any competent evidence decedent lacked the requisite testamentary capacity" or was subjected to undue influence. Id. at 4. On May 14, 2014, petitioner filed a motion for reconsideration and a stay of the April 29, 2014 order. On June 24, 2014, the court denied both requests.

On June 27, 2014, defendants filed a motion for sanctions against petitioner for frivolous litigation. In response, on July 7, 2014, petitioner filed a cross-motion, requesting the court to (1) stay all relief granted up to that point, (2) reconsider and vacate both the April 29, 2014 and June 24, 2014 orders, and (3) reinstate her complaint. Subsequently, petitioner filed multiple "notices of correction" to this motion, making minor language alterations. The court denied both cross-motions.

On July 21, 2014, petitioner filed a notice of appeal with this court, challenging both the April 29, 2014 and June 24, 2014 orders. After filing her notice of appeal, petitioner filed a motion to settle the record in the Probate Part, alleging

irregularities and mishandling of evidence by the "Surrogate's Court.[3]" On October 27, 2014, the trial court denied the motion, rejecting petitioner's attempt to rely on arguments that were "already considered but rejected" by the court, and to "raise the same unsubstantiated allegations" to reargue her motion. Petitioner also filed a second notice of appeal, which she later dismissed.

II.

A. Motion to Vacate.

Rule 4:50-1 allows a trial court to set aside "a final judgment or order." This decision is "addressed to the sound discretion of the trial court, which should be guided by equitable principles in determining whether relief should be granted or denied." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994) (citing Hodgson v. Applegate, 31 N.J. 29, 37 (1959). On appeal, we will leave the trial court's decision "undisturbed unless it represents a clear abuse of discretion." Ibid.

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[3] Rule 4:83-2, addressing the filing of papers in probate and related matters, provides:

> In all matters relating to estates of decedents, trusts, guardianships and custodianships, other than those set forth in R. 4:80 and R. 4:81, all papers shall be filed with the Surrogate of the county of venue as the deputy clerk of the Superior Court, Chancery Division, Probate Part, pursuant to R. 1:5-6.

Specifically, petitioner sought relief under Rule 4:50-1(b). When a party seeks to obtain relief by invoking Rule 4:50-1(b), the party "must demonstrate 'that the evidence would probably have changed the result, that it was unobtainable by the exercise of due diligence for use at the trial, and that the evidence was not merely cumulative.'" DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 264 (2009) (quoting Quick Chek Food Stores v. Twp. of Springfield, 83 N.J. 438, 445 (1980)). Further, "[a]ll three [of these] requirements must be met;" it is insufficient to prove only one or two prongs of the test. Ibid. Finally, "'newly discovered evidence' does not include an attempt to remedy a belated realization of the inaccuracy of an adversary's proofs." Ibid. (quoting Posta v. Chung-Loy, 306 N.J. Super. 182, 206 (App. Div. 1997)). "The motion shall be made within a reasonable time, and for reasons (a), (b) and (c) of R. 4:50-1 not more than one year after the judgment, order or proceeding was entered or taken." R. 4:50-2.

In her brief, petitioner states the new evidence involved "a confirmed docket sheet received by the surrogate . . . which proved someone in the surrogate office had misled the trial court" as well as a statement by the defendant's attorney that "missing medical records at issue had been . . . stolen from the

courthouse." Ibid. Petitioner makes no other arguments nor provides any of the alleged evidence in the record.

Petitioner's claims are meritless. First, petitioner fails to meet any of the three requirements necessary to obtain relief under Rule 4:50-1(b). See DEG, supra, 198 N.J. at 264. Second, her new evidence consists solely of written and oral claims, unsupported by corroborating documentation. Additionally, her claims are generalized and non-specific. We therefore affirm the trial court's order denying petitioner's motion to vacate its April 29, 2014 and June 25, 2014 orders.

For the first time on appeal, petitioner asserts that Rule 1:5-6(b)(5)[4] and Rule 2:5-4(b)[5] are "as written, [] unconstitutional in [their] effect." However, petitioner's brief fails to provide any logical basis for asserting this argument in this case. We therefore conclude the argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

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[4] Rule 1:5-6(b)(5) states that in probate matters, a paper is considered to be "filed with the trial court if the original is filed" with the Surrogate, "in the Surrogate's Court," or "in actions in the Chancery Division, Probate Part, with the Surrogate of the county of venue as deputy clerk of the Superior Court."

[5] Rule 2:5-4(b) addresses specifications for records on appeal.

B. Motion for Sanctions.

As a general rule, we review "[a] trial judge's decision to award attorney's fees pursuant to Rule 1:4-8," under an abuse of discretion standard. McDaniel v. Lee, 419 N.J. Super. 482, 498 (App. Div. 2011); United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 390 (App. Div.), certif. denied, 200 N.J. 367 (2009). "Reversal is warranted when 'the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.'" Ferolito v. Park Hill Condo Ass'n, 408 N.J. Super. 401, 407 (App. Div.) (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)), certif. denied, 200 N.J. 502 (2009).

Rule 1:4-8(d) authorizes a sanction against an attorney or pro se party for violating Rule 1:4-8(a), which requires an attorney to certify, based on "knowledge, information, and belief" after reasonable inquiry, that, among other things, "the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." R. 1:4-8(a)(2); Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 68-69 (2007) (stating Rule 1:4-8 outlines the motion procedure for a party seeking attorney's fees directly incurred

from the suit); see also N.J.S.A. 2A:15-59.1(a)[6] (authorizing sanctions for the prevailing party when the underlying litigation is deemed frivolous).

The court must strictly interpret the statute and the rule against the applicant seeking an award of fees. LoBiondo v. Schwartz, 199 N.J. 62, 99 (2009); DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226 (App. Div. 2000) (citation omitted). This strict interpretation is grounded in "the principle that citizens should have ready access to . . . the judiciary." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div.) (citation omitted), certif. denied, 162 N.J. 196 (1999). "The statute should not be allowed to be a counterbalance to the general rule that each litigant bears his or her own litigation costs, even when there is litigation of 'marginal merit.'" Ibid. (quoting Venner v. Allstate, 306 N.J. Super. 106, 113 (App. Div. 1997)). The court should award sanctions in only exceptional cases. See Iannone v. Mchale, 245 N.J. Super. 17, 28 (App. Div. 1990). "When the petitioner's conduct bespeaks an honest attempt to press a

[6] The statute provides a complaint is frivolous when "commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury," N.J.S.A. 2A:15-59.1(b)(1), or if "[t]he nonprevailing party knew, or should have known, that the complaint . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law," N.J.S.A. 2A:15-59.1(b)(2). First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007).

perceived, though ill-founded and perhaps misguided, claim, he or she should not be found to have acted in bad faith." Belfer, supra, 322 N.J. Super. at 144-45. The party seeking sanctions bears the burden to prove bad faith. Ferolito, supra, 408 N.J. Super. at 408.

Additionally, Rule 1:4-8(d) specifically stipulates

> [a] sanction imposed for a violation of paragraph (a) of this rule shall be limited to a sum sufficient to deter repetition of such conduct. The sanction may consist of . . . an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of a violation . . . . In the order imposing sanctions, the court shall describe the conduct determined to be a violation of this rule and explain the basis for the sanction imposed.

In this case, petitioner claims the trial court erred when it sanctioned her for engaging in frivolous litigation. Petitioner argues the Rule 1:4-8(d) certification of defense counsel, dated July 16, 2015, contained numerous deficiencies. First, counsel filed the certification on July 17, 2015, thus failing to meet the July 15, 2015 filing deadline mandated by the trial court's June 10, 2015 order. Second, the certification failed to comply with Rule 1:4-4(b) because "[i]nstead of stating 'I am subject to punishment' it stated 'I may be subject to punishment.'" Third, defendant did not serve the certification on petitioner until July 20, 2015, the same day she had to file her reply. Fourth, the

certification failed to comply with Rule 4:42 because it failed to include an itemized list of costs and fees.

Additionally, petitioner argues the trial court clearly abused its discretion because it "sanctioned the [petitioner] for procedural error, but did not sanction the defendants for their procedural error." Petitioner argues the court did so when it "made the extra effort — without even being asked to by the defendants — to help the defendants correct their errors by carrying [their] [Rule 1:4-8] sanction requests to July 31, 2015."

Notwithstanding evidence in the record supporting an award of sanctions in this case, we are constrained to vacate the award of attorney's fees against petitioner. When defendants filed their motion for sanctions for frivolous litigation on June 12, 2015, defendants failed to file the supporting certification required by Rule 1:4-8(b)(1). Notwithstanding this deficiency, the trial court indulgently permitted defendants additional time to provide this certification. In addition to filing this certification beyond the date set by the court, more importantly, defendants filed a non-compliant certification. Specifically, the supporting certification included a certification in lieu of oath that failed to track precisely the language mandated by Rule 1:4-4(b).

Rule 1:4-4(b) entitled "Certification in lieu of Oath" provides as follows:

> In lieu of the affidavit, oath or verification required by these rules, the affiant may submit the following certification which shall be dated and immediately precede his signature:
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> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment."

In 1974, Justice Jacobs explained the amendment of Rule 1:4-4(b) to its current form:

> Under this amendment[,] the available punishment was no longer restricted to contempt. The clear purpose of the broadened language was to subject those who made wilfully false certifications to the punishment available under any applicable law or legal principle and to so advise the signatory. The Court's allowance of certification in lieu of oath was admittedly intended as a convenience but it in nowise reduced the solemnity of the verification or declaration of truth. Indeed the language of the certification was well designed to impress the signatory with the gravity and consequence of his act, perhaps much more so than the sometimes perfunctory notarization.
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> [State v. Parmigiani, 65 N.J. 154, 156-57 (1974) (citation omitted).]

"The rules of court clearly require the same solemnity in the act of verification as is required when a document is formally sworn to." State v. Kushner, 192 N.J. Super. 583, 586 (App. Div. 1984) (citing R. 1:4-4(b)). As we previously explained,

> The change in rules was not intended to degrade the solemnity of the affirmation of the truth . . . . In our view, the adoption of the certification procedure merely constituted a change in ritual and not in substance. Certification is only another way of swearing or affirming. It is nothing in itself except as a perceptible manifestation of the intent to verify the statement certified.
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> [State v. Angelo's Motor Sales, 125 N.J. Super. 200, 207 (App. Div. 1973).]

A willfully false certification in lieu of oath will support a criminal prosecution for false swearing. Id. at 208.

The certification in lieu of oath included in defense counsel's Rule 1:4-8(b)(1) certification stated, "I certify that the statements made by me are true. If any of the foregoing statements made by my [sic] are willfully false, I may be subject to punishment."

The critical distinction here is the difference between acknowledging only that "I may be subject to punishment," as opposed to acknowledging "I am subject to punishment." We do not view the language used by defense counsel as the equivalent of the language required by Rule 1:4-4(b) nor do we share the view of the trial court this represents a "de minimis" "[t]echnical violation[]."

Because defendants' motion for sanctions was not supported by a Rule 1:4-8(b)(1) certification that included a valid

certification in lieu of oath, the trial court mistakenly exercised its discretion in awarding any fees to defendants. We therefore vacate the award in favor of defendants.

Affirmed in part, and vacated in part.