SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0806-15T3

HELMER, CONLEY & KASSELMAN, PA,

Plaintiff-Appellant,

v.

VINCENT MONTALVO, II and PATRICIA MONTALVO,

Defendants,

and

BARBARA MONTALVO,

Defendant-Respondent.

Argued February 14, 2017 – Decided October 25, 2017

Before Judges Messano and Suter.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-0289-14.

Rebecca K. McDowell argued the cause for appellant (Saldutti Law Group, attorneys; Thomas B. O'Connell and William D. Brown, of counsel and on the brief).

Gary M. Marek argued the cause for respondent.

The opinion of the court was delivered by

SUTER, J.A.D.

Plaintiff Helmer, Conley & Kasselman, PA (Helmer) appeals the September 11, 2015 order that granted defendant Barbara Montalvo's (defendant) cross-motion for summary judgment and dismissed its complaint with prejudice. We reverse only the "with prejudice" nature of the dismissal, concluding that dismissal without prejudice was the appropriate remedy. Because Helmer had actual knowledge that defendant did not have notice of her right to request fee arbitration before it filed suit, we conclude Helmer did not satisfy Rule 1:20A-6, requiring dismissal of the complaint.

Helmer is a law firm. In 2007, defendant signed a "guarantee of fees and disbursements" (guarantee) in connection with Helmer's legal representation of her brother-in-law, Vincent Montalvo (Vincent). Her mother-in law, Patricia Montalvo, also signed the same guarantee. The guarantee provided that defendant and her mother-in-law would "be liable and responsible for, and guarantee the payment of the fees and services for which [Vincent] has contracted in the [retention agreement], and to promptly pay same when due . . . ." In the space provided on the guarantee form, defendant listed her address as 8th Street in Mays Landing[1] and

[1] We have omitted the actual house numbers throughout this opinion.

provided her social security number. Vincent failed to make the required payments.

On March 26, 2013, Helmer sent a pre-action notice (notice) under Rule 1:20A-6 about fee arbitration. The content of the notice is not an issue raised by the parties in this appeal. The notice was sent both by regular and certified mail to the 8th Street address that was on the guarantee. The certified mail was returned with the notation "not deliverable as addressed, unable to forward." The regular mail also was returned with the notation "not deliverable as addressed, unable to forward."[2] Helmer did not look for another address for defendant. Defendant did not notify Helmer that she had a different address.

On January 23, 2014, Helmer, through its counsel, the Saldutti Law Group (Saldutti), filed suit against defendant on the guarantee seeking payment of $26,768.85 in attorney's fees, interest and costs for its legal representation of Vincent. By that time, Saldutti had information that the best address for defendant was at a residence on Main Street in Mays Landing. Personal service of the complaint was made on the mother-in-law and on a "co-resident" at the mother-in-law's address, also in Mays Landing but

[2] It appears to have been returned to Helmer on the 31st of a month in 2013, but the month is not legible on the copy in the record.

on a different street, and a default judgment was entered against defendant.

Defendant claims that the first notice she had that Helmer sued her on the guarantee was when her wages were garnished. She successfully moved to vacate the default judgment and filed an answer and counterclaim. Defendant alleged that she signed the guarantee under coercion and duress and did not read it before she signed. She did not raise Rule 1:20A-6 as an affirmative defense to the complaint, but did claim that Helmer used an incorrect address for service. She listed her address on the answer as Main Street in Mays Landing.

The parties attended court ordered mediation. The mediator concluded that Helmer did not give proper notice to defendant of the right to fee arbitration and therefore, that it could not file suit against her. By then, Helmer had filed a motion for summary judgment based on the guarantee and, following the court mediation, defendant filed a cross-motion claiming she did not receive proper notice under Rule 1:20A-6, and requested the dismissal of the litigation. Helmer contended that they complied with Rule 1:20A-6 by sending the pre-action notice to defendant's last known address before filing suit.

On September 4, 2015, the trial court granted defendant's cross-motion and dismissed Helmer's complaint with prejudice,

finding that Helmer did not comply with Rule 1:20A-6. The court reasoned that Helmer's position, if accepted, "would defeat the purpose of the rule if attorneys only had to send to the last known address without regard to whether or not plaintiff knows it's the wrong address or finds out." A revised order was entered on September 11, 2015, that granted the cross-motion but also dismissed plaintiff's counterclaims based on the consent of the parties. Helmer appeals the September 11, 2015 order.

On appeal, Helmer contends that the court erred by failing to apply the plain, unambiguous, and ordinary meaning of R. 1:20A-6, to consider the "guiding principles" of Rule 1:1-2 and to consider defendant's "unclean hands." Helmer argues that the court overlooked its substantial compliance with Rule 1:20A-6. If we conclude the dismissal should have been without prejudice, then Helmer contends we should equitably toll the statute of limitations. We find no merit in these issues.

We review summary judgment using the same standard that governs the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). As the parties agreed on the material facts, our task is limited to determining whether the trial court's ruling on the law was correct. Prudential Prop. & Cas. Ins. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We review issues of law de novo and accord no deference

to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013); see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"Under R. 1:20A-3(a)(1), the client has the exclusive right to submit a fee dispute to the [District Fee Arbitration] committee for resolution." Kamaratos v. Palias, 360 N.J. Super. 76, 91 (App. Div. 2003) (Fuentes, J., concurring). "The policy underlying the fee arbitration system is the promotion of public confidence in the bar and the judicial system." Saffer v. Willoughby, 143 N.J. 256, 263 (1996). "The fee arbitration process is designed to afford a client a 'swift, fair and inexpensive' method to resolve fee disputes." Kamaratos, supra, 360 N.J. Super. at 86.

Fee committees have the "jurisdiction to arbitrate fee disputes between clients and attorneys." Id. at 264 (quoting R. 1:20A-2(a)). The fee committee "shall also have jurisdiction to arbitrate disputes in which a person other than the client is legally bound to pay for the legal services" unless that obligation arises from settlement. R. 1:20A-2(a). The parties do not question the ability of defendant to have asked for fee arbitration under these rules.

The Rules provide that "[b]efore an attorney can file suit against a client to recover a fee, the attorney must notify the

client of the availability of fee arbitration." Id. at 264. The procedures are set forth out in Rule 1:20A-6.

> No lawsuit to recover a fee may be filed until the expiration of the 30 day period herein giving Pre-action Notice to a client . . . . Pre-action Notice shall be given in writing, which shall be sent by certified mail and regular mail to the last known address of the client, or, alternatively, hand delivered to the client, and which shall contain the name, address and telephone number of the current secretary of the Fee Committee in a district where the lawyer maintains an office . . . . The notice shall specifically advise the client of the right to request fee arbitration and that the client should immediately call the secretary to request appropriate forms; the notice shall also state that if the client does not promptly communicate with the Fee Committee secretary and file the approved form of request for fee arbitration within 30 days after receiving pre-action notice by the lawyer, the client shall lose the right to initiate fee arbitration. The attorney's complaint shall allege the giving of the notice required by this rule or it shall be dismissed.

Helmer contends its case against defendant should not have been dismissed because it satisfied this Rule. It mailed the pre-action notice to defendant's last known address as set forth in the guarantee; it mailed the notice by regular and certified mail; it made reference to this mailing in the complaint. The problem is that both of the mailings were returned to Helmer with notations that defendant did not receive either one.

"New Jersey cases have recognized a presumption that mail properly addressed, stamped and posted was received by the party to whom it was addressed." SSI Med. Servs. v. HHS, Div. of Med. Assistance & Health Servs., 146 N.J. 614, 621 (1996). That presumption has been rebutted here because both the regular and certified mail were returned to Helmer. Helmer does not contend that defendant was aware of her right to fee arbitration; it only asserts that it sent the notice to her last known address.

The purpose of the Rule was to give clients and others who might be responsible to pay legal fees the ability for a short window of time to request the alternate dispute procedure of arbitration before being subjected to litigation. That the ability to so do is important cannot be understated. The ability is expressed in the Rule as a "right" and the sanction for having not given this opportunity is severe, namely the dismissal of the complaint. As we stated in Mateo v. Mateo, 281 N.J. Super. 73, 80 (App. Div. 1995), where no notice was given under Rule 1:20A-6, "[t]here is no sense in requiring an attorney to inform a client that litigation over a fee dispute may be avoided by bringing the matter before the Fee Committee, yet binding the client to the judgment in such litigation where the attorney failed to give the required notice."

Given the purpose of the Rule, we conclude that Helmer did not comply with it when it knew that the client or responsible third person was not actually notified of her right to request fee arbitration. In light of our holding, we find no merit to Helmer's contention that it substantially complied with the Rule's requirements. See Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 353 (2001) (requiring a "general compliance with the purpose of the statute" as an element of finding substantial compliance).

The focus of our decision is narrow. We are not incorporating a general due diligence requirement into the Rule. That is an issue more appropriately left for the Supreme Court's consideration. We simply hold that where counsel has actual knowledge that the client or responsible third party did not receive the pre-action notice because both mailings were returned, the presumption of receipt has been rebutted. Counsel then should make a genuine effort to obtain a current address and resend the notice. To do otherwise undercuts the purpose of the Rule because it pays lip service to the client's "right" to request arbitration without giving any meaningful opportunity to the client to exercise it. As the Supreme Court has stated "[t]he ultimate wisdom of the fee arbitration system depends on its operation in fact." In re LiVolsi, 85 N.J. 576, 604 (1981).

The trial court dismissed the complaint with prejudice because of Helmer's lack of compliance with Rule 1:20A-6. We hold that the dismissal should have been without prejudice. "As a general rule, a dismissal on the merits is with prejudice while a dismissal based on the court's procedural inability to consider a case is without prejudice." Pressler & Verniero, Current N.J. Court Rules, comment 4 on R. 4:37-2 (2018) (citing Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 415-16 (1991)). In this case, because there was no adjudication of defendant's obligations under the guarantee to pay for Vincent's legal fees, it was error to dismiss the litigation with prejudice.

We briefly address Helmer's contention that the statute of limitations should be equitably tolled. It is not clear whether that issue was raised before the trial court, but even if it were, we have no need to address it where the complaint remains dismissed and where the record before us is not adequate to resolve it. No other issues warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

The dismissal is affirmed but it shall be without prejudice; we reverse the "with prejudice" designation.