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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1546-16T4

RONALD J. O'MALLEY,

Plaintiff-Respondent,

v.

BRIAN NEARY and THE LAW
OFFICES OF BRIAN NEARY,

Defendants-Appellants.

Argued April 25, 2017 – Decided June 19, 2017

Before Judges Fisher, Vernoia and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No. L-1844-16.

Peter W. Till argued the cause for appellant.

Peter A. Kreiner argued the cause for respondent
(Kreiner & Kreiner LLC, attorneys; Mr. Kreiner, on
the brief).

PER CURIAM

Defendants, Brian Neary and The Law Offices of Brian Neary
(conjointly: Neary), were retained on or about June 17, 2009 to

represent plaintiff in a federal criminal prosecution.¹ On August 14, 2009, O'Malley also hired the law firm of Walder, Hayden & Brogan (Walder), with which he signed a separate retainer agreement for investigatory services regarding the same prosecution. Plaintiff signed a second retainer with Walder on September 7, 2010 to cover the trial phase. He signed a third retainer agreement with Walder on February 14, 2012 to cover the appeal of plaintiff's sentence. A separate retainer with Neary was signed by plaintiff on April 16, 2012 for appellate work. Both firms represented O'Malley during the trial phase and in his appeal after sentencing.

On May 17, 2013, O'Malley filed suit against Walder alleging breach of contract, breach of fiduciary duty, breach of the duty of good faith and fair dealing, consumer fraud and fraud. Neary was not named in that suit; nor was he named as a potential party in a notice pursuant to Rule 4:5-1(b)(2). A deposition subpoena in the Walder matter was issued to Neary as a non-party. That deposition was taken on October 21, 2015. The suit against Walder was subsequently settled on June 3, 2016.

¹ The respective complaints filed by plaintiff against Neary and Walder Hayden & Brogan provide the facts we here consider. The complaints were attached to defendants' motion to dismiss.

O'Malley filed suit against Neary on July 6, 2016, alleging breach of contract and breach of the duty of good faith and fair dealing. The following month, Neary moved for dismissal, arguing that O'Malley's failure to name Neary in the Walder suit barred this action under the entire controversy doctrine. The motion judge denied the application and Neary filed a motion for leave to appeal, which we granted. In this interlocutory appeal, Neary claims the motion judge failed to consider and properly apply the entire controversy doctrine. We find insufficient proofs, at present, to warrant dismissal of the suit pursuant to the entire controversy doctrine, and affirm the denial of Neary's motion to dismiss the complaint.

The entire controversy doctrine is equitably rooted, thus its applicability is left to judicial discretion based on the particular circumstances in a given case. Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 323 (1995); DiTrollo v. Antiles, 142 N.J. 253, 275 (1995); Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 27 (1989). We review a trial court's denial of a motion to dismiss based on the entire controversy doctrine under the abuse of discretion standard. See Paradise Enterprises v. Sapir, 356 N.J. Super. 96, 102 (App. Div. 2002) (analogously applying an abuse of discretion standard to the trial court's application of

the equitable principles of forum non conveniens), certif. denied, 175 N.J. 549 (2003).

In Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960), this court held:

It is well settled that discretion means legal discretion, in the exercise of which the trial judge must take account of the law applicable to the particular circumstances of the case and be governed accordingly. . . . [I]f the trial judge misconceives the applicable law, or misapplies it to the factual complex, in total effect the exercise of legal discretion lacks a foundation and becomes an arbitrary act, however conscientious may have been the judge in the performance of it. When this occurs it is the duty of the reviewing court to adjudicate the controversy in light of the applicable law in order that a manifest denial of justice be avoided.

The entire controversy doctrine entered a stage of evolution² in 1998 when the New Jersey Supreme Court approved changes to the New Jersey Court Rules. Rule 4:30A was amended to eliminate mandatory party joinder. Party joinder was readdressed by the adoption of Rule 4:5-1(b)(2).

Our Supreme Court, in Kent, supra, 207 N.J. at 445, recognized the interplay between Rule 4:5-1(b)(2) and Rule 4:30A:

² The history of the entire controversy doctrine has been well-documented by a number of courts. See, e.g., Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co., 207 N.J. 428, 442-44 (2011); Olds v. Donnelly, 150 N.J. 424, 432-34 (1997).

Taken together, both Rule 4:30A and Rule 4:5-1(b)(2) advance the same underlying purposes. As it relates to claims and to parties, they express a strong preference for achieving fairness and economy by avoiding piecemeal or duplicative litigation. Both, however, recognize that the means of accomplishing those goals rests with the court. That is, Rule 4:30A requires joinder of claims but grants authority to a trial judge to create a safe harbor in an appropriate case. Similarly, Rule 4:5-1(b)(2) requires that names of potentially liable or relevant parties be disclosed to the court, leaving to it the decision about whether to join them or not.

We consider defendants' motion to dismiss only under the parameters of Rule 4:5-1(b)(2),³ which mandates that, with the initial pleading, each party submit a certification advising a court if any other action is pending or contemplated that relates to the controversy before the court. If an action is pending or contemplated, the certification:

shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts.

[Ibid.]

³ Despite defendants' claim at oral argument to the contrary, we believe that the issue in this case involves only party joinder, i.e., the joinder of Neary to the Walder suit. It does not involve the joinder of any claim that was not included in the Walder suit. We need not examine that issue.

The duty to amend the certification is continuing if the facts set forth therein change. Ibid. Courts may impose sanctions for a party's failure to comply with the Rule:

including dismissal of a successive action against a party whose existence was not disclosed or the imposition on the noncomplying party of litigation expenses that could have been avoided by compliance with this rule. A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action.

[Ibid.]

"The purpose of paragraph (b)(2) . . . is to implement the philosophy of the entire controversy doctrine." Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 4:5-1(b)(2)(2017). The Kent Court explained how the execution of Rule 4:5-1(b)(2) fosters the aim of the entire controversy doctrine:

The goals of avoiding piecemeal litigation and creating efficiency as related to parties were accomplished by substituting the mechanism of disclosure for the automatic requirement of joinder. That is, a party to any litigation is obligated to reveal the existence of any non-party who should be joined or who might have "potential liability to any party on the basis of the same transactional facts." R. 4:5-1(b)(2). The disclosure obligation attaches to each party when filing its first pleading and continues thereafter, requiring each to file and serve amended certifications

should facts or circumstances change. Ibid. The Rule demands only disclosure, explicitly leaving it to the court to decide whether to require that notice of the action be given to any non-party identified or to compel that party's joinder.

[Kent, supra, 207 N.J. at 444-45 (citations omitted).]

It is within a court's discretion, once noticed of a potentially related non-party, to compel joinder of that party. Id. at 445-46.

The motion judge found that the instant suit involved different transactional facts than did the Walder suit, and ended its analysis there. The judge did not make findings as to whether the failure to submit a certification pursuant to Rule 4:5-1(b)(2), disclosing Neary as a non-party who had potential liability in the Walder suit, was inexcusable. Nor did the court determine if Neary's right to defend plaintiff's action was "substantially prejudiced by not having been identified in the prior action." R. 4:5-1(b)(2).⁴

⁴ In his initial ruling, the motion judge found that the dismissal of the action "would create a significant prejudice against the plaintiff if the plaintiff's allegations pan out." No finding as to prejudice against the defendants was made at that time. At a subsequent hearing, the judge reiterated his finding. When plaintiff's counsel pointed out that defendants had to show substantial prejudice, the court said, "Well, I figured that implicit in my finding that there's substantial prejudice against the plaintiff is that there's insubstantial prejudice against the

We briefly examine the two prongs of Rule 4:5-1(b)(2).

A.

Plaintiff now contends that he did not comply with the notice requirements of Rule 4:5-1(b)(2) because defendants willfully failed to provide plaintiff with invoices, and that the factual transactions in the Neary and Walder suits were discrete.

The entire controversy doctrine sprang from the constitutional principle that courts should create rules to ensure that matters in controversy be efficiently and completely determined. Kent, supra, 207 N.J. at 442-43 (citing N.J. Const. art. VI, § III, ¶ 4). In the context of the 1998 rule changes involving the party joinder aspect of the doctrine, the Kent court declared that "the Rule demands only disclosure," id. at 445, and held:

The ultimate authority to control the joinder of parties and claims remains with the court; the parties may not choose to withhold related aspects of a claim from consideration, see, e.g., Hobart Bros. Co. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 240-41 (App. Div. 2002) (quoting Oltremare v. ESR Custom Ruqs, Inc., 330 N.J. Super. 310, 315 (App. Div. 2000)), nor may they decline to reveal the existence of other parties in an effort to achieve an advantage.

[Id. at 446.]

defendants." The judge did not reveal the facts underpinning his finding.

The Rule requires parties to give notice even if the nexus to the potential party is not clear. Compliance with the Rule allows courts to monitor the status of that party vis-à-vis pending litigation. A judge can ascertain if any nexus between the potential party and the pending suit is revealed during the course of discovery. The procedure allows a court to address entire controversy doctrine issues early on—certainly before the pending case is settled or tried—and to avoid motions to dismiss based on the doctrine, and the appeals that follow. A court can exercise its prerogative to require joinder or allow a separate cause of action against a potential party only if notice is given.

There are insufficient proofs, at this early stage of litigation, to determine if the failure to give the Walder court notice of the instant suit was inexcusable. Neary has not provided O'Malley with invoices for the services rendered, thus no comparison of the services provided to O'Malley by both firms can be made. While the deposition of Brian Neary may have, arguably, established that Neary and Walder were O'Malley's co-counsel in the criminal prosecution, it did nothing to foster a comparison of services, or to establish that the suits against each lawyer were based on the same transactional facts. O'Malley's letter⁵ to

⁵ This letter was included in Neary's appendix, but we do not see that it was considered by the motion judge. In the appendix, it

Neary, dated November 26, 2012, gives some insight into O'Malley's grievances against Neary on that date, but does not establish a link between the suits.

B.

In light of our holding regarding the first prong of Rule 4:5-1(b)(2), we need not determine if defendants suffered substantial prejudice to justify the dismissal of this case under the second prong of the Rule.

Our Supreme Court has recognized that "substantial prejudice" can include the loss of evidence or other proofs needed to defend a suit, or an increase in damages occasioned by a separate action. Kent, supra, 207 N.J. at 446-48.

Defendants advance that they have been prejudiced because they were "denied the opportunity to participate in discovery and to develop defenses in the broader litigation context involving all of the participants." Defendants do not specify the discovery or defenses to which they refer. They do not indicate the reason discovery cannot now be obtained, or defenses cannot now be asserted. In any event, it is unnecessary to determine if defendant demonstrated substantial prejudice because we have

is attached to counsel's reply certification filed in connection with Neary's motion to dismiss the complaint. We take note of it as part of the documents that appear to have been submitted to the motion court.

concluded the record does not permit a finding that the failure to identify Neary was inexcusable under the first prong of Rule 4:5-1(b)(2).

C.

The Rule proscribes dismissal of a successive suit unless both inexcusable failure to comply with the notice provision and substantial prejudice are established by the undisclosed party. Even if both prongs are proved, courts may, instead, consider sanctions.⁶ The basis for the imposition of less draconian remedies follows long-standing jurisprudential tenets. As we explained in Alpha Beauty v. Winn-Dixie Stores, 425 N.J. Super. 94, 102 (App. Div. 2012):

Our Court Rules, from their inception, have been understood as "a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits." Ragusa v. Lau, 119 N.J. 276, 284 (1990) (quoting Tumarkin v. Friedman, 17 N.J. Super. 20, 27 (App. Div. 1951), certif. denied, 9 N.J. 287(1952)); see also Ponden v. Ponden, 374 N.J. Super. 1, 9-10 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005); Tucci v. Tropicana Casino and Resort Inc., 364 N.J. Super., 48, 53 (App. Div. 2003). As a result, the Supreme Court has recognized a "strong preference for adjudication on the merits rather than final disposition for procedural reasons." Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 356 (2001) (quoting Mayfield v.

⁶ Defendants did not request, and the trial court did not consider sanctions, only dismissal.

Cnty. Med. Assocs., P.A., 335 N.J. Super. 198,
207 (App. Div. 2000)).

The party asserting the entire controversy doctrine as a defense, bears "the burden of establishing both inexcusable conduct and substantial prejudice." Hobart Bros. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 242 (App. Div.), certif. denied, 175 N.J. 170 (2002). Defendants, on this record, have not met that burden and dismissal of the suit against Neary is not warranted.

The order under review is affirmed, although we do not foreclose the trial court's later reconsideration of these principles, if appropriate, upon receiving a better understanding about the facts and allegations and their relationship to the prior suit against Walder. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION