SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1672-15T1

ANDREA TREZZA and
JOSEPH TREZZA, her husband,

Plaintiffs-Appellants,

v.

MARGARET LAMBERT-WOOLEY, M.D.,

Defendant-Respondent,

and

ATLANTIC WOMEN'S MEDICAL GROUP,

Defendant.

Argued February 1, 2017 – Decided March 6, 2017

Before Judges Alvarez and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4516-11.

Robert G. Hicks argued the cause for appellants (Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, attorneys; Mr. Hicks, of counsel and on the briefs).

Thomas Conlon argued the cause for respondent (Orlovsky, Moody, Schaaff, Conlon & Gabrysiak, attorneys; Mr. Conlon, of counsel; Russell J. Malta, on the brief).

PER CURIAM

Andrea Trezza and Joseph Trezza (plaintiffs) appeal from the November 9, 2015 order dismissing their medical malpractice action with prejudice. Following our review of the record and applicable law, we reverse and remand for trial.

We recite the procedural history essential to our determination. On September 26, 2011, plaintiffs filed a medical malpractice complaint against Margaret Lambert-Wooley, M.D. (defendant) and the Atlantic Women's Medical Group. The Atlantic Women's Medical Group was dismissed with prejudice by stipulation dated April 27, 2012.

A peremptory trial date was scheduled for March 31, 2014, but rescheduled by the court, after the case was not reached, for December 8, 2014.[1] The trial did not take place on the December date or on a subsequent rescheduled date, June 1, 2015, due to the unavailability of defendant's designated trial counsel.[2] See R. 4:25-4. In a July 2, 2015 sua sponte order, the Presiding Judge

[1] The record does not disclose whether there were prior trial dates.

[2] The Rule also provides that, in medical malpractice cases, the court may disregard the designation of trial counsel if the designation will delay trial. R. 4:25-4. In Track I or II medical malpractice cases pending for more than two years, the court may do so "on such notice to the parties as it deems adequate in the circumstances." Ibid. However, "[d]esignations of trial counsel presumptively expire in all Track III medical malpractice cases pending for more than three years." Ibid.

of the Civil Part scheduled a peremptory trial date for November 9, 2015.

The order setting the peremptory date recited specific and stringent terms as to the course and conduct of the case relative to the trial. First, the trial would not be adjourned to accommodate the parties' or counsel's personal or professional commitments. Second, counsel was obligated to monitor the schedules of their respective clients, experts, and witnesses to insure their availability. In the circumstance of their clients', experts', or witnesses' unavailability, counsel was responsible to arrange for a de bene esse deposition in advance of trial. Third, in the event designated trial counsel was unavailable, counsel was responsible to have available alternate trial counsel, whether or not from the same firm. Consistent therewith, all trial designations were waived by virtue of the order and no adjournment would be granted for failure to obtain alternate counsel. Finally, no adjournment would be granted for failure to comply with the terms of the order.

By letter dated November 4, 2015, plaintiffs requested the case be listed for a conference on November 9, 2015, and the trial be carried until November 13, 2015, due to the unavailability of plaintiffs' liability expert. In the letter, plaintiffs' counsel stated:

> Due to scheduling issues with expert witnesses on behalf of both parties, it would be preferable to start the [t]rial on Friday of that week. I presently have scheduled the videotaped deposition of one of [p]laintiff's subsequent treating physicians Thursday afternoon and I understand defense counsel may likewise need to put an expert on videotape. Accordingly, I respectfully request that this matter be conferenced on Monday, November 9, 2015 and carried to start [t]rial on Friday, November 13, 2015. I anticipate that the [t]rial will conclude no later than Thursday, November 19, 2015.

On November 9, 2015, the Law Division judge assigned to the case considered plaintiffs' request. Plaintiffs' counsel stated that he only learned of the expert's unavailability one week prior to the start of the trial date. Nonetheless, the judge found, in light of the July 2, 2015 order, that he did not have the authority to grant an adjournment. The judge directed the parties to meet with the presiding judge to resolve the scheduling issue. The presiding judge denied the adjournment request and directed that the parties proceed with the trial. Predicated upon the terms of the order, the age of the case, and plaintiffs' expert's unavailability, the judge dismissed the complaint with prejudice. This appeal followed.

Plaintiffs raise the following arguments on appeal:

POINT I

> THE TRIAL COURT IMPROPERLY DISMISSED THE PLAINTIFFS/APELLANTS' CASE.

POINT II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING PLAINTIFF[S'] REQUEST FOR A TWO[-]DAY CONTINUANCE AND DISMISSING PLAINTIFFS' COMPLAINT WITH PREJUDICE.

POINT III

THE PRESIDING JUDGE OF THE CIVIL DIVISION ERRED AND ABUSED HIS EXERCISE OF DISCRETION BY DENYING PLAINTIFFS' REQUEST FOR A TWO[-]DAY CONTINUANCE AND BY IMPLICATION[,] THE ENTRY OF THE SUA SPONTE ORDER FILED JULY 2, 2015.

In plaintiffs' reply brief, they also raise the following points:

POINT I

DEFENDANT, HAVING CONSENTED TO PLAINTIFF[S'] REQUEST FOR A TWO[-]DAY CONTINUANCE AND AT NO TIME HAVING SOUGHT OR REQUESTED A STRICT APPLICATION OF THE JULY 2, 2015 ORDER[,] CANNOT NOW ON APPEAL ARGUE THE CONTRARY.

POINT II

EVEN IF THE COURT WERE TO CONSIDER WHAT THE DEFENDANT FAILED TO RAISE BELOW AND RAISES FOR THE FIRST TIME ON APPEAL, DEFENDANT[] STILL HA[S] FAILED TO DISTINGUISH THE CONTROLLING CASE LAW AND THE CASES CITED ARE INAPPLICABLE TO [THE] CURRENT APPEAL.

We review a trial court's decision to grant or deny an adjournment under an abuse of discretion standard. Kosmowski v. Atl. City Med. Ctr., 175 N.J. 568, 574 (2003). "Absent an abuse of discretion, denial of a request for an adjournment does not constitute reversible error." State v. D'Orsi, 113 N.J. Super. 527, 532 (App. Div.) (quoting State v. Smith, 87 N.J. Super. 98,

105 (App. Div. 1965)), certif. denied, 58 N.J. 335 (1971). We will reverse a refusal to grant an adjournment only if it causes "manifest wrong or injury." State v. Hayes, 205 N.J. 522, 537 (2011) (citation omitted).

When determining whether to adjourn a case due to an expert's unavailability, the court:

> must focus on the tension between, on the one hand, the salutary principle that the sins of the advocate should not be visited on the blameless litigant, and, on the other, the court's strong interest that management of litigation, if it is to be effective, must lie ultimately with the trial court and not counsel trying the case.
>
> [Kosmowski, supra, 175 N.J. at 574 (internal citations and quotation marks omitted).]

In balancing these considerations, the court must remain mindful of its overriding objective that "[c]ases should be won or lost on their merits and not because litigants have failed to comply precisely with particular court schedules, unless such noncompliance was purposeful and no lesser remedy was available." Connors v. Sexton Studios, Inc., 270 N.J. Super. 390, 395 (App. Div. 1994).

In Kosmowski, the court reluctantly rescheduled a trial date after denying several adjournments. Kosmowski, supra, 175 N.J. at 571-72. Three days before trial, plaintiff's counsel learned that plaintiff's expert would be unavailable for the start of

trial. Id. at 572. On the trial date, counsel misrepresented to the court that the expert was in Europe, and thus unavailable for two weeks. Id. at 573. The court dismissed the complaint with prejudice, and later refused to reinstate the complaint after learning of counsel's misrepresentation. Ibid.

Our Supreme Court held that counsel's clients were "denied their day in court based exclusively on the conduct of their attorney." Id. at 575. The Court stated that "[w]hen an attorney is unable to try a case due to the first unavailability of an expert, dismissal of the complaint with prejudice 'is drastic punishment and should not be invoked except in those cases where the actions of the party show a deliberate and contumacious disregard of the court's authority.'" Ibid. (quoting Allegro v. Afton Vill. Corp., 9 N.J. 156, 160-61 (1952)). Dismissal with prejudice should be imposed "only sparingly," and "only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party." Kosmowski, supra, 175 N.J. at 575 (quoting Zaccardi v. Becker, 88 N.J. 245, 253 (1982)). Accordingly, the Court directed the trial court, on remand, to "consider whether restoration of the complaint would cause any prejudice to defendants caused by the delay . . . . [and] [i]f the complaint is restored, then the court should consider the range of sanctions to be imposed on plaintiffs' counsel." Id. at 576.

Here, the actions of plaintiffs' counsel did not amount to a "deliberate and contumacious disregard of the court's authority" to warrant dismissal of the complaint with prejudice. Furthermore, the court was not unequivocally bound by the terms of the July 2, 2015 order. "[A] pretrial order may be modified at any time to prevent manifest injustice." Wilkins v. Hudson Cty. Jail, 217 N.J. Super. 39, 44 (App. Div.) (citing Jenkins v. Devine Foods, Inc., 3 N.J. 450, 458 (1950)), certif. denied, 109 N.J. 520 (1987). "The court rules afford flexibility in amending pretrial orders 'where necessary to subserve the presentation of the merits of the action, provided the adverse party will not be prejudiced thereby.'" L & L Oil Serv., Inc. v. Dir., Div. of Taxation, 340 N.J. Super. 173, 181 (App. Div. 2001) (citing Fluoro Elec. Corp. v. Smith Transp. Ltd., 58 N.J. Super. 287, 294 (App. Div. 1959), aff'd, 32 N.J. 277 (1960)). Notably, defendant not only did not argue prejudice, she consented to the brief adjournment.

We are informed by "the salutary principle that the sins of the [expert] should not be visited on the blameless litigant," Kosmowski, supra, 175 N.J. at 574 (quoting Aujero v. Cirelli, 110 N.J. 566, 573 (1988)), and find under these circumstances the denial of the adjournment "was inconsistent with the fundamental principles of justice and fairness that must guide all judicial decisions." Berkowitz v. Soper, 443 N.J. Super. 391, 407 (App.

Div. 2016). Accordingly, we conclude the denial of plaintiffs' adjournment request, under these circumstances, constituted an abuse of discretion.

Reversed and remanded for trial.