NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4631-15T2

JOSE VILLANUEVA,

Plaintiff-Appellant,

v.

CITY OF CLIFTON,

Defendant-Respondent,

and

CITY OF CLIFTON DEPARTMENT OF PUBLIC WORKS,

Defendant.

Submitted July 12, 2017 – Decided July 26, 2017

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-3354-15.

Emolo & Collini, attorneys for appellant (John C. Emolo, on the brief).

Matthew T. Priore, Clifton Municipal Attorney, attorney for respondent (Thomas M. Egan, Assistant Municipal Attorney, on the brief).

PER CURIAM

Plaintiff Jose Villanueva appeals from a May 16, 2016 Law Division order that denied his motion for reconsideration. Plaintiff sought reconsideration of an earlier order that denied his motion to amend his complaint. For the reasons that follow, we affirm.

On September 8, 2014, plaintiff instituted this action against defendant City of Clifton and its Department of Public Works (DPW) (collectively, Clifton) for injuries he allegedly sustained when he slipped on ice outside the Clifton Municipal Building on January 10, 2014. Plaintiff asserted that Clifton was negligent in failing to adequately remove snow and ice from the walkway in front of the building. A Clifton police officer responded to the scene and his incident report describes the pertinent events as follows:

> As [plaintiff] exited the building, he slipped on the wet ground just prior to the outside steps. He fell back and was unable to get up due to pain in his upper back and [r]ear neck area. [Plaintiff] is disabled and has had surgery on his back in the past. EMS 2 arrived on [the] scene and transported [plaintiff] to St. Joseph's Hospital . . . . DPW workers [are] currently on the scene placing rock salt on the walkway due to it snowing at this time.

Clifton filed its answer in October 2014. Clifton denied it was negligent, and set forth numerous affirmative defenses, including that it was immune from liability.

The matter was initially assigned an August 6, 2015 discovery end date (DED). The DED was extended until October 5, 2015, by consent of the parties. On September 4, 2015, the DED was extended to January 4, 2016, on plaintiff's motion. On January 19, 2016, on Clifton's motion, the DED was extended a third time until March 24, 2016, and an arbitration hearing was simultaneously scheduled for that date.

On February 19, 2016, Clifton moved for summary judgment, invoking the common law doctrine of snow removal immunity accorded to public entities that the Supreme Court first recognized in Miehl v. Darpino, 53 N.J. 49 (1968). Plaintiff opposed the motion, and cross-moved for leave to amend his complaint to include additional counts alleging that Clifton violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and failed to warn of a dangerous condition. In support of the cross-motion, plaintiff's counsel certified that plaintiff testified at his September 2015 deposition that he did not use the disability entrance ramp when he left the Municipal Building "because it was impassable due to ice and snow, causing him to have to walk in front of the building to exit same which was covered with ice." Plaintiff also sought to adjourn the March 24, 2016 arbitration, and extend the DED a fourth time for an additional ninety days, to June 24, 2016.

Clifton opposed the motion to amend on the basis that it would be prejudiced by the amendment at such a late stage in the proceedings. Clifton also argued it was absolutely immune from liability for all snow removal activities under Miehl, thus rendering the proposed amended complaint futile.

The court declined to adjourn the March 24, 2016 arbitration. On April 11, 2016, Clifton rejected the arbitration award and filed a timely demand for a trial de novo. Five days later, a June 27, 2016 trial date was scheduled.

On April 21, 2016, the court heard plaintiff's motion to amend the complaint and extend discovery. In denying the motion, the judge explained: "This [Track] II case has had 531 days of discovery. A trial date of 6/27/16 is set. Plaintiff knew of the information for more than [six] months prior to making this motion. The granting of this motion would unduly delay resolution."

On April 25, 2016, plaintiff filed a motion seeking reconsideration of that portion of the April 21 order that denied leave to file an amended complaint. Plaintiff's counsel cited the liberal standard for granting amendments, and now asserted that Clifton would not be prejudiced as no further discovery was needed with respect to the proposed LAD claim. Clifton opposed the motion, arguing that: (1) plaintiff did not meet the standard for reconsideration under Rule 4:49-2 and applicable case law; (2) it

would be prejudiced if it was compelled to defend plaintiff's LAD claim without the benefit of proper discovery; and (3) as with plaintiff's original claims, his newly asserted claims were futile.

The court denied plaintiff's motion for reconsideration on May 16, 2016. The court found that plaintiff "failed to show that this [c]ourt's 4/21/16 [o]rder was based on palpably incorrect reasoning or it failed to consider relevant information." Subsequently, on June 1, 2016, a different judge granted Clifton's motion for summary judgment, thereby dismissing plaintiff's complaint with prejudice.

Plaintiff filed the present appeal on July 1, 2016. The Notice of Appeal and accompanying case information statement identify the May 16, 2016 order denying reconsideration as the order from which plaintiff appeals.

Rule 2:5-1(f)(3)(A) states, "In civil actions the notice of appeal shall . . . designate the judgment, decision, action or rule, or part thereof appealed from[.]" Therefore, "it is only the judgments or orders or parts thereof designated in the notice of appeal which are subject to the appeal process and review." Pressler & Verniero, Current N.J. Court Rules, comment 6.1 on R. 2:5-1 (2017); see also Campagna ex rel. Greco v. Am. Cyanamid Co., 337 N.J. Super. 530, 550 (App. Div.) (refusing to consider an

order not listed in the notice of appeal), certif. denied, 168 N.J. 294 (2001).

"Consequently, if the notice [of appeal] designates only the order entered on a motion for reconsideration, it is only that proceeding and not the order that generated the reconsideration motion that may be reviewed." Pressler & Verniero, supra, comment 6.1 on R. 2:5-1 (2017); see also W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458-59 (App. Div. 2008) (considering only the order denying reconsideration because it was the sole order designated in the notice of appeal); Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 461-62 (App. Div.) (reviewing only denial of the plaintiff's motion for reconsideration and refusing to review the original grant of summary judgment because that order was not designated in the notice of appeal), certif. denied, 174 N.J. 544 (2002).

The sole argument advanced in plaintiff's brief is that the motion court abused its discretion when it denied his motion to amend the complaint. However, as noted, plaintiff's notice of appeal listed the May 21, 2016 order denying his motion for reconsideration as the only order being appealed. Therefore, we limit our review to the provisions of that order.

A trial court's order on a motion for reconsideration will not be set aside unless shown to be a mistaken exercise of

discretion. Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016) (citing Fusco, supra, 349 N.J. Super. at 462), certif. denied, ___ N.J. ___ (2017). Reconsideration should only be granted in those cases in which the court had based its decision "upon a palpably incorrect or irrational basis," or did not "consider, or failed to appreciate the significance of probative, competent evidence." Ibid. (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). A motion for reconsideration must "state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred[.]" R. 4:49-2.

We discern no abuse of discretion on the part of the trial court in denying reconsideration here. Plaintiff has failed to present any new facts that were not available at the time the motion to amend was made, nor has he pointed to any controlling legal authority that the court either overlooked or misapplied in denying his original motion to amend. Moreover, while plaintiff is correct that leave to amend is to be liberally granted, see Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006), a decision on a motion to amend "is generally left to the sound discretion of the trial court, and its exercise of discretion will not be disturbed on appeal, unless it constitutes a 'clear abuse

of discretion.'" Franklin Med. Assocs. v. Newark Pub. Sch., 362 N.J. Super. 494, 506 (App. Div. 2003) (internal citation omitted) (quoting Salitan v. Magnus, 28 N.J. 20, 26 (1958)). "That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte, supra, 185 N.J. at 501. Additionally, a motion to amend is properly denied where, as here, the merits of the amendment are marginal, and allowing the amendment would unduly protract the litigation or cause undue prejudice. Pressler & Verniero, Current N.J. Court Rules, comment 2.2.1 on R. 4:9-1 (2017).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION