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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-5502-14T1

ROGER A. WEST, JR., d/b/a
527 CYCLES SALVAGE, f/k/a
527 CYCLE, INC.,

Plaintiff-Respondent,

v.

SUNSHINE VENTURES, INC.,

Defendant-Appellant,

and

LAUREN EGIERD, a/k/a LAUREN
VANDZUTAN, and MICHAEL EGIERD,

Defendants.

Submitted November 17, 2016 – Remanded January 18, 2017
Resubmitted July 7, 2017 – Decided August 9, 2017

Before Judges O'Connor and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No. L-
4892-11.

Richard Lupo, LLC, attorneys for appellant
(Michael Wiseberg, on the brief).

Heilbrunn Pape, LLC, attorneys for respondent
(Steven Kropf, on the brief).

PER CURIAM

Defendant, Sunshine Ventures, Inc., appealed from a July 16, 2015 judgment in favor of plaintiff, Roger A. West, Jr. d/b/a 427 Cycles Salvage, in the amount of \$5000 based on an offer of judgment made by defendant, which had been accepted by plaintiff six days before trial. Defendant asserted the offer of judgment was withdrawn, pursuant to Rule 4:58-1(b), ten days before trial, and the trial court did not weigh the competing interests prior to applying Rule 1:1-2 to relax the time limitation. We agreed and reversed the judge's decision, vacated the judgment, and remanded for further proceedings consistent with our opinion.

On remand, the judge held a hearing on March 2, 2017. Following our review of the remand record, we again determine there is an omission of mandated findings to support the order. We again reverse the judge's determination, vacate the July 16, 2015 judgment, and remand to a different judge for proceedings consistent with this opinion.

We have outlined the relevant facts in our prior opinion and need not repeat them here. West v. Sunshine Ventures, Inc., No. A-5502-14 (App. Div. January 18, 2017).

In the initial appeal, defendant argued relaxation of Rule 4:58 was error because the trial court did not conduct the required

balancing test to determine whether enforcement of the offer of judgment would avoid any injustice or create an injustice for defendant. We agreed.

Rule 4:58-1(b) states if an offer of judgment is

not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee.

Rule 1:3-4(a) states "[u]nless otherwise expressly provided by rule, a period of time thereby fixed for the doing of an act may be enlarged before or after its expiration by court order on notice" or by consent. Section (c) includes various enlargements that are prohibited. This subsection does not prohibit an enlargement under Rule 4:58-1. See R. 1:3-4(c). The rule requires a motion for extension of time "to be on notice and to be determined on the merits of the application." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:3-4 (2017). A court is to consider the reasons for the delay, prejudice to opposing parties, and the effect upon the trial calendar. Ibid. Rule 1:3-4 is to be read in accordance with Rule 1:1-2 and allows relaxation of time periods "in order to avoid injustice." Ibid.

Rule 1:1-2(a) is considered the catch-all provision as it allows for the general relaxation of the court rules. Rule 1:1-2(a) states the following:

The rules in Part I through Part VIII, inclusive, shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice.

In Romagnola v. Gillespie, 194 N.J. 596 (2008), the New Jersey Supreme Court set forth circumstances under which Rule 1:1-2 is to be applied to relax the Rule 4:58-2 and warned how sparingly the relaxation rule should be invoked. Id. at 604. In Romagnola, an amendment to Rule 4:58-2 during the proceedings was regarded as a unique circumstance that demonstrated the need for the flexible approach of Rule 1:1-2. Id. at 606. The Court "further explained that '[d]etermining whether relaxation is appropriate . . . requires an examination and balancing of the interests that are at stake.'" Id. at 605 (quoting State v. Williams, 184 N.J. 432, 443 (2005)). Rule 1:1-2 does not provide a "safe harbor for the dilatory," and those who seek relief under the rule "bear a heavy burden" because the relief is only granted sparingly "after an appropriate weighing of all relevant factors." Id. at 606.

In our initial decision, we noted the trial court found no specific injustice to plaintiff to justify the relaxation of Rule 4:58-1(b), other than plaintiff was two business days late and was waiting for Department of Transportation billing records before attempting to communicate acceptance of the offer. The trial court's initial analysis did not reflect it engaged in the appropriate analysis and met the heavy burden needed to relax the rule. See ibid. In relaxing the rule, the court merely noted it "is not fair to the plaintiff," to embrace the time limit against him without any consideration for the time defendant expended to prepare for trial. As such, we reversed the judge's determination, vacated the July 16, 2015 judgment, and remanded for the judge to weigh and balance all relevant considerations.

At the March 2, 2017 remand hearing, the court found the relaxation of Rule 4:58-1(b) appropriate because both parties agreed to relax the deadlines in the discovery rules, as evidenced by both parties continuation of discovery, up until the eve of trial. Citing that fact, the judge determined it would be "unfair" not to relax Rule 4:58-1(b). The judge found plaintiff had a "rational reason why he did not make the ten-day window" to accept the offer of judgment, as plaintiff was waiting for the subpoenaed records to verify records provided in discovery by defendant Egierd were accurate. Ultimately, the judge concluded,

It has to be recognized that if you're going to relax the rules with regard to the late depositions . . . you have to understand that that could very well change the posture of the case and change your adversary's position to possible resolution. And I think it would be unfair, then, to pull the rug out on an offer of judgment when you know that he just got these materials in the wake of a late deposition

The judge asked defendant how it was prejudiced by allowing acceptance of the offer of judgment four days past the expired date, to which defendant responded it had begun preparing for trial. There was no further discussion of how either party was prejudiced by allowing, or not allowing, plaintiff to accept the untimely offer of judgment.

Based upon the transcript provided, the judge did not complete the appropriate balancing test under Romagnola. The only discussion of injustice was the suggestion if the discovery rules were relaxed, then it is fair Rule 4:58-1(b) be as well. This justification is the same used in the original ruling, which triggered our remand. Although we stated specific instructions, the decision provides no discussion as to how plaintiff satisfied the heavy burden in this case to warrant relaxation. Moreover, we disagree with the proposition if the parties consent to extend discovery beyond the time provided by the rules, they implicitly agreed to relax Rule 4:58-1.

As stated in our initial opinion, the record does not establish this is an exceptional case warranting the relaxation of our court rules in order to avoid an injustice. The Court made clear in Romagnola, the relaxation of our court rules should only be made in exceptional cases, and despite this court's instructions to do the appropriate balancing of interests, it was not undertaken.

The record does not reflect, as required by Rule 1:1-2, how the adherence to Rule 4:58-1(b) would create an injustice, and the record fails to demonstrate how a trial would have prevented a "just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." R. 1:1-2.

For these reasons, we reverse the judge's determination, vacate the July 16, 2015 judgment and remand to a different judge for proceedings consistent with this opinion. 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