SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4121-14T2

PAUL LEWISON and
WENDY LEWISON,

Plaintiffs-Appellants,

v.

MICHAEL HORSBURGH, JOSEPHINE HORSBURGH, THOMAS HORSBURGH, CATHERINE HORSBURGH, RIDGID PAPER TUBE CORP., NEPTUNE PAPER CAN CORP. and COLUMBIA BANK,

Defendants-Respondents.

Submitted November 8, 2017 – Decided January 12, 2018

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-0912-13.

Paul Lewison and Wendy Lewison, appellants pro se.

Robert A. Solomon, PC, attorneys for respondents Michael Horsburgh, Josephine Horsburgh, Thomas Horsburgh, Catherine Horsburgh, Ridgid Paper Tube Corp. and Neptune Paper Can Corp. (Robert A. Solomon, of counsel and on the brief).

Harwood Lloyd, LLC, attorneys for respondent Columbia Bank (John W. McDermott, on the brief).

PER CURIAM

Paul Lewison and Wendy Lewison appeal from an order entered by the Law Division February 24, 2015, which denied their motion for reconsideration of an order entered on December 5, 2014, dismissing their amended complaint with prejudice for failure to provide discovery. We affirm.

I.

We briefly summarize the relevant facts and procedural history. On March 4, 2013, Paul Lewison, Wendy Lewison, CCNPP, Inc. (CCNPP), Neptune Paper Products, Inc. (NPP), and Science Supplies WLE Corp. (Science Supplies) filed a complaint in the Law Division against Michael Horsburgh, Josephine Horsburgh, Thomas Horsburgh, Catherine Horsburgh, Ridgid Paper Tube Corp. (Ridgid), and Neptune Paper Can Corp. (collectively, the Horsburgh Defendants). Plaintiffs also named Columbia Bank as a defendant.

In the complaint, plaintiffs allege that Mr. Lewison was the sole shareholder and officer of CCNPP, which manufactures Neptune Paper Cans though NPP, one of its divisions. Plaintiffs assert that Neptune Paper Cans are liquid- and powder-tight cylindrical paper containers. Plaintiffs further allege that Mrs. Lewison is

the officer and sole shareholder of Science Supplies, which distributes Neptune Paper Cans.

Plaintiffs claim that in 2008, Mr. Lewison agreed to create a partnership with members of the Horsburgh family, the owners of Ridgid, whereby NPP would move its operations to Ridgid's facility in Wayne. Plaintiffs allege that under the partnership agreement, Mr. Lewison was entitled to receive fifty percent of the sales of NPP's products. Plaintiffs claim that at the time, NPP had annual sales that exceeded $800,000.

Plaintiffs further allege that by the late spring of 2009, NPP had moved all of its machinery, equipment, inventory, raw materials, and personal property to Ridgid's facility. They assert that from July 2009 to April 2010, the Horsburghs paid Mr. Lewison the monies due to him under the partnership agreement.

Plaintiffs claim, however, that in April 2010, Michael Horsburgh threw Mr. Lewison out of the Wayne facility and stopped paying him pursuant to the partnership agreement. Michael Horsburgh also allegedly prevented Mr. and Mrs. Lewison from accessing NPP's equipment and records, and their personal property.

Plaintiffs also claim that members of the Horsburgh family failed to follow through on their agreement to continue Mrs. Lewison's agreement to distribute NPP's products through Science

Supplies. Plaintiffs allege that at the time, Science Supplies had annual sales that exceeded $450,000. In addition, plaintiffs allege that members of the Horsburgh family retained without lawful authority certain property of NPP and Science Supplies.

Plaintiffs asserted various claims against the Horsburgh Defendants, including breach of the partnership agreement with Mr. Lewison; breach of the agreement with Mrs. Lewison to distribute NPP's products through Science Supplies; fraud in the inducement; breach of the covenant of good faith and fair dealing; unlawful conversion and retention of property; tortious interference; and misappropriation of the "Neptune" name.

As noted, the complaint included a claim against Columbia Bank. Plaintiffs allege that Columbia Bank wrongfully deposited into Ridgid's bank account certain checks that were made payable to NPP. Plaintiffs claim the checks had fraudulent endorsements.

Among other relief, plaintiffs sought an accounting by Columbia Bank of all the NPP checks deposited in Ridgid's account; an accounting by the Horsburgh Defendants of the use and sale of the assets of NPP and Science Supplies; an accounting by the Horsburgh Defendants of the use and sale of the Lewisons' personal property; rescission of the partnership agreement; compensatory damages; and punitive damages.

The Horsburgh Defendants filed an answer denying liability and served interrogatories and requests for admission upon the Lewisons. In October 2013, the Lewisons served their answers to the discovery request, and filed a motion seeking leave to amend the complaint and other relief. The Horsburgh Defendants filed a cross-motion to dismiss the complaint without prejudice, which plaintiffs opposed. In November 2013, the Law Division judge conducted a hearing on the motions.

On December 4, 2013, the judge entered an order which: (1) permitted plaintiffs to amend the complaint; (2) dismissed the claims of NPP, CCNPP, and Science Supplies without prejudice; (3) required the Lewisons to provide the Horsburgh Defendants with the names and addresses of all accountants who performed work for NPP CCNPP, and Science Supplies; (4) required the Lewisons to provide the Horsburgh Defendants with signed federal tax forms 4506 (Forms 4506) directing the Internal Revenue Service (IRS) to release the tax returns for NPP, CCNPP, and Science Supplies; and (5) denied the Horsburgh Defendants' motion to dismiss the complaint without prejudice.

In January 2014, the Lewisons filed an amended complaint and on January 17, 2014, the Horsburgh Defendants filed a motion to dismiss the amended complaint pursuant to Rule 4:23-5(a) and Rule 4:23-2 because the Lewisons had not complied with the court's

December 4, 2013 order. The Lewisons filed a cross-motion for a protective order.

In February 2014, the Lewisons' attorney provided counsel for the Horsburgh Defendants with signed Forms 4506. The forms did not, however, contain the tax identification numbers for NPP, CCNPP, and Science Supplies. On February 14, 2014, the judge entered a case management order, which stated that the motion and cross-motion had been withdrawn. The order required the Lewisons to provide the Horsburgh Defendants with, among other things, fully-completed Forms 4506 for NPP, CCNPP, and Science Supplies.

On March 18, 2014, the Horsburgh Defendants filed a motion to dismiss the amended complaint because the Lewisons had not complied with the court's December 4, 2013 order. In a supporting certification, counsel for the Horsburgh Defendants stated that the Forms 4506 the Lewisons had provided "were useless" because they were not "fully completed." On April 4, 2014, the Lewisons opposed the motion and filed a cross-motion for a protective order.

On April 11, 2014, the judge entered an order denying the motion to dismiss the amended complaint, but ordered the Lewisons to provide fully-completed Forms 4056 for NPP, CCNPP, and Science Supplies by May 11, 2014. The judge also entered an order dated April 14, 2014, which granted the Lewisons' motion for a protective order.

Thereafter, the Lewisons' attorney provided Forms 4056, which included the corporations' tax identification numbers, but did not contain the addresses for these entities. The Horsburgh Defendants also checked the tax identification numbers on the forms and determined that the numbers provided for NPP and CCNPP were not the tax identification numbers for these entities.

On May 15, 2014, the Horsburgh Defendants filed a motion to dismiss the amended complaint with prejudice pursuant to Rule 4:23-2 because the Lewisons had not complied with the court's April 11, 2014 order. After hearing oral argument, the judge entered an order dated August 21, 2014, dismissing the complaint without prejudice. The order states that the Lewisons "must provide the information" the court's order of April 11, 2014 required them to provide.

On October 31, 2014, the Horsburgh Defendants filed a motion to dismiss the amended complaint with prejudice pursuant to Rule 4:23-5(a)(2) and Rule 4:23-2. In a supporting certification, counsel for the Horsburgh Defendants stated that more than sixty days had passed since the court dismissed the complaint without prejudice, and the Lewisons had not provided the required tax information.

In November 2014, the Lewisons filed a substitution of attorney, which indicated they would henceforth represent

themselves. On December 5, 2014, the judge heard oral argument on the motion and placed his decision on the record. The judge noted that while Mr. Lewison had provided some financial information, he had not provided the federal tax information he had been ordered to provide. The judge rejected the Lewisons' assertion that they were not able to provide the information requested.

The judge found that the Lewisons had not shown exceptional circumstances for their failure to provide discovery, and the reasons they proffered for failing to do so were "incredulous and incredible." The judge entered an order dated December 5, 2014, dismissing the amended complaint with prejudice.

On December 30, 2014, Columbia Bank filed a motion to dismiss the complaint against it with prejudice because the Lewisons had not provided discovery, as required by the court's orders. On December 26, 2014, the Lewisons filed a motion for reconsideration of the court's December 5, 2014 order.

On February 24, 2015, the court entered an order dismissing the claims against Columbia Bank. The court also entered an order dated February 24, 2015, denying the Lewisons' motion for reconsideration. This appeal followed.

II.

On appeal, the Lewisons argue that the trial court's order of December 5, 2014, dismissing their claims against the Horsburgh

Defendants should be reversed. The Lewisons contend they have been "victimized" by the Horsburgh Defendants and their attorney. They assert that these defendants "commandeered" their business records and then prohibited them from gaining access to the records, which made them incapable of providing the discovery requested. The Lewisons claim the Horsburgh Defendants had possession of all of the tax information they were seeking in discovery from the Lewisons.

We note that the Lewisons' notice of appeal states they are appealing from the trial court's order of February 24, 2015, which denied their motion for reconsideration of the December 5, 2014 order. Rule 2:5-1(f)(3)(A) requires the notice of appeal in a civil action to "designate the judgment, decision, action or rule, or part thereof appealed from."

In light of that requirement, an appeal is limited to those judgments or orders, or parts thereof, designated in the notice of appeal. Pressler & Verniero, Current N.J. Court Rules, cmt. 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. 2001) (refusing to consider a challenge to an order not listed in the notice of appeal). Thus, the Lewisons' appeal is limited to the trial court's February 24, 2015 order, which denied their motion for reconsideration.

The decision of whether to grant or deny a motion for reconsideration is committed to the sound discretion of the trial court. Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). Reconsideration is warranted only when "1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Ibid. (quoting Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008)).

On the February 24, 2015 order, the judge wrote that the Lewisons had not provided any basis for reconsideration of the court's December 5, 2014 order. The judge noted on the order that defendants were entitled to the documents they had requested, and the Lewisons still had not provided the documents. The judge also noted that the Lewisons had not shown exceptional circumstances for their failure to provide discovery.

As we have explained, the trial court entered the December 5, 2014 order because the Lewisons repeatedly failed to comply with the court's discovery orders. Rule 4:23-2(b) states that the trial court may impose sanctions for a party's failure to comply with an order to provide discovery. Among other sanctions, the court may enter an order dismissing the action or proceeding with

or without prejudice. R. 4:23-2(b)(3). "Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, or when the litigant rather than the attorney was at fault." Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514 (1995) (citing Zaccardi v. Becker, 88 N.J. 245, 253 (1982)).

Generally, the court will not order the dismissal of a complaint with prejudice "except in those cases in which the order for discovery goes to the very foundation of the cause of action, or where the refusal to comply is deliberate and contumacious." Ibid. (quoting Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 339 (1951)). However, a party "invites this extreme sanction by deliberately pursuing a course that thwarts persistent efforts to obtain the necessary facts." Id. at 515.

We will not reverse a trial court's order dismissing an action or proceeding with prejudice for discovery misconduct unless the order represents a mistaken exercise of discretion. Id. at 517. Furthermore, the trial court's factual findings on the motion are binding on appeal "when supported by adequate, substantial and credible evidence." Ibid. (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

In this case, the Lewisons asserted damage claims that are based in part on the allegation that the Horsburgh Defendants breached a partnership agreement with Mr. Lewison and deprived him of his share of the gross sales of NPP, a Division of CCNPP. The Lewisons claimed that at the relevant time, NPP had annual gross sales that exceeded $800,000.

The Lewisons also claimed that the Horsburgh Defendants failed to follow through on their agreement to continue to allow Mrs. Lewison to distribute NPP's products through Science Supplies. The Lewisons claimed that at the relevant time, Science Supplies had annual sales that exceeded $450,000.

The Horsburgh Defendants sought discovery to substantiate the Lewisons' damage claims. Among other things, the Horsburgh defendants sought completed federal tax Forms 4506 that would allow defendants to obtain from the IRS federal tax returns for NPP, CCNPP, and Science Supplies. They also sought discovery of the names and addresses of the accountants who performed work for these entities in the relevant period.

On December 4, 2013, the judge entered an order, which required the Lewisons to provide this information. The Lewisons did not comply with that order. The judge afforded the Lewisons several opportunities to provide the required information, and entered additional orders, which required the Lewisons to provide

the required information. The Lewisons did not comply with the court's orders.

When he granted the motion to dismiss the complaint with prejudice, the judge noted that because the Lewisons claimed they had been damaged by the alleged conversion of the corporations and the breach of the partnership and sales agreements, the Horsbourgh Defendants were entitled to the tax returns for the corporations involved. The judge stated that these defendants required this information so they could determine what damages, if any, the Lewisons had sustained, and whether the Lewisons were, in fact, the registered owners of the corporations, as they claimed.

The Lewisons asserted that they could not provide the relevant tax information because the corporations had new tax identification numbers and they could not ascertain the companies' previous identification numbers. The Lewisons also asserted that the individual who assisted them with preparation of the tax returns for the corporations had left the university where he had been employed, and he could not be located. The judge found that these explanations were "incredulous and incredible."

We conclude there is sufficient credible evidence in the record to support the judge's factual findings and his determination that dismissal of the complaint was warranted under the circumstances. The record shows that the discovery sought went

to the "very foundation" of the Lewisons' lawsuit, and their refusal to comply with the court's orders requiring discovery was deliberate. Id. at 514 (quoting Lang, 6 N.J. at 339).

Furthermore, the record shows that lesser sanctions would not suffice to remedy the prejudice to defendants resulting from the Lewisons' failure to comply with the court's orders. Without the relevant information, the Horsburgh Defendants could not defend the damage claims being asserted against them, and no lesser sanction could address the prejudice resulting from the Lewisons' consistent and deliberate failure to provide the information.

In seeking reconsideration, the Lewisons failed to show that the judge had expressed his decision on a "palpably incorrect or irrational basis" or that the judge "did not consider, or failed to appreciate the significance of probative, competent evidence." Pitney Bowes, 440 N.J. Super. at 382 (quoting Capital Fin. Co., 398 N.J. Super. at 310). Thus, the denial of the Lewisons' motion for reconsideration was not a mistaken exercise of discretion.

We note that the trial court's order of December 5, 2014, states that the Lewisons' complaint and amended complaint are dismissed pursuant to Rule 4:23-5(a)(2) and Rule 4:23-2. Since we conclude that dismissal of the pleadings was proper under Rule 4:23-2, we need not address whether Rule 4:23-5(a)(2) also provides authority for the order.

III.

As stated previously, the Lewisons' notice of appeal states that they are appealing from the court's order of February 24, 2015. The Lewisons' case information statement indicates that they are appealing from the order denying their motion for reconsideration of the December 5, 2014 order. Because the Lewisons did not state in the notice of appeal that they are appealing from the order of February 24, 2015, which dismissed their complaint as to Columbia Bank with prejudice, they are precluded from challenging that order on appeal.

Moreover, in their initial brief, the Lewisons only sought reversal of the December 5, 2014 order. In their reply brief, the Lewisons did not specifically address the court's order of February 24, 2015, which dismissed their claims against Columbia Bank. In the brief, the Lewisons only address the merits of their claims against the Columbia Bank.

We therefore conclude that even if the notice of appeal is deemed to encompass the court's order of February 24, 2015, which dismissed the claims against Columbia Bank, the Lewisons have not provided any basis for reversing that order. The court's order is supported by sufficient credible evidence in the record, and the

dismissal with prejudice of the claims against Columbia Bank does not represent a mistaken exercise of discretion.

Affirmed.