SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4799-16T2

SAFIYA DANIELS, JAMES GARRISON, LAQUAN HUDSON and MELVIN WEBB,

Plaintiffs-Appellants,

v.

NANCY ERIKA SMITH, NEIL MULLIN, SMITH MULLIN, PC, KEVIN E. BARBER, and NIEDWESKE, BARBER HAGER,

Defendants-Respondents.

Submitted April 17, 2018 – Decided April 25, 2018

Before Judges Fisher and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4117-14.

Preston & Wilkins, LLC, attorneys for appellants (Gregory R. Preston, on the brief).

Gordon & Rees Scully Mansukhani, attorneys for respondents (Robert Modica and Lauren C. Wilke, on the brief).

PER CURIAM

Plaintiffs filed this suit in June 2014 against the attorneys who represented them and others in an earlier, settled lawsuit.

Dissatisfied with the division of the settlement proceeds and the size of defendants' fees, plaintiffs based their demand for damages on breach-of-contract and breach-of-fiduciary-duty theories.

Defendants filed an answer and, in October 2014, served interrogatories and document requests. Plaintiffs did not timely respond, despite securing multiple extensions. When plaintiffs' failures persisted, defendants moved in May 2015 for a dismissal without prejudice pursuant to Rule 4:23-5(a)(1). Plaintiffs didn't respond to either the motion or the outstanding discovery requests; consequently, on May 29, 2015, the court entered an order dismissing the complaint without prejudice.

Two months later, the discovery end date passed without plaintiffs' request for an extension or a restoration of their case to the active trial calendar. By that time, plaintiffs still had not provided the outstanding discovery.

In November 2015 — six months after the without-prejudice dismissal — defendants moved for dismissal with prejudice pursuant to Rule 4:23-5(a)(2). A week before that motion's return date, plaintiffs provided responses to the discovery requests, opposed defendants' motion, and cross-moved for both the action's reinstatement and an extension of the discovery end date. To avoid a with-prejudice dismissal, a delinquent party must show either

"exceptional circumstances" or provide "fully responsive discovery." R. 4:23-5(a)(2).

On the motion's December 18, 2015 return date, the focus turned to whether plaintiffs' answers to interrogatories were "fully responsive"; plaintiffs did not assert the existence of "exceptional circumstances." Defendants insisted plaintiffs' answers to interrogatories were inadequate for a number of reasons. The judge, however, advised that plaintiffs' discovery responses had not been provided to him[1] and, other than a brief discussion about one ostensibly inconsequential interrogatory,[2] the judge confirmed he was ill-positioned to decide whether plaintiffs' answers to interrogatories were responsive. At the conclusion of the December 18 argument, the judge reserved decision pending his receipt of plaintiffs' answers to interrogatories:

> THE COURT: . . . [W]hen can you get me the interrogatory answers? . . . .

[1] When this became clear, defense counsel argued he "d[id]n't see how this court can establish that . . . fully responsive discovery has been provided if they haven't been submitted[.]" The judge agreed, saying: "I can't."

[2] The one instance argued about on the return date concerned an interrogatory which asked whether plaintiffs had ever been known by other names. "Yes" or "no" would have been responsive. Plaintiffs, however, answered: "not applicable." The judge correctly found that unresponsive. We do not think, however, that the judge intended — in entering the orders under review — that this one unresponsive answer foreclosed reinstatement and warranted dismissal with prejudice.

> [PLAINTIFFS' COUNSEL]: I will send them out today, Your Honor. . . .
>
> . . . .
>
> THE COURT: All right. Well, get them to me as soon as you can. I can['t] make a decision till I see them.
>
> [PLAINTIFFS' COUNSEL]: I will put them in the overnight today and you'll have them on Monday.

The judge entered two orders; both were dated December 18, 2015. The first denied plaintiffs' cross-motion to reinstate the action and to extend discovery, and the second dismissed the complaint with prejudice pursuant to Rule 4:23-5(a)(2). By way of explanation, the judge handwrote at the foot of the former:

> Movant's motion to extend discovery is out of time substantially. Movant has not set forth any exceptional circumstances. Discovery supplied by movant is required to be fully responsive and it is not. Discovery end date expired 7/27/15, relief sought by movant is alarmingly out of time, with no reasonable explanation.

On the second order, the judge incorporated the explanation he provided in the first order and provided these additional handwritten comments:

> [T]his failure to respond to basic discovery requirements for an extended period of time, with no reasonable explanation, let alone exceptional circumstances, requires that [defendants'] motion [] be granted.

Plaintiffs then appealed, arguing the judge's ruling constituted an abuse of discretion. We vacated the orders under review because it did not appear possible – in light of what was presented in the record on appeal – for the judge to have examined the answers to interrogatories before entering the orders. That is, the orders were entered on December 18: the date the motions were argued, a time at which the judge acknowledged he did not have those materials to consider. Daniels v. Smith, No. A-2059-15 (App. Div. Mar. 24, 2017).

Following our mandate, the trial judge explained in a letter that the December 18, 2015 orders were actually entered on December 21, 2015, after he had received and examined plaintiffs' answers to interrogatories that were forwarded after oral argument. The judge further explained the grounds for his conclusion that those discovery responses were inadequate and, in light of all the circumstances, dismissal with prejudice was appropriate. The judge entered an order memorializing this determination on May 3, 2017.

Plaintiffs again appeal, arguing in a single point:

> THE COURT BELOW ABUSED ITS DISCRETION WHEN THE COURT FAILED TO ORDER MORE SPECIFIC RESPONSES TO DEFENDANT'S DISCOVERY DEMANDS, RATHER THAN DISMISS PLAINTIFFS' COMPLAINT WITH PREJUDICE.

We find insufficient merit in this argument to warrant further discussion, R. 2:11-3(e)(1)(E), and affirm substantially for the

reasons set forth by the trial judge in his May 3, 2017 letter opinion. Our prior decision was based upon the confusion caused by the misdated orders; the experienced judge acted well within his discretion in dismissing the action with prejudice.

Affirmed.