

**NOT FOR PUBLICATION WITHOUT THE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-5347-15T2

THOMAS ALETTA,

Plaintiff-Appellant,

v.

BERGEN COUNTY PROSECUTOR'S
OFFICE, STATE OF NEW JERSEY,
BERGEN COUNTY PROSECUTOR JOHN
MOLINELLI, LIEUTENANT JOHN
HAVILAND, and ASSISTANT
PROSECUTOR DANIEL KEITEL,

Defendant-Respondent.

Argued January 10, 2018 — Decided April 13, 2018

Before Judges Koblitiz and Manahan.

On appeal from New Jersey Superior Court, Law
Division, Bergen County, Docket No. L-7873-
15.

Eric V. Kleiner argued the cause for
appellant.

Benjamin H. Zieman, Deputy Attorney General,
argued the cause for respondents (Christopher
S. Porrino, Attorney General; Melissa Dutton
Schaffer, Assistant Attorney General, of
counsel; Ashley Gagnon, Deputy Attorney
General, on the brief).

PER CURIAM

Plaintiff Thomas Aletta, a retired Hackensack Police Sergeant, appeals from the May 27, 2016 dismissal of his second complaint with prejudice, dismissed because he did not sufficiently address the "scandalous" nature of his initial complaint, which was dismissed without prejudice. See R. 4:6-4(b). Plaintiff also appeals from the July 8, 2016 order denying his motion for reconsideration and recusal of the judge. Plaintiff's complaint accused various public officials of tortious behavior including criminal behavior in furtherance of a civil conspiracy to harm plaintiff, who was indicted and in December 2012 acquitted of official misconduct by tampering with a police report, N.J.S.A. 2C:30-2. Given the nature of the cause of action, a dismissal with prejudice was a mistaken exercise of discretion. A lesser remedy was called for.

Because parts of Aletta's initial complaint were deemed not to be relevant and "scandalous and impertinent," the court granted the State's motion to strike the complaint against defendant, without prejudice, on June 30, 2015.¹ The court wrote,

Plaintiff's [c]omplaint is long with irrelevant passages, and unnecessarily casts unfounded aspersions on Prosecutor Molinelli as well as other public figures. In 116 pages

¹ The complaint against defendant Laura Campos was dismissed with prejudice due to the statute of limitations. Plaintiff did not appeal that decision.

and 471 paragraphs, [p]laintiff pleads certain causes of action while simultaneously filling the public record with erroneous, irrelevant and highly inflammatory claims that do not relate to the instant causes of action.

The court delineated many of the scandalous assertions in the complaint, including participation in the cover-up of a murder. See Estate of Frank P. Laqano v. Bergen Cty. Prosecutor's Office, ___ N.J. Super. ___, ___ (slip op. at 31). On August 18, 2015, Aletta's motion for reconsideration and clarification was denied in a written opinion because Aletta had not offered any "new evidence or persuasive arguments" to overturn the earlier order. The court also denied his request that it only strike the scandalous and irrelevant allegations. The court wrote it "will leave [p]laintiff to his burden."

Aletta then filed a somewhat shorter, 100-page, 447-paragraph complaint on September 1, 2015. Following oral argument, the court issued a written opinion in May 2016 again dismissing Aletta's complaint, this time with prejudice, finding that it was "indistinguishable from the [f]irst [c]omplaint." The court wrote: "Plaintiff's [c]ounsel disregarded the reasoning of the [c]ourt in its June 30, 2015 opinion and simply filed a duplicative pleading under a separate docket number."

Impertinent material "'consists of statements that do not pertain, and are not necessary, to the issues in question.'

Superfluous historical allegations are a proper subject of a motion to strike." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993) (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382, at 711 (1990) (construing Fed. R. Civ. Proc. 12(f))), rev'd on other grounds, 510 U.S. 517 (1994). Rule 4:6-4(b)(1)-(2) permits a judge to dismiss an offending complaint in its entirety or to strike portions that are immaterial or redundant.

First, Aletta takes issue with the trial court's determination that his complaint made "scandalous" allegations. He argues that although he vilified the State, his allegations were pertinent to his grievance. He argues his cause of action required a motivation for why he was targeted for prosecution by the Bergen County Prosecutor's Office, and his complaint was therefore wrongfully dismissed with prejudice for supporting that motivation.

DeGroot explains the "scandalous matter" test. Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:6-4 (2018). The test "does not necessarily go to the nature of the complained-of allegations or the manner in which they are expressed, but rather the . . . relevance of such allegations to the cause." To be deemed "scandalous" the allegations in a complaint must be

prejudicial and irrelevant to the claim asserted. Calliari v. Sugar, 180 N.J. Super. 423, 430 (Ch. Div. 1980).

Aletta's central cause of action was that he was the subject of malicious prosecution motivated by a conspiracy among powerful and corrupt officials. To state a valid malicious prosecution claim, as the motion court reviewed in his June 30, 2015 decision, one must prove "(1) that the criminal action was instituted by the defendant against the plaintiff, (2) that it was actuated by malice, (3) that there was an absence of probable cause for the proceeding, and (4) that it was terminated favorably to the plaintiff." Lind v. Schmid, 67 N.J. 255, 262 (1975). Arguably, at least some of plaintiff's rather over-heated claims of political favoritism on the part of the State were relevant to the malicious motivation behind his prosecution.

Second, Aletta claims the trial court's dismissal of his complaint with prejudice violates Rule 4:6-4(b). Rule 4:6-4(b) states in pertinent part:

(b) Impropriety of Pleading. On the court's or a party's motion, the court may either (1) dismiss any pleading that is, overall, scandalous, impertinent, or, considering the nature of the cause of action, abusive of the court or another person; or (2) strike any such part of a pleading or any part thereof that is immaterial or redundant. The order of dismissal shall comply with R. 4:37-2(a).

Dismissal of a pleading pursuant to Rule 4:6-4(b) thus must comply with Rule 4:37-2(a). Rule 4:37-2(a) provides that "a dismissal shall be without prejudice unless otherwise specified in the order." (emphasis).

In its May 2016 decision, the court wrote that Aletta's second complaint, although somewhat shorter, "repeate[d] and re-allege[d] numerous scandalous and impertinent accusations against non-party law enforcement officers." The court stated that some factual allegations in the second complaint,² like the first complaint, were "wholly unsupported, outrageous, and totally unrelated to a cognizable cause of action." As a result, the "pervasiveness of the . . . outrageous allegations necessitates dismissal of the [c]omplaint." The dismissal this time was with prejudice.

Our Supreme Court has stated that, "[s]ince dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will erase the prejudice suffered by the non-delinquent party." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 346 (1984); compare Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005) (finding that plaintiff's deliberate refusal to testify merited dismissal of the case with prejudice), with Zaccardi v. Becker, 88 N.J. 245, 253-54 (1982) (finding that

² Of 471 paragraphs in the first filing, 28 were removed, and others were modified. Aletta included eleven exhibits to support his cause of action in the second complaint.

a dismissal for failure to answer interrogatories should not ordinarily bar a plaintiff from filing a new complaint within the statute of limitations). Generally a dismissal with prejudice is only appropriate for deliberate and contumacious violations of the court's order, or if the complained-of behavior harms the defendant's case. Gonzalez, 185 N.J. at 115-16.

Aletta argues that after the trial court granted the State's motion to strike his first filing on June 30, 2015, the court gave insufficient direction. Aletta claims the court's decision on his reconsideration motion was also insufficiently specific. Counsel wrote that, without direct instruction, he would not "gut the meat of his case on the grounds that doing so would potentially cause legal malpractice." The situation, according to counsel, was a "Hobson's choice." Without evidence, the complaint would likely be dismissed due to the State's immunity, but with evidence, counsel would risk violating the court's instruction. The motion court, however, wrote a comprehensive opinion cataloging many allegations it found scandalous and irrelevant.

A complaint need not allege more than sufficient acts to support the cause of action. As our Supreme Court has instructed, a reviewing court assessing the dismissal of a complaint for failure to state a claim under Rule 4:6-2(e), must "search[] the complaint in depth and with liberality to ascertain whether the

fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Thus Aletta did not need the scandalous material included in his complaint.

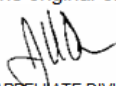
The decision to dismiss a complaint is ordinarily without prejudice, as occurred here the first time. See Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009). While we are sympathetic with the court's frustration at receiving yet another improper complaint, given the underlying allegations of malicious prosecution requiring malicious intent, plaintiff's counsel's concern that he delineate the perceived evil intent is understandable. Unlike a situation where a plaintiff refuses to provide discovery, plaintiff's failure to fully comply with the court's order was not harmful to the defense, nor does it appear contemptuous to the court. See Abtrax Pharm. v. Elkins-Sinn, 139 N.J. 499, 517 (1995) ("The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked 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."). Defendant was not prejudiced by the inability of plaintiff to conform his pleading

to the court's direction. The State has provided no legal precedent for a dismissal with prejudice based on a scandalous complaint. The motion court's decision to dismiss with prejudice was a misapplication of its discretion.

On remand, the court may itself strike the offending paragraphs of the complaint, or the court may appoint an attorney to assist the court at plaintiff's expense to conform the extremely lengthy complaint to the court's direction. The court may also impose another remedy in conformity with this opinion. We see no reason to return this matter to a different judge as requested by plaintiff.

Reversed and remanded for further 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