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MARY C. SIRACUSA, J.S.C.

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MEMORANDUM OF DECISION PURSUANT TO RULE 1:6-2(f)

MICHAEL DIMEO, SR., MICHAEL, DIMEO, JR.,

Plaintiffs,

v.

JOSEPH H. KAYATI, JR., ANTHONY DIMEO, III, JOHN DOE(S) 1-10,

Defendants,

v.

WILLIAM DIMEO, FRANK DIMEO,

Third Party Defendants.

JOSEPH H. KAYATI, JR., ANTHONY DIMEO, III,

Plaintiffs,

v.

MICHAEL DIMEO, SR., MICHAEL DIMEO, JR., MIKE DIMEO AND SONS, LLC, D3K ASSOCIATES, LLC, DIMEO BLUEBERRY FARMS, LLC, WILLIAM DIMEO, FRANK DIMEO, INDIAN BRAND FARMS, and all JOHN DOES, 1-10 all jointly and severally, and in the alternative,

Defendants

DOCKET #: **ATL-L-2883-15**
(consolidated) **ATL-L-2884-15**

DATE:	**February 14, 2020**
MOTION:	**Motion for Reconsideration of November 8, 2019 Orders** **Motion for Stay to File Interlocutory Appeal** **Motion to Enforce Litigant's Rights** **Motion for Change of Venue**
MOVANT:	**Joseph H. Kayati, *Pro se*- Plaintiff/Defendant**

Nature of Motion and Procedural Background

The Complaints in this consolidated matter were filed on April 1, 2014. The discovery end date was June 29, 2018, although discovery is currently continuing. There were one thousand four-hundred forty-four days of discovery prior to the discovery end date. There were nine (9) extensions of discovery. There has been substantial motion practice subsequent to the discovery end date. Trial is scheduled for May 4, 2020. Pursuant to the Court's December 19, 2019 Case Management Order, the discovery depositions of Third Party Defendants William and Frank DiMeo were completed on January 23 and 24, 2020. William and Frank DiMeo may be required to attend a supplemental deposition following the competency hearing of Michael DiMeo, Sr., currently scheduled to commence on April 20, 2020 and continue on April 21, 2020, if necessary. William and Frank DiMeo may also be required to attend a supplemental deposition if Mr. Kayati is successful on his Motion for Reconsideration of the Court's November 8, 2019 Orders.

Plaintiff Joseph Kayati also seeks Reconsideration of the Court's November 8, 2019 Order which granted Third Party Defendants William and Frank DiMeo's Motion for Reconsideration of the Court's December 8, 2018 and August 16, 2019 Orders. The November 8, 2019 Order reinstated paragraph #2 of the Court's November 3, 2017 Order and granted a Protective Order to Third Party Defendants. Paragraph #2 of the November 3, 2017 Order states:

> The Motion to Quash Subpoenas filed by Frank Olivo, Esquire on May 31, 2017 on behalf of Third Party Defendants William DiMeo, Frank DiMeo and Indian Brand

> Farms Inc. is GRANTED. The Subpoena Duces Tecum dated May 19, 2017 and served upon Anthony Nini and the Subpoena Duces tecum dated May 19, 2017 and served upon Friedman, L.L.P. are hereby quashed.

Mr. Kayati also seeks Reconsideration of the Court's November 8, 2019 Order which denied Mr. Kayati's Motion for Reconsideration of the Court's August 16, 2019 Order. Said Order granted non-parties Frank Donio Inc. and David Arena's Motion to Quash the June 7, 2019 Subpoena sent by Mr. Kayati seeking Frank Donio Inc.'s business information.

Mr. Kayati also seeks Reconsideration of the Court's November 8, 2019 Order which denied his Motion for Reconsideration of the Court's September 10, 2019 which quashed four (4) Subpoenas dated June 7, 2019 served upon Matthew McCrink, Esquire, Krisden McCrink, Esquire, Michael DiMeo Sr., and Michelle DiMeo.

Plaintiffs Michael DiMeo, Sr. and Michael DiMeo, Jr. oppose Mr. Kayati's Motion for Reconsideration asserting that he fails to meet the standard for reconsideration and the same issues he raises in his present motion have been addressed a multitude of times by the Court.

Third Party Defendants, William and Frank DiMeo also oppose Mr. Kayati's Motion for Reconsideration arguing that Mr. Kayati fails to identify any items or controlling law that the Court overlooked; or that the Court's decisions were based on a palpably incorrect or irrational basis. Third Party Defendants emphasize that Mr. Kayati's Motion for Reconsideration is seeking to reconsider Orders and decisions that were ruled upon in previously filed motions for reconsideration.

Non-parties Frank Donio, Inc. and David Arena oppose Mr. Kayati's Motion for Reconsideration and assert that Mr. Kayati's voluminous Motion for Reconsideration raises all of his previous arguments in opposition to non-parties Frank Donio, Inc. and David Arena's Motion to Quash Kayati's June 7, 2019 Subpoena, as well as the previous Motion for Reconsideration. Non-parties Frank Donio, Inc. and David Arena contend that the present motion is wholly inappropriate

and should be denied. They further argue that a Motion for Reconsideration is neither a tool to continue to delay a proceeding, nor a vehicle to address Mr. Kayati's dissatisfaction with the outcome of the original decision.

Motion for Reconsideration Standard and Analysis

R. 4:49-2 provides that a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties. R. 4:49-2 further provides that the motion shall state with specificity the basis on which it is made including statement of the matters or controlling decisions, which counsel believe the court overlooked or to which it has erred. Specifically, it states:

> Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall 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

"Motions for reconsideration are granted only under very narrow circumstances: Reconsideration should be used only for those cases which fall into that narrow corridor in which either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. See Fusco v. Board of Educ. of City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002). "Reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice," and more plainly stated, the movant must demonstrate that the court's prior ruling was arbitrary and capricious. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Appellate Division provided that further guidance by stating that:

> if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of

> justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the Court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.
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> Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)

On the other hand, the Appellate Division has held that a motion for reconsideration is not a forum for parties to bring up arguments or facts known to the movant prior to entry of the decision being challenged. Del Vecchio v. Hemberger, 388 N.J. Super. 179, 188 (App. Div. 2006). The mere fact that a litigant is displeased by a Court's decision does not justify reconsideration. Id. at 401-02.

The time prescription of this rule applies only to final judgments and orders. Rusak v. Ryan Automotive, LLC, 418 N.J. Super. 107, 117 n.5 (App. Div. 2011). A motion to amend or reconsider interlocutory orders may be made at anytime until final judgment in the court's discretion and in the interest of justice. See Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250 (App. Div. 1987) certif. den. 110 N.J. 196 (1988); Aktar v. JDN Properties at Florham Park, 439 N.J. Super. 391, 399-400 (App. Div.), certify. den. 221 N.J. 566 (2015).

Mr. Kayati has failed to establish that he is entitled to Reconsideration of the Court's November 8, 2019 Orders, which:

1) granted Third Party Defendants William and Frank DiMeo's Motion for Reconsideration of the Court's December 8, 2018 and August 16, 2019 Orders, reinstated paragraph #2 of the Court's November 3, 2017 Order and granted a Protective Order to Third Party Defendants.
2) quashed the subpoenas served by him on the non-parties FDI and David Arena.
3) denied his Motion for Reconsideration of the Court's September 10, 2019 which quashed four (4) Subpoenas dated June 7, 2019 served upon Matthew McCrink, Esquire, Krisden McCrink, Esquire, Michael DiMeo Sr., and Michelle DiMeo.

"Motions for reconsideration are granted only under very narrow circumstances: Reconsideration should be used only for those cases which fall into that narrow corridor in which either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. See Fusco v. Board of Educ. of City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002).

R. 4:49-2 further provides that the motion shall state with specificity the basis on which it is made including statement of the matters or controlling decisions, which counsel believe the Court overlooked or to which it has erred.

Mr. Kayati's Motion for Reconsideration of the November 8, 2019 Orders has failed to show that the Court expressed its decision (1) based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Mr. Kayati has failed to present any new or additional information for the Court to consider.

Additionally, Mr. Kayati's current Motion once again re-argues issues that have been previously submitted to the Court, analyzed by the Court and ruled upon by the Court. Mr. Kayati disingenuously argues that this Court never considered the certification of his expert, Frederick Blum, CPA, in rendering its November 8, 2019 Order. The record is clear; this Court considered Mr. Blum's certification and the overwhelming evidence supports the fact that Mr. Kayati has been provided with a voluminous amount of financial discovery to assist Mr. Blum in the preparation of his expert report.

For those reasons, Mr. Kayati's Motion for Reconsideration of the Court's November 8, 2019 Orders is DENIED.

Motion to Stay for Leave to File an Interlocutory Appeal

R. 2:5-6(a) provides:

> (a) Appeals. Applications for leave to appeal from interlocutory orders of courts or of judges sitting as statutory agents and from interlocutory decisions or actions of state administrative agencies or officers shall be made by serving and filing with the court or agency from which the appeal is taken and with the appellate court a notice of motion for leave to appeal, as prescribed by R. 2:8-1, within 20 days after the date of service of such order, administrative decision or notice of such administrative action. If, however, a motion to the trial court for reconsideration of the order from which leave to appeal is sought is filed and served within 20 days after the date of its service, the time to file and serve the motion for leave to appeal in the Appellate Division shall be extended for a period of 20 days following the date of service of an order deciding the motion for reconsideration. The filing of a motion for leave to appeal **shall not stay** the proceedings in the trial court or agency except on **motion made to the court** or agency which entered the order or if denied by it, to the appellate court.

Under our rules, parties do not have a right to appeal an interlocutory order. In re Pa, R.R. Co., 34 N.J. Super. 103, 107-108 (App. Div. 1955), aff'd, 20 N.J. 398 (1956). The stringent standard for grant of leave to appeal is based on the "general policy against piecemeal review of trial level proceedings. Brundage v. Estate of Carambio, 195 N.J. 575, 599 2008). The moving party must establish at a minimum, that the desired appeal has merit and that justice calls for an appellate court's interference in the cause. See, Romano v. Maglio, 41 N.J. Super. 561, 568 (App. Div.), certify. denied, 22 N.J. 574 (1956).

The authority to stay a proceeding is within the sound discretion of the trial court. Procopio v. Government Employees Ins., 433, N.J. Super. 377, 380 (App. Div. 2013). It is well-settled that the issuance of an interlocutory injunction requires the court to consider the four factors set forth in Crowe v. DeGoia, 90 N.J. 126 (1982). Each factor must be "clearly and convincingly demonstrated." Waste Management of New Jersey v. Union County Utilities Authority, 399 N. J. Super. 508, 519 (App. Div. 2008); *see also*, B & S Ltd., Inc. v. Elephant & Castle Intern., Inc., 388 N.J. Super. 160, 164 (Super. Ct. 2006) (The movant carries the burden to prove its entitlement to

injunctive relief by clear and convincing evidence). The factors that an applicant must demonstrate in order for a preliminary or temporary injunction to issue are as follows:

(1) Substantial, immediate, and irreparable harm;

(2) A settled legal right;

(3) A reasonable probability of success on the merits; and

(4) The balance of the relative hardships to the parties weighs in favor of granting the relief sought.

Crowe, supra, 90 N.J. at 132-34.

Mr. Kayati has failed to establish that he is entitled to a stay of these proceedings in order to file an interlocutory appeal of this Courts November 8, 2019 Orders. Mr. Kayati's application for a stay demonstrates nothing more than dissatisfaction with prior orders of the Court. Mr. Kayati has not demonstrated by clear and convincing evidence that:

1) he will suffer immediate and irreparable harm if the stay is not granted;
2) he is asserting a settled legal right;
3) he has a reasonable probability of success on the merits; or
4) the balance of the relative hardships to the parties weighs in favor of granting the relief sought.

Moreover, this case was commenced on April 1, 2014. It is now almost six (6) years old. The progress of this case has been delayed by innumerable and voluminous Motions for Reconsideration. With the depositions of Frank and William DiMeo having been recently completed and the competency hearing of Michael DiMeo, Sr. being scheduled for April 20, 2020 this case is finally moving towards its conclusion.

For all of the above reason, the Motion to Stay the Case for Leave to File an Interlocutory Appeal is DENIED.

Motion to Change Venue

R. 4:3-3 provides:

> (a) By Whom Ordered; Grounds. In actions in the Superior Court a change of venue may be ordered by the Assignment Judge or the designee of the Assignment Judge of the county in which venue is laid or by a judge of such county sitting in the Chancery Division, General Equity, or the presiding judge of the Family Part, or the designee of the Assignment Judge for the Special Civil Part, (1) if the venue is not laid in accordance with R. 4:3-2; or (2) if there is a substantial doubt that a fair and impartial trial can be had in the county where venue is laid; or (3) for the convenience of parties and witnesses in the interest of justice; or, (4) in Family Part post-judgment motions, if both parties reside outside the county of original venue and application is made to the court by either party to change venue to a county where one of the parties now resides.
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> (b) Time; Form of Order; Filing. A motion for a change of venue shall be made not later than 10 days after the expiration of the time prescribed by R. 4:6-1 for the service of the last permissible responsive pleading, or, if the action is brought pursuant to R. 4:67 (summary actions), on or before the return date. If not so made, objections to venue shall be deemed waived except that if the moving party relies on R. 4:3-3(a)(2) the motion may be made at any time before trial. The order changing venue shall not be incorporated in any other order and shall be filed in triplicate. If a mediator has already been appointed, the party moving to change venue shall serve a copy of the motion on that person prior to the mediation date. The moving party also shall promptly serve on the mediator a copy of the order entered on the motion.

I have been designated by the Honorable Julio Mendez, A.J.S.C. to rule on this Motion to Change Venue.

As indicated above, R. 4:3-3(b) outlines the time frame within which a party must file a motion to change venue. The rule states that "[a] motion for a change in venue shall be made not later than 10 days after the expiration of the time prescribed by R. 4:6-1 for the service of the last permissible responsive pleading, or, if the action is brought pursuant to R. 4:67 (summary actions), on or before the return date. If not so made, objection to venue shall be deemed waived …."

In support of his Motion to Change Venue, Mr. Kayati argues that there is substantial doubt that a fair and impartial trial can be had in this venue as this Court has manipulated its own Orders in an effort to ignore the financial discovery requested by Mr. Kayati's expert, Frederick Blum, CPA. Mr. Kayati alleges violations of ethical and fiduciary duties by Judges, Court employees, and counsel.

Counsel for Third Party Defendants, William and Frank DiMeo, Counsel for Michael DiMeo Sr., and Michael DiMeo. Jr., and Counsel for non-parties Frank Donio, Inc. and David Arena assert that Mr. Kayati has provided nothing but baseless and offensive accusations of conspiracy and other wrongdoings to support his request for a change of venue, which will further delay this case.

The Court agrees that Mr. Kayati's accusations of conspiracy and other wrongdoings are baseless and offensive and have no merit. These unsupported allegations fail to establish that a fair and impartial trial cannot be had in the county where venue is laid. Additionally, there has been a tremendous amount of judicial time expended in managing this case and in reviewing and ruling upon the numerous and voluminous pretrial motions. The Court is greatly concerned with the possible duplication of this effort, as well as the potential time delay if a change of venue is granted. This case is more than six (6) years old and trial is set for May 4, 2020. There is no basis at this time to change venue. Venue is not just a jurisdictional issue; it is a question that implicates both the efficient administration of justice and the convenience of the parties. New Jersey Thoroughbred Horseman's Ass'n v. State, 348 N.J. Super. 125, 136 (Ch. Div. 2001). The credible evidence in this case demonstrates that Mr. Kayati has been treated fairly and impartially to date and he will receive a fair and impartial trial in Atlantic County. Therefore, this record does not warrant a change of venue.

Accordingly, for all of the above reason, Mr. Kayati's Motion to change venue is DENIED.

CONCLUSION

Mr. Kayati's Motion for Reconsideration of the Court's November 8, 2019 Orders is DENIED.

Mr. Kayati's Motion to Stay Case for leave to File an Interlocutory Appeal is DENIED.

Mr. Kayati's Motion to Change Venue is DENIED.

An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision. A copy of the Order and a copy of this Memorandum of Decision shall be served on all of counsel of record *via* eCourts and upon *Pro Se* Plaintiff Joseph Kayati *via* email within the next seven (7) days.

Mary C. Siracusa, J.S.C.