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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1535-21**

ARETHA CALDWELL,
Administrator ad Prosequendum
of the estate of ISABEL
LOATMAN, deceased,

Plaintiff-Appellant,

v.

1420 SOUTH BLACK HORSE
PIKE OPERATIONS LLC,
d/b/a MEADOWVIEW
NURSING & RESPIRATORY
CARE, and GENESIS
HEALTHCARE, INC.,

Defendants-Respondents.

Argued March 1, 2023 – Decided March 17, 2023

Before Judges Mayer, Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Gloucester County, Docket No. L-1509-18.

Matthew E. Gallagher argued the cause for appellant
(Swartz Culleton PC, attorneys; Christopher J.
Culleton, on the briefs).

Eric D. Heicklen argued the cause for respondents (Buchanan Ingersoll & Rooney PC, attorneys; David L. Gordon, David R. Drake, Caitlin L. Cardene, of counsel and on the brief).

PER CURIAM

Plaintiff Aretha Caldwell, Administrator ad Prosequendum of the Estate of Isabel Loatman, appeals from a January 12, 2022 order granting summary judgment to defendants 1420 South Black Horse Pike Operations LLC d/b/a Meadowview Nursing and Respiratory Care (Meadowview) and Genesis Healthcare, Inc. and dismissing her complaint with prejudice for failure to timely provide an expert causation report. Because the judge failed to consider less drastic sanctions as an alternative to dismissal of plaintiff's complaint, we reverse and remand.

We recite the facts from the summary judgment motion record. On January 9, 2018, Loatman, then seventy-two years old, was discovered unresponsive at her home following a stroke and admitted to a local hospital. At the hospital, Loatman's neurologist determined that she suffered a recent subacute right posterior cerebral artery territory stroke and a prior left cerebral hemispheric stroke. Loatman transferred from the hospital to Meadowview about two weeks later.

On February 22, 2018, while at Meadowview, Loatman fell from her bed. No one at Meadowview witnessed her fall, and Loatman denied hitting her head. Three days later, Loatman returned to the hospital because her mental condition deteriorated. On or about March 2, 2018, Loatman suffered additional strokes and died on March 5, 2018. The death certificate listed the cause of death as intracranial hemorrhage.

On December 27, 2018, plaintiff filed a complaint alleging that defendants' negligence, carelessness, and recklessness caused Loatman's fall on February 22, 2018. Plaintiff further alleged Loatman's intracranial hemorrhage from the fall caused or contributed to her death.

On August 2, 2021, plaintiff served an expert report authored by Darlene Parks, a registered nurse. Nurse Parks opined that defendants' nursing staff breached the standard of care for nursing home facilities by failing to properly monitor Loatman before and after her fall. Nurse Parks further explained that defendants' staff failed to identify early signs of Loatman's head injury from that fall.

The trial court conducted a case management conference on October 29, 2021. Plaintiff's counsel told the judge that no additional expert reports were

contemplated. At the time of the conference, plaintiff believed defendants were disputing the proper standard of nursing care rather than medical causation.

Per the November 5, 2021 case management order, plaintiff's expert reports were due November 1, 2021, and defendants' expert reports were due December 15, 2021. The case management order did not contain any language stating that the failure to produce expert reports by the deadline would result in the barring of the expert's trial testimony. See R. 4:17-4(e). While the case management order established February 1, 2022 as the discovery end date, there was no trial date fixed in that order.

On December 9, 2021, defendants produced a neurology expert report from Dara Jamieson, M.D. Dr. Jamieson found Loatman's cerebral hemorrhage on February 24, 2018 was "not related to any aspect of what was presumed to be an unwitnessed fall out of her bed." The defense expert further found the strokes Loatman suffered in March just before her death were "cardioembolic in origin and were unrelated to the care or the events at [Meadowview]." According to plaintiff, it was not until receipt of Dr. Jamieson's report that she learned defendants were challenging medical causation.

The day after serving Dr. Jamieson's expert report, defendants moved for summary judgment. On December 28, 2021, while defendants' summary

judgment motion was pending, plaintiff served an expert report from Nirav K. Shah, M.D., a neurosurgeon. In addition to opposing defendants' summary judgment motion, plaintiff cross-moved to extend the discovery deadlines in the November 5, 2021 case management order.

In his expert report, Dr. Shah concluded Loatman suffered a "catastrophic traumatic brain injury causally related to the February 22nd 2018 injury" which led to her death. According to Dr. Shah, Loatman's neurological condition worsened after falling from her bed at Meadowview and she developed "a surgical intracerebellar hemorrhage with hydrocephalus and traumatic subarachnoid hemorrhage." Dr. Shah found no evidence that Loatman suffered a spontaneous stroke subsequent to her fall at Meadowview. The doctor concluded Loatman died from a cerebral hemorrhage traumatically induced by falling from her bed at Meadowview.

On January 7, 2022, the motion judge heard oral argument on defendants' motion. In a January 12, 2022 order and accompanying written decision, the judge granted defendants' motion and dismissed plaintiff's complaint with prejudice. The judge found the only timely expert report submitted by plaintiff was provided by Nurse Parks. While the judge explained Nurse Parks was qualified to render an opinion on the standard of nursing care, he found she was

not "competent or even licensed" to opine on Loatman's medical diagnoses or cause of death. The judge concluded Nurse Parks "offer[ed] nothing more than speculation that [Loatman]'s fall resulted in her death." Because the judge found that Nurse Parks lacked the requisite qualifications to opine on the cause of Loatman's death, he determined plaintiff could not sustain her cause of action without an expert opinion as to causation.

Additionally, the judge declined to allow Dr. Shah's report "at this late juncture." The judge, citing Rule 4:17-4(e) governing the furnishing of expert reports, found plaintiff "did not provide a certification justifying the report's untimeliness per R. 4:17-7."¹ Further, the judge accepted defendants' argument that "they were 'induced to disclose their defenses'" based upon plaintiff's representation at the October 29, 2021 case management conference that no additional expert reports were contemplated. Because plaintiff submitted Dr. Shah's expert report after defendants supplied Dr. Jamieson's report, and defendants asserted that Dr. Shah presumably tailored his report in response to

¹ Because Dr. Shah's report was served more than twenty days prior to the end of the discovery period, Rule 4:17-7 did not apply and plaintiff was not required to provide a certification of due diligence. Nor did Rule 4:17-4(e) apply because the November 5, 2021 case management order did not state that an expert whose name or report was not furnished by the deadline in that order would be precluded from testifying at trial.

their defense expert report, the judge concluded "[s]uch indeed is not fair play." The judge explained he was "in the difficult position that [he] cannot cure the [p]laintiff's conduct here in any effective way without barring Shah's report."

In a January 18, 2022 order, the judge denied plaintiff's motion to extend the discovery end date as moot based on the January 12, 2022 summary judgment order.²

On appeal, plaintiff argues the motion judge erred in barring Dr. Shah's expert report. She contends there were other remedies available that should have been considered by the judge in lieu of dismissing her complaint. Further, plaintiff asserts that, even without Dr. Shah's report, there was "ample medical evidence in the record from contemporaneous physicians' assessments that establish[ed] the requisite causal link between the subject fall and decedent's resulting head injuries and death."

We review a trial court's grant of summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no

² Plaintiff's notice of appeal is limited to the January 12, 2022 order granting summary judgment.

genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Friedman v. Martinez, 242 N.J. 449, 471–72 (2020) (quoting R. 4:46-2(c)).

In reviewing a summary judgement order, we consider the evidence in the light most favorable to the non-moving party and then determine whether such evidence could "permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "Summary judgment should be granted, in particular, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman, 242 N.J. at 472 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

We apply an abuse of discretion standard "when reviewing the propriety of a trial court's dismissal of a plaintiff's complaint with prejudice because of discovery violations." Quail v. Shop-Rite Supermarkets, Inc., 455 N.J. Super. 118, 133 (App. Div. 2018) (citing Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 517 (1995)). We will uphold a trial court's discovery sanction "unless an injustice appears to have been done." Ibid. Where a judge refuses to consider

a late report in opposition to a party's motion for summary judgment, particularly if the motion was made prior to the discovery end date, the judge's decision constitutes an abuse of discretion. See Baldyga v. Oldman, 261 N.J. Super. 259, 268 (App. Div. 1993) (holding the exclusion of the plaintiff's expert report received after the discovery end date but prior to ruling on the defendant's summary judgment motion was erroneous).

We first address plaintiff's argument that the judge's dismissal of her complaint with prejudice was drastic and a lesser sanction should have been considered. We agree.

While a judge has broad discretion in formulating sanctions for discovery violations, such as the failure to timely file an expert report, any sanction imposed must be "just and reasonable." Conrad v. Robbi, 341 N.J. Super. 424, 441 (App. Div. 2001) (quoting R. 4:23). Imposition of sanctions for violation of discovery deadlines in a case management order requires consideration of "a number of factors, including whether the plaintiff acted willfully and whether the defendant suffered harm, and if so, to what degree." Gonzales v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005).

Dismissal of a claim for failure to comply with discovery deadlines is the "last and least favorable option." Il Grande v. DiBenedetto, 366 N.J. Super. 597,

624 (App. Div. 2004). "The varying levels of culpability of delinquent parties justify a wide range of available sanctions against the party violating a court rule If a lesser sanction than dismissal suffices to erase the prejudice to the non-delinquent party, dismissal of the complaint is not appropriate and constitutes an abuse of discretion." Georgis v. Scarpa, 226 N.J. Super. 244, 251 (App. Div. 1988). See also Robertet Flavors v. Tri-Form Const., 203 N.J. 252, 274 (2010) (recognizing dismissal as the ultimate sanction to be ordered only when no lesser sanction will suffice to erase the prejudice).

Dismissal with prejudice for procedural violations "must be a recourse of last resort, not to be invoked unless no lesser sanction is adequate in view of the nature of the default, its attendant prejudice to other parties, and the innocence of the sanctioned litigant." Tucci v. Tropicana Casino and Resort, Inc., 364 N.J. Super. 48, 52 (App. Div. 2003). Importantly, cases should be disposed of on their merits rather than for discovery violations. Trust Co. of N.J. v. Sliwinski, 350 N.J. Super. 187, 192 (App. Div. 2002) ("[W]henever possible, litigation should be resolved on the merits rather than on procedural violations.").

Under Rule 4:23-2(b), "[i]f a party . . . or authorized agent of a party . . . fails to obey an order to provide . . . discovery," the court "may make such orders in regard to the failure as are just," including:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the introduction of designated matters in evidence;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party;

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Here, a lesser sanction short of dismissal of plaintiff's complaint should have been considered by the judge. The judge never explored any of the sanctions available under Rule 4:23-2(b) to cure any prejudice defendants may have suffered as a result of plaintiff's delayed submission of Dr. Shah's report.

For example, the judge could have allowed defendants to submit a supplemental or rebuttal report in response to Dr. Shah's report. See R. 4:23-1; R. 4:23-2.


Absent consideration of lesser sanctions and an explanation as to why lesser sanctions were inadequate to remedy the delayed service of Dr. Shah's expert report served prior to the discovery end date and before any scheduled trial date, the judge abused his discretion in dismissing plaintiff's complaint.

While defendants claimed to have suffered prejudice resulting from the service of Dr. Shah's report after the November 1 deadline, they failed to demonstrate severe prejudice warranting dismissal of plaintiff's case. Dr. Shah relied on Loatman's medical records and radiological images in support of his opinion that "it is within a reasonable degree of medical certainty that [Loatman's] hemorrhage was traumatic in origin" and that "Dr. Jamieson neglected to identify the origin of the subarachnoid hemorrhage and instead, focused on the cerebellar hemorrhage." If the matter proceeded to trial, it would be up to a jury to determine which expert's opinion as to Loatman's cause of death was more credible based upon the evidence. On this record, defendants failed to demonstrate the requisite level of severe prejudice justifying dismissal of plaintiff's complaint with prejudice.

Additionally, the judge dismissed plaintiff's complaint in the absence of a scheduled trial date. We note Chief Justice Stuart Rabner recently suspended civil trials in Gloucester County due to the number of judicial vacancies in that vicinage. See Judiciary Office of Commc'ns, Statement of the Chief Justice on Suspension of Civil and Matrimonial Trials in Two Vicinages Due to Vacancy Crisis (2023). Given our reversal of the judge's dismissal of plaintiff's complaint with prejudice and remand to the trial court for further proceedings, defendants have ample time to obtain a supplemental expert report, depose Dr. Shah, or undertake any additional discovery related to Dr. Shah's expert opinions before this matter might be scheduled for trial. We take no position on the sanctions, if any, to be considered by the judge on remand.

Reversed and remanded. 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