

**NOT FOR PUBLICATION WITHOUT THE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 NOS. A-2112-20
A-2275-20

REGINA S. BAILEY,

Plaintiff-Appellant/
Cross-Respondent,

v.

JOSEPH GIBBONS, TANYA WOOD,
DAVID WATKINS, ESQ., PAT
PRIANT, and RUSSO REALTY,

Defendants,

and

THE CITY OF ENGLEWOOD,
ENGLEWOOD POLICE OFFICER
THORTON WHITE, ENGLEWOOD
POLICE OFFICER GONZALEZ, and
ENGLEWOOD LIEUTENANT
BARRETT,

Defendants-Respondents,

and

KELLY BERTON¹ ROCCO, ESQ.,

Defendant/Third-Party Plaintiff-
Respondent/Cross-Appellant,

v.

JAMES M. MARKS, II, ESQ.,

Third-Party Defendant-
Respondent.

REGINA S. BAILEY,

Plaintiff-Respondent,

v.

JOSEPH GIBBONS, TANYA WOOD,
DAVID WATKINS, ESQ., PAT
PRIANT, and RUSSO REALTY,

Defendants,

and

THE CITY OF ENGLEWOOD,
ENGLEWOOD POLICE OFFICER
THORTON WHITE, ENGLEWOOD
POLICE OFFICER GONZALEZ, and
ENGLEWOOD LIEUTENANT
BARRETT,

Defendants-Respondents,

¹ Improperly pled as Burton.

and

KELLY BERTON² ROCCO ESQ.,

Defendant/Third-Party Plaintiff-
Respondent,

v.

JAMES M. MARKS, II, ESQ.,

Third-Party Defendant-Appellant.

Argued November 16, 2022 – Decided October 31, 2023

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-0673-09.

James M. Marks, II, Esq., argued the cause for
appellant Regina S. Bailey in A-2112-20, and as pro
se appellant in A-2275-20.

Adam Jeffrey Adrignolo argued the cause for
respondent/cross-appellant Kelly Berton Rocco
(McElroy, Deutsch, Mulvaney & Carpenter, LLP,
attorneys; Adam Jeffrey Adrignolo, of counsel and on
the briefs; Daniel Albert Malet, on the briefs).

Grace Lempka argued the cause for respondents City
of Englewood, Englewood Police Officer Thorton
White, Englewood Police Officer Gonzalez, and

² Improperly pled as Burton.

Englewood Lieutenant Barrett (Dvorak & Associates, LLC, attorneys; Lori A. Dvorak, of counsel; Marc D. Mory, on the brief).

The opinion of the court was delivered by

MITTERHOFF, J.A.D.

This consolidated matter returns to our court for the fourth time following a remand on October 15, 2018. On March 5, 2021, Judge Rachelle L. Harz entered final judgment resolving all claims in this matter pursuant to our instruction on remand. Plaintiff, the Estate of Regina S. Bailey,³ now appeals from six orders: (1) a June 3, 2013 order dismissing plaintiff's claims against Kelly Berton Rocco, Esq., and the City of Englewood and several Englewood police officers (the "Englewood defendants"); (2) an April 14, 2015 order dismissing plaintiff's claims with prejudice against David Watkins, Esq.; (3) a March 5, 2019 order granting Rocco's motions to quash plaintiff's request for admissions; (4) a July 1, 2019 order reaffirming the dismissals of plaintiff's claims against Rocco and the Englewood defendants; (5) a March 5, 2021 order denying plaintiff's request to place a bankruptcy court judgment for

³ The original plaintiff, Regina Bailey, died in 2016 during the pendency of this appeal, and her Estate has been substituted in her stead. For ease of reference, we continue to use "plaintiff" to refer to the Estate.

pre-petition debts against Joseph Gibbons on the record in Bergen County; and (6) a March 5, 2021 order entering final judgment as to all parties.⁴

Third-party defendant/appellant, James M. Marks, II, Esq., who represents plaintiff in this matter, also individually appeals from four orders: (1) a March 8, 2013 order⁵ naming Marks as a third-party defendant, which also disqualified him as a witness under ("RPC") 3.7; (a), stating in pertinent part, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness"; (2) an October 25, 2013 order denying plaintiff's unopposed summary judgment motion against Gibbons and Tanya Wood; (3) a January 31, 2014 order refusing to rule upon Marks's unopposed motion to dismiss the third-party complaint against him; and (4) a March 5, 2019 order quashing Marks's request for admissions directed to Rocco and her counsel.⁶

⁴ Appellate Docket No. A-2112-20.

⁵ Marks incorrectly cites to this order as the April 23, 2013 order.

⁶ Appellate Docket No. A-2275-20.

Finally, defendant Rocco cross-appeals from a September 17, 2013 decision that denied her motion for sanctions, including fees, against Marks.⁷

Having reviewed the history of this litigation, and the applicable legal principles governing the myriad arguments raised, we affirm on all issues.

The underlying litigation largely arises from the 2008 court-ordered sale of plaintiff's former marital home, her arrest by the Englewood police for trespassing on the property after the sale, the destruction of her personal property by the purchasers, defendants Gibbons and Wood, and the failure of her matrimonial attorney, defendant Rocco, to file a Notice of Claim against the Englewood officers.

On October 15, 2018, concerned about the lack of finality as to plaintiff's claims against Gibbons and Wood, we remanded and directed the trial court to scrutinize the record to ensure all claims were fully and appropriately resolved. On January 2, 2019, we issued a clarifying order instructing the "newly-assigned trial judge" to "address any claims that any party wishes the court to consider or reconsider, not just those that concern

⁷ Appellate Docket No. A-2112-20.

defendants Gibbons and Wood[], on appropriate notice to any affected parties."

On remand, Judge Harz undertook the Herculean task of reviewing the entire tortured history of this case, which has been the subject of litigation in both the federal and state courts, as well as bankruptcy proceedings pursued by Gibbons and Wood. In a written decision dated June 26, 2019, which painstakingly details the factual and procedural history of this matter, Judge Harz addressed plaintiff's claims against the subject defendants. As for the Englewood defendants, Judge Harz found that "Judge Wilson's order and opinion that no claims can be sustained against [them] . . . is completely in line with the . . . prevailing law." As for plaintiff's claim against Rocco, Judge Harz agreed with Judge Wilson's determination that, pursuant to the retainer agreement, Rocco did not have a duty to represent plaintiff for anything outside the scope of her matrimonial matter. However, Judge Harz reserved decision on plaintiff's claims against Gibbons pending the bankruptcy court's ruling on plaintiff's motion to preserve its claims.

On June 8, 2020, the bankruptcy judge denied plaintiff's motion for non-dischargeability of the claims against Gibbons. Based on the federal court's determination, Judge Harz entered a March 5, 2021 order, which: (1) vacated

a January 6, 2020 stay imposed due to Gibbons's bankruptcy proceedings; (2) dismissed plaintiff's claims against Gibbons, finding that they were "discharged in bankruptcy"; and (3) entered final judgment in the matter, stating "this matter is now final and concluded as to all parties." (emphasis added).

On appeal in A-2112-20, plaintiff presents the following arguments for this panel's consideration:

ARGUMENT 1:

JUDGE HARZ ERRED BY NOT PLACING GIBBON'[S] JUDGMENT FOR PRE-PETITION LIABILITY ON THE RECORD.

ON OCTOBER 15, 2018[,] THIS COURT REMANDED THE MATTER. . . .

ARGUMENT 2:

WATKINS IS LIABLE FOR LEGAL MALPRACTICE AND BREACH OF FIDUCIARY DUTY.

POINT 1:

WATKINS LIED ABOUT OBTAINING MORTGAGE EXTENSIONS SUBJECTING HIM TO LIABILITY UNDER PETRILLO

POINT 2:

WATKINS DEMANDED CLEANING INVOICES
BE FALSIFIED.

POINT 3:

LAW OF LEGAL MALPRACTICE LIABILITY TO
THIRD PARTIES

POINT 4:

WATKINS LIABILITY FOR BREACH OF
FIDUCIARY DUTY (ESCROW AGENT).

ARGUMENT 3:

IT WAS ERROR TO GRANT ROCCO'S SUMMARY
JUDGMENT MOTION.

POINT 1:

PLAINTIFF'S CLAIMS OF LEGAL MALPRACTICE
AND LEGAL STANDARD.

STANDARD OF LEGAL MALPRACTICE

P[OIN]T 2:

JUDGE WILSON ERRED FINDING THAT
MALPRACTICE WAS BEYOND THE SCOPE OF
THE RETAINER.

A. ACTS WERE NOT EXCLUDED BY RETAINER

B. JUDGE WILSON ERRED WHEN HE RULED
ACTS WERE "BEYOND THE SCOPE" OF THE
RETAINER.

POINT 3:

JUDGE[S] WILSON AND HARZ ERRED IN HOLDING THAT ROCCO COMMITTED NO MALPRACTICE IN FAILING TO COLLECT THE EQUITABLE DISTRIBUTION

A. JUDGE[S] HARZ AND WILSON ERRONEOUSLY IGNORED ROCCO'S MALPRACTICE IN SECURING EQUITABLE DISTRIBUTION AND 2007 LEGAL FEES.

POINT 4:

ROCCO COMMITTED MALPRACTICE IN REGARDS TO THE ROSE LEGAL FEES.

A. FACTUAL BACKGROUND:

B. ROCCO MALPRACTICE RE: ROSE #1: ROCCO COMMITTED PLAINTIFF TO PAY AN AMOUNT GREATER THAN SHE ACTUALLY OWED.

C. ROCCO MALPRACTICE #2: ROCCO FAILED TO CHALLENGE THE ROSE MORTGAGE.

D. MALPRACTICE #3: ROCCO FAILED TO CHALLENGE A) THE AMOUNT PLAINTIFF OWED (IF ANYTHING) AND B) IF PLAINTIFF OWED ANY FEES, MOVE THEY BE EQUITABLY REALLOCATED TO THE EX-HUSBAND.

E. MALPRACTICE #4: ROCCO FAILED TO SEEK AMENDMENT/REALLOCATION OF 1990 LEGAL FEE ORDER.

POINT 5:

ROCCO FAILED TO CHALLENGE THE CORA WALKER MORTGAGE AND SEEK REFORMATION.

POINT 5 [sic]:

BOTH JUDGES IGNORED THAT ROCCO FAILED TO SEEK EQUITABLE REALLOCATION OF THE ROSE MORTGAGE EQUITY.

POINT 6:

BOTH JUDGES IGNORED THAT ROCCO FAILED TO CONDUCT DILIGENCE ON CLOSING DEDUCTIONS.

POINT 7:

ROCCO HAD NO AUTHORITY OR CONSENT TO HIRE DONALD MILLER ESQ.[.] AND COMMIT PLAINTIFF TO PAY HIS FEES WITHOUT HER CONSENT OR KNOWLEDGE. CLAIM WAS IGNORED BY BOTH JUDGES.

A. MILLER[']S ROLE:

POINT 8:

ROCCO FAILED TO REPRESENT PLAINTIFF ADEQUATELY IN THE ESCROW AND MOVE-OUT PERIOD; HER FAILURE WAS A SUBSTANTIAL CONTRIBUTING CAUSE TO DESTRUCTION OF PLAINTIFF'S PROPERTY.

POINT 9:

ROCCO FAILED TO DELIVER THE ESCROW INVOICES AND IS LIABLE FOR THE COSTS OF

RECOVERING THE ESCROW FUNDS: CLAIM IGNORED BY BOTH JUDGES.

POINT 10:

JUDGE HARZ ERRED IN RULING THAT THE "SETTLEMENT" ROCCO UNILATERALLY NEGOTIATED WITHOUT PLAINTIFF'S CONSENT SEVERED PLAINTIFF'S MALPRACTICE CLAIM.

A. DISCUSSION OF THE CONDITION OF THE HOME/SALE PRICE

B. THE "SETTLEMENT"

POINT 11:

JUDGE HARZ & WILSON ERRED IN DISMISSING PLAINTIFFS CLAIM THAT ROCCO COMMITTED MALPRACTICE WHEN SHE FAILED TO ADVISE PLAINTIFF TO FILE A NOTICE OF CLAIM.

POINT 12:

JUDGE HARZ ERRED IN GRANTING MOTION TO QUASH REQUEST FOR ADMISSIONS.

POINT 13:

JUDGE[S] HARZ AND WILSON ERRED IN NOT FINDING THAT ROCCO'S SEIZURE OF \$5,000 WITHOUT PLAINTIFF'S AUTHORIZATION CONSTITUTED MALPRACTICE (NOT RAISED IN EITHER OPINION)

POINT 14:

JUDGE HARZ ERRED IN FINDING THAT
PLAINTIFF[']S DEPOSITION MAY PRECLUDE
CLAIMS.

ARGUMENT 4:

UNDER NEW JERSEY LAW, OFFICERS POSSESSED NO
PROBABLE CAUSE FOR THE ARREST AND EVICTION OF
PLAINTIFF

LEGAL STANDARD

FACTUAL BACKGROUND OF THE JANUARY 14, 2008
ARREST

POINT 1:

OFFICERS BASED THEIR ARREST/EVICTION UPON NO
OBJECTIVE FACTS

THE "DEED"

THE "WRITTEN AGREEMENT"

REASONABLE OFFICER STANDARD UNDER NEW JERSEY
CONSTITUTIONAL LAW

POINT 2:

UNDER NJ CONSTITUTIONAL LAW, OFFICERS CANNOT
BASE PROBABLE CAUSE ONLY ON THE
UNCORROBORATED STATEMENT OF AN ADVERSARIAL
WITNESS.

POINT 3:

JUDGE WILSON IGNORED MONELL CLAIMS; [JUDGE]
HARZ ERRED IN DISMISSING[.]

POINT 4:

MATERIAL DISPUTE OF FACT THAT A) PLAINTIFF IGNORED THE OFFICERS AND B) SHE WAS ARRESTED ON THE 1ST INTERACTION BY THE OFFICERS.

POINT 5:

THE OFFICERS NEVER QUESTIONED PLAINTIFF AND THEREFORE COULD NOT POSSESS PROBABLE CAUSE FOR THE SCIENTER ELEMENT OF TRESPASS.

In a separate appeal A-2275-20, third-party defendant Marks presents the following arguments:

ARGUMENT 1:

JUDGE[S] HARZ AND WILSON ERRED IN NOT DISMISSING THE THIRD PARTY COMPLAINT BY MARKING SUCH AS WITHDRAWN AS ROCCO DEMANDED (NOT RAISED BELOW).

POINT 1: Judge Harz Erred in Granting the Motion to Quash; She Erred in Not Dismissing the Third Party Complaint as Withdrawn by Rocco.

ARGUMENT 2:

JUDGE WILSON'S ORDER SHOULD BE REVERSED ON PROCEDURAL GROUNDS.

Point 1: The Third Circuit Vacated the District Judge's Rehearing Not the Magistrate's Order.

Point 2: Rocco's February 22 Motion to Name Mr. Marks a Third Party Was Not Timely Made and Should Have Been Dismissed.

Point [3]: The Order Authorizing the Third Party Complaint Was Vacated and No Subsequent Order was Ever Filed.

Point [4]: Order Granting Was Vacated, but Complaint Was Never Refiled.

ARGUMENT 3:

JUDGE WILSON ERRED IN GRANTING ROCCO'S MOTION TO AMEND HER COMPLAINT AND NAME MR. MARKS AS A THIRD-PARTY DEFENDANT.

Point 1: Judge Wilson Erred in Ignoring Clear Issue Preclusion and By Ruling on Rocco's motion de novo rather than on a rehearing standard.

a. Issue preclusion standard: This court reviews Judge Wilson's choice of standard on a de novo basis.

b. Law of issue preclusion.

c. There is no difference between Federal/ NJ District Court law and New Jersey State law on this issue.

Point 2: If Judge Wilson Wished to Review this Issue, He Was Required to do so Under a Rehearing Standard.

a) As a matter of law, Mr. Marks could not be viewed as plaintiff's attorney prior to April 13, 2008.

[ARGUMENT] 4: Even on a de novo standard, Judge Wilson's Ruling Ignored the Rules for Amending an Answer and was Therefore Erroneous.

Point 1: Rocco has no excuse for her delay in bringing the motion.

[a] As such delay is truly unexplained, or has no proper explanation, the motion should have been dismissed on this ground alone.

Point 2: Amending her answer would (and has) delayed the trial.

[a] This amendment was made on the eve of trial – a trial was scheduled on June 4, mere 40 days from the date of his April 23 opinion.

Point 3: The grant of the motion was an undue burden on plaintiff.

Point 4: The motion was denied as it was "futile."

[a] Rocco[']s Complaint would be dismissed therefore it was "futile."

ARGUMENT 4:

NO FACTS REQUIRE MR. MARK'S TESTIMONY
UNDER RPC 3.7.

Point 1: Disqualification Was Not Based
Upon "Necessary Testimony."

Point 2: Law of Disqualification Under
RPC 3.7.

Point 3: The Disqualification of
Plaintiff's Counsel at this Late Date
Works a Substantial Hardship.

Based on our review of the record and the applicable law, we conclude that appellants' arguments are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons set forth in Judge Harz's thorough August 18, 2017, decision as memorialized in the January 22, 2018, order.

Finally, defendant Rocco cross-appeals from a September 17, 2013 decision, which denied her motion for sanctions, including fees, against Marks.⁸ We reject her argument, raised under Point VII,⁹ that the trial court erred in denying her motion seeking sanctions against Marks. Here, we

⁸ Appellate Docket No. A-2112-20.

⁹ Having already rejected plaintiff's arguments on the matter, there is no need to address Rocco's contentions raised under Points I through VI.

discern no abuse of discretion in Judge Wilson's refusal to impose sanctions against Marks in this matter. See McDaniel v. Man Wai Lee, 419 N.J. Super 482, 498 (App. Div. 2011) (establishing that a trial judge's decision on a motion for frivolous lawsuit sanctions is reviewed under an abuse of discretion standard).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION