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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-2305-21**

ALEXIS MILLER,

Plaintiff-Appellant,

v.

J.C. REALTY,

Defendant-Respondent.

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Submitted March 6, 2023 – Decided March 15, 2023

Before Judges Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Law  
Division, Bergen County, Docket No. DC-006776-21.

Alexis Miller, appellant pro se.

Ehrlich, Petriello, Gudin, Plaza & Reed, PC, attorneys  
for respondent (Kevin G. Desai, on the brief).

PER CURIAM

Plaintiff Alexis Miller appeals from the January 25, 2022 Special Civil  
Part order dismissing her complaint and entering judgment in favor of defendant

J.C. Realty. Based on our review of the record and the applicable legal principles, we vacate and remand.

Plaintiff sued defendant for breach of contract, illegal eviction, fraud, and retaliation stemming from her eviction from her apartment in 2019, where she had lived for thirteen years. Plaintiff alleges she was evicted for having a dog at the property, but claims the real motive was because she contacted the State to have repairs done to her apartment after defendant failed to do so. Plaintiff concedes she reached an agreement on June 30, 2018, whereby she agreed to move out of the apartment on November 30, 2018. However, she claims the agreement was made under duress.

As discussed more fully below, the trial court dismissed plaintiff's complaint subsequent to defendant making a motion to dismiss after plaintiff's opening statement during a virtual trial.<sup>1</sup>

Plaintiff raises the following points on appeal:

POINT I

JUDGE WOULD NOT ALLOW [PLAINTIFF] THE  
OPPORTUNITY TO EMAIL THE EVIDENCE SINCE  
IT WAS NOT EMAILED BEFOREHAND.

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<sup>1</sup> The court denied defendant's application for fees and costs pursuant to Rule 1:4-8.

## POINT II

THE JUDGE INTERRUPTED [PLAINTIFF] AND SAID "I'VE HEARD ENOUGH" AS [PLAINTIFF] WAS GIVING [HER] TESTIMONY.

## POINT III

JUDGE WENT OFF CAMERA FOR [SEVEN] MIN[UTES] TO DISCUSS WITH HER STAFF, WHETHER OR NOT THEY HAD SENT [PLAINTIFF] INSTRUCTIONS TO EMAIL THE EVIDENCE BEFORE TRIAL.

## POINT IV

TRIAL ONLY LASTED [TWENTY] MIN[UTES].

## POINT V

THE JUDGE WAS GOING TO SKIP [PLAINTIFF'S] REBUTTAL AFTER HEARING FROM THE DEFENDANT.

More particularly, plaintiff contends she did not get a fair trial because she was not allowed a short adjournment so she could email her evidence to the court. She also claims the trial judge cut her off several times during the trial. Plaintiff further asserts the trial judge "slandered" her by finding her not credible.<sup>2</sup>

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<sup>2</sup> Although we reverse the trial court's order for other reasons, there is no basis for this argument. A trial court is required to make specific findings of fact and

Defendant counters "at the start of trial, [it] moved to dismiss [plaintiff's] complaint pursuant to [Rule] 4:6-2(e) for failure to state a claim upon which relief can be granted."<sup>3</sup> Defendant notes it filed a summary dispossession action in July 2018. The parties appeared in court on August 22, 2018, and entered into a "Consent to Enter Judgment (Tenant to Vacate)" agreement which was placed on the record.<sup>4</sup> Defendant notes on December 17, 2018, the parties appeared before the Landlord-Tenant judge on an order to show cause plaintiff filed seeking to vacate the August 22, 2018 agreement, claiming it was executed under duress. The court denied the application. When plaintiff did not vacate the property as agreed, defendant filed an application to enforce the agreement. The Landlord-Tenant judge entered an order for orderly removal and stayed the execution of the warrant of removal until January 30, 2019.

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state its conclusions of law. R. 1:7-4(a) (requiring the court in non-jury trials "by an opinion or memorandum decision, either written or oral" to "find the facts and state its conclusions of law"); see also Elrom v. Elrom, 439 N.J. Super. 424, 443 (App. Div. 2015). This means the court must make credibility findings at trial.

<sup>3</sup> As noted below, this motion was never filed. Rather it was an oral motion made prior to plaintiff presenting evidence or testimony.

<sup>4</sup> Plaintiff did not provide a copy of that transcript on appeal. Plaintiff contends nothing was placed on the record.

After plaintiff's opening statement, but before she testified, defendant made an oral motion to dismiss plaintiff's complaint. Defendant characterizes the application as a motion to dismiss under Rule 4:6-2. Because the motion was made orally, as opposed to in written form and filed with the court, defendant did not comply with the various procedural requirements set forth in Rule 6:3-3, which would have given plaintiff an opportunity to respond in writing to the motion.

"Our court rules simply do not countenance the practice of filing dispositive motions on the eve of or at the time of trial." L.C. v. M.A.J., 451 N.J. Super. 408, 411 (App. Div. 2017); see also Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461, 470-74 (App. Div. 2015); Klier v. Sordoni Skanska Constr. Co., 337 N.J. Super. 76, 83-85 (App. Div. 2001). "When granting a motion will result in the dismissal of a plaintiff's case . . . the motion is subject to Rule 4:46, the rule that governs summary judgment motions." Cho, 443 N.J. Super. at 471. The motion must comply with all of the timelines applicable to summary judgment motions. Ibid. While Cho dealt with an improper motion in limine, the same principle would apply to a Rule 4:6-2(e) motion in a Special Civil trial. Here, defendant made its application after plaintiff's opening statement. Filing such a motion has specific time requirements that were not followed in this

case.<sup>5</sup> While defendant could have filed a motion pursuant to Rule 4:37-2(b) at the close of plaintiff's case, that is not what transpired.<sup>6</sup>

Here, because of the procedural posture in which this motion was filed, we do not have the benefit of a fully developed record. After defendant made the motion to dismiss, plaintiff was initially asked to respond to the motion for sanctions, but not the substantive motion to dismiss. She then was given an opportunity to give "rebuttal" to the motion to dismiss. It is not clear at that juncture if the rebuttal was argument or testimony, but it appears the court considered the rebuttal as testimony because it subsequently made credibility findings. However, it is not evident plaintiff understood the purpose of rebuttal was to offer legal argument or testimony as she had not yet testified in her case-in-chief.

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<sup>5</sup> Recent amendments to Rule 4:6-2 provide, "[a] motion to dismiss based on defense (e), and any opposition thereto, shall be filed and served in accordance with the time frames set forth in [Rule] 4:46-1." Rule 4:46-1, in turn, states, "[a]ll motions for summary judgment shall be returnable no later than [thirty] days before the scheduled trial date, unless the court otherwise orders for good cause shown . . . ." Here, there was no motion actually filed, let alone within thirty days of the trial.

<sup>6</sup> A motion to dismiss pursuant to Rule 4:37-2(b) requires a trial court to enter judgment in favor of a defendant if, after the presentation of plaintiff's evidence, "upon the facts and upon the law the plaintiff has shown no right to relief." In making that assessment, the trial court must afford all favorable inferences to the plaintiff. Fox v. Millman, 210 N.J. 401, 428 (2012).

We determine there was some procedural confusion, which in fairness was partially caused by plaintiff not uploading her evidence and the court breaking for a recess in an effort to determine if plaintiff had been provided with proper instructions concerning the electronic submission of her evidence.<sup>7</sup> Nevertheless, defendant should not have been permitted to make a motion to dismiss following plaintiff's opening statement. We understand it is unclear what plaintiff's testimony may have shown and whether she could have established a cause of action—without her documentary evidence—if she had an opportunity to testify. However, she should have been afforded that opportunity. Given the procedural posture in which this case was dismissed, we remand for further proceedings so the matter can be adjudicated on the merits.

Because we are remanding, we make the following observations regarding the trial court precluding plaintiff from uploading or emailing evidence at the beginning of the trial. As a general matter, N.J.R.E. 611(a) states, in pertinent part, that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses . . . ." This provision reflects the "broad discretion invested by the common law in trial judges to control the scope and mode of

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<sup>7</sup> Plaintiff later conceded she had not looked at the bottom of the email from the court to see the instructions concerning uploading her evidence.

examination of witnesses, during both direct and cross-examination." Biunno, Current New Jersey Rules of Evidence, cmt. 1 on N.J.R.E. 611 (2023). In short, "a trial court has wide discretion in controlling the courtroom and the court proceedings." D.G. ex rel. J.G. v. N. Plainfield Bd. of Educ., 400 N.J. Super. 1, 26 (App. Div. 2008) (citations omitted). Accordingly, we do not criticize the court for barring plaintiff from introducing evidence based on her failure to timely submit evidence to the court pursuant to the directions provided in advance of trial. However, given that we are remanding for further proceedings, plaintiff should be given an opportunity to present such evidence consistent with our rules of evidence so the case can be decided on the merits if there is a trial.

We leave to the Special Civil Part's sound discretion on remand whether defendant should be permitted to file a motion to dismiss or for summary judgment, or whether the matter should proceed directly to trial. Our decision remanding this matter shall not be construed as an expression of an opinion on the merits of plaintiff's claim.

Vacated and remanded.

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

  
CLERK OF THE APPELLATE DIVISION