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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-2405-21**

ANDREW RICHMOND,

Plaintiff-Respondent,

v.

DEREK KHOROZIAN,

Defendant-Respondent.

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VAROUJAN KHOROZIAN, as  
administrator ad prosequendum  
for the ESTATE OF DEREK  
KHOROZIAN,

Plaintiff-Appellant,

v.

ROBERT J. FEDERMAN, D.D.S.,  
CRANIO ASSOCIATES, P.A.,

Defendants-Respondents.

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VAROUJAN KHOROZIAN, as  
administrator ad prosequendum  
for the ESTATE OF DEREK

KHOROZIAN,

Plaintiff-Appellant,

v.

METLIFE AUTO & HOME,

Defendant-Respondent.

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Argued March 20, 2023 – Decided March 30, 2023

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5044-19.

Richard A. Grodeck argued the cause for appellant (Piro, Zinna, Cifelli, Paris & Genitempo, LLC, attorneys; Richard A. Grodeck, of counsel and on the briefs).

Sam Rosenberg argued the cause for respondents Robert J. Federman, D.D.S., and Cranio Associates, P.A. (Rosenberg Jacobs Heller & Fleming, PC, attorneys; Gayle M. Halevy, on the brief).

PER CURIAM

In this discovery dispute arising from a dental malpractice action, plaintiff Varoujan Khorozyan, as administrator ad prosequendum for the estate of Derek Khorozyan, appeals from two May 14, 2021 orders, dismissing plaintiff's

complaint with prejudice and denying plaintiff's motion to extend discovery, and a June 25, 2021 order, denying plaintiff's motion for reconsideration. We affirm.

We discern the following facts from the record. On June 8, 2015, plaintiff's decedent, his son Derek Khorozyan, was involved in a motor vehicle accident. Due to the accident, plaintiff's decedent came under the care of Robert Federman, DDS, a Bergen County dentist. Dr. Federman diagnosed plaintiff's decedent with temporomandibular joint syndrome ("TMJ") and prescribed him oxycodone for the pain. On September 18, 2015, plaintiff's decedent died after developing pulmonary edema from the combined effects of the oxycodone and alprazolam (Xanax), which he was also prescribed.

On September 14, 2017, plaintiff commenced this dental malpractice action against defendants Dr. Federman and his practice, Cranio Associates, P.A.<sup>1</sup> The complaint sought damages pursuant to the Wrongful Death Act, N.J.S.A. 2A:31-1 to -6, and the Survivorship Act, N.J.S.A. 2A:15-3.

Plaintiff initially supported this action with an Affidavit of Merit ("AOM") executed by Philip R. Geron, DMD, a licensed oral and maxillofacial

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<sup>1</sup> On January 6, 2020, this matter was consolidated with two additional actions, Khorozyan v. Met Life Auto & Home, BER-L-5044-19, and Richmond v. Khorozyan, BER-L-3681-17. The former was settled in early 2022 while the latter was dismissed.

surgeon. However, after extensive discovery, facts emerged which were different from those believed to have been true at the time Dr. Geron executed the AOM, and he was no longer of the opinion that Dr. Federman deviated from accepted standards of care.

In addition, after initial discovery was exchanged and several depositions had been taken, the depositions of decedent's mother, Angela Khoroizian, and two brothers, Kyle and Anthony Khoroizian, were requested by defendants beginning in April 2020. By October 2020, the three witnesses had not been produced for deposition, despite multiple renewed requests by defendants. This failure led defendants to file a motion to dismiss plaintiff's complaint for failure to comply with prior court orders or, in the alternative, to compel plaintiff to produce the requested witnesses.

In a December 15, 2020 order, the court directed plaintiff to produce the subject witnesses by January 29, 2021. However, on January 25, 2021, plaintiff requested a status conference with the court to obtain an extension on all discovery, which was conducted on January 27, 2021. Having found "exceptional circumstances" present, the court extended discovery from March 31, 2021 to June 30, 2021. In addition, pursuant to a January 28, 2021 consent

order, depositions of the subject witnesses were to be conducted by February 28, 2021 and plaintiff was to serve his expert report by March 31, 2021.

Rather than produce the subject witnesses, plaintiff filed a motion for a protective order to prevent the deposition of Kyle Khorozian only, which the court denied on April 1, 2021 following a hearing on the matter. On the same day, the court entered an order, on cross-motion by defendants, compelling the production of the subject witnesses for deposition within twenty days. Pursuant to that order, plaintiff's counsel was to notify defendants by April 5, 2021 as to whether plaintiff has the ability to produce the subject witnesses. If plaintiff was unable to produce the subject witnesses, plaintiff's counsel was to provide defendants with accurate address information for the witnesses at issue by April 5, 2021 to permit defendants to take the appropriate steps to compel the depositions.

Plaintiff did not produce the subject witnesses for deposition by April 20, 2021, nor did plaintiff advise defendants of his refusal or inability to produce the witnesses by April 5th, thereby violating the court's April 1, 2021 order. In addition, plaintiff violated the court's January 28, 2021 order by failing to produce an expert report by March 31, 2021.

Thereafter, plaintiff requested an eight extension of discovery in this matter, which was originally commenced on September 14, 2017 and had been pending for three and a half years at the time. In April 2021, defendants filed two motions to dismiss plaintiff's complaint with prejudice for failure to comply with the January 28, 2021 and April 1, 2021 orders, respectively. In response to those motions, plaintiff filed another motion for a protective order, this time to prevent the deposition of Angela Khorozian. At the same time, plaintiff's counsel sought to be relieved as counsel, citing "irreconcilable differences."

On May 14, 2021,<sup>2</sup> the court contemporaneously entered four orders, which: (1) granted both of defendants' motions to dismiss with prejudice; (2) denied plaintiff's motion to extend discovery as moot; and (3) denied plaintiff's counsel's application to be relieved as counsel as moot. Subsequently, on June 3, 2021, plaintiff filed a motion for reconsideration, seeking review of the order of dismissal which was based on plaintiff's failure to adhere to the orders compelling discovery.

On June 25, 2021, the court entered an order denying plaintiff's motion for reconsideration. Affixed to the order was a note, stating "[t]here is no basis

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<sup>2</sup> The court allegedly held a hearing on this date to address the then-pending motions; however, we were not provided with a copy of the transcript from the May 14, 2021 hearing.

for modification or reversal of the Court's prior orders. The plaintiff violated multiple Court Orders and willfully chose to frustrate the discovery process."

In early 2022, plaintiff settled the consolidated action with the defendants in the other matter and, with entry of the March 4, 2021 stipulation of dismissal, the orders in this matter became final. This appeal followed.

On appeal, plaintiff raises the following arguments:

POINT I

THE TRIAL COURT ERRED IN FAILING TO  
EXTEND DISCOVERY AND PROVIDE  
KHOROZIAN WITH SUFFICIENT TIME TO FIND  
NEW COUNSEL

- A. Our courts have uniformly held that under circumstances where an expert declines to testify plaintiff must be given sufficient time to secure a replacement expert.
- B. The court erred in failing to conclude that good cause warranted a further extension.

POINT II

THE COURT ERRED IN FAILING TO  
RECONSIDER ITS ORDER DISMISSING THE  
COMPLAINT FOR FAILURE TO COMPLY WITH  
ORDERS COMPELLING FACT DISCOVERY.

"[T]he standard of review for dismissal of a complaint with prejudice for discovery misconduct is whether the trial court abused its discretion, a standard that cautions appellate courts not to interfere unless an injustice appears to have been done." Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 517 (1995). A court abuses its discretion when its "decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." United States ex rel. U.S. Dep't of Agric. v. Scurry, 193 N.J. 492, 504 (2008) (alteration in original) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

Our "[d]iscovery rules are designed 'to further the public policies of expeditious handling of cases, avoiding stale evidence, and providing uniformity, predictability[,] and security in the conduct of litigation.'" Abtrax Pharms., 139 N.J. at 512 (quoting Zaccardi v. Becker, 88 N.J. 245, 252 (1982)). "It necessarily follows, if such rules are to be effective, that the courts impose appropriate sanctions for violations thereof." Oliviero v. Porter Hayden Co., 241 N.J. Super. 381, 387 (App. Div. 1990) (quoting Evtush v. Hudson Bus Transp. Co., 7 N.J. 167, 173 (1951)).



Rule 4:23-2 allows for dismissal of a complaint "with or without prejudice" in response to a party's failure to comply with an order to provide discovery:

If a party . . . fails to obey an order to provide or permit discovery, including an order made under [Rule] 4:23-1, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (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.

[R. 4:23-2(b).]

As reflected in Rule 4:23-2, a "trial court has an array of available remedies to enforce compliance with a court rule or one of its orders." Williams v. Am. Auto Logistics, 226 N.J. 117, 124 (2016) (quoting Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005)). A "court must . . . carefully weigh what sanction is the appropriate one, choosing the approach that imposes a sanction consistent with fundamental fairness to both parties." Id. at 125 (alteration in original) (quoting Robertet Flavors v. Tri-Form Constr., Inc., 203 N.J. 252, 282-83 (2010)). In its selection of a sanction, a court must consider "[t]he varying levels of culpability of delinquent parties," Georgis v. Scarpa, 226 N.J. Super. 244, 251 (App. Div. 1988), and "[t]he extent to which [one party] has impaired [the other's] case may guide the court in determining whether less severe sanctions will suffice." Williams, 226 N.J. at 125 (second and third alterations in original) (quoting Gonzalez, 185 N.J. at 116); see also Casinelli v. Manglapus, 181 N.J. 354, 365 (2004) (explaining that a

determination as to whether dismissal is appropriate requires an assessment of the "facts, including the willfulness of the violation, the ability of plaintiff to produce the [outstanding discovery], the proximity of trial, and prejudice to the adversary").

Here, we discern no abuse of discretion in the dismissal of plaintiff's complaint with prejudice. Careful review of the record confirms the court's finding that plaintiff "willfully chose to frustrate the discovery process." Plaintiff and his counsel continuously prejudiced defendants by failing to comply with court orders establishing deadlines for responding to discovery requests in accordance with the applicable rules, despite several assurances by plaintiff that he had control over the subject witnesses and the ability to produce them. In addition to plaintiff's failure to serve an expert report, the subject witnesses sought to be deposed allegedly had critical knowledge and information regarding the decedent, his medical history, and the events leading up to his death. Therefore, we are satisfied that the court's utilization of "the ultimate sanction" in this matter was justified. See Robertet Flavors, 203 N.J. at 274.

To the extent that we have not specifically addressed any of plaintiff's remaining arguments, we conclude that they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION