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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-2611-20**

BRETT T. DUFFY,

Plaintiff-Appellant,

v.

**THE ABSECON POLICE
DEPARTMENT, THE CITY OF
ABSECON, former ABSECON
CHIEF OF POLICE DAVID
RISLEY, ABSECON MAYOR
JOHN ARMSTRONG, ABSECON
OFFICER CHRISTOPHER
CALVILEER, THE OFFICE OF THE
PROSECUTOR OF ATLANTIC
COUNTY, OFFICE OF THE
ATTORNEY GENERAL OF NEW
JERSEY, COUNTY OF ATLANTIC,
THE ATLANTIC COUNTY
SHERIFF'S OFFICE, VICINAGE I
OF SUPERIOR COURT, THE NEW
JERSEY ADMINISTRATIVE OFFICE
OF THE COURTS, JUDGES JULIO
MENDEZ, A.J.S.C., AND GLENN
GRANT, J.A.D., ACTING AOC
ADMINISTRATIVE DIRECTOR,
and THE STATE OF NEW JERSEY,**

Defendants-Respondents.

Argued January 10, 2023 – Decided February 28, 2023

Before Judges Sumners, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-0480-16.

Thomas B. Duffy argued the cause for appellant (Duffy Law Group, attorneys; Thomas B. Duffy on the briefs).

Vanessa E. James argued the cause for respondents Absecon Police Department, City of Absecon, Former Absecon Chief of Police David Risley, Absecon Mayor John Armstrong, and Absecon Police Officer Christopher Cavileer (Barker, Gelfand, James & Sarvas, PC, attorneys; Vanessa E. James and Jeffrey P. Sarvas, on the brief).

Justine M. Longa, Deputy Attorney General, argued the cause for respondents Hon. Glenn A. Grant, J.A.D., Hon. Julio L. Mendez, A.J.S.C, The Superior Court of New Jersey, Vicinage I, the Administrative Office of the Courts, the Atlantic County Prosecutor's Office, the Office of the Attorney General, and the State of New Jersey (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raska, Assistant Attorney General, of counsel; Justine M. Longa, on the brief).

PER CURIAM

This appeal is taken from a Law Division order improperly certified as a final order by the parties, although not by the trial court, as required by the court

rules. Because the order is interlocutory, we dismiss the appeal without prejudice as improvidently filed.

This case involves alleged violations of the NJLAD, NJCRA, and Declaratory Judgment Act. Plaintiff Brett Duffy has a diagnosis of Asperger's syndrome.¹ On April 17, 2014, when Brett² was twenty-one years old, he fired his pellet gun into a marsh area next to Absecon Creek. Brett and an unnamed third party, who is not party to this litigation, became involved in a verbal altercation about Brett firing the pellet gun. Brett then drove away to a shooting range but was stopped by an Absecon police officer.

¹ The Center for Disease Control defines Asperger's syndrome as a developmental disability within the autism spectrum disorder (ASD). People with ASD often have problems with social, emotional, and communication skills. Facts About ASD, Autism Spectrum Disorder (ASD), <http://www.cdc.gov/ncbddd/autism/facts.html>. In 2013 the DSM-V removed Asperger's syndrome from its own distinct classification and replaced it with a general diagnosis of scalable severity of autism spectrum disorder, which can be manifested with a diverse array of symptoms and behaviors. Nat'l Inst. of Mental Health, Autism Spectrum Disorder, Health, and Education, <https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml>. There is no suggestion in the record that Brett has been deemed incompetent and no guardianship order was provided as part of the record on appeal.

² Because two involved individuals share the same last name, we refer to Brett by his first name. We intend no disrespect.

Although Brett's complaint is difficult to understand and, at times, rambling and incomprehensible, Brett appears to allege many aspects of his arrest were improper, including police searching his vehicle without his consent, unsheathing a machete found in his vehicle, failing to issue a Miranda³ warnings, and denying him his right to counsel. Brett's father, Thomas B. Duffy, is also his legal counsel, and has purportedly instructed his son regarding interactions with police, including immediately asking that his father be called,⁴ which Brett alleges he did during his arrest.

Brett was indicted and charged with violating N.J.S.A. 2C:39-5(d), possession of a machete and a pellet gun for an unlawful purpose. Brett alleges he applied for pretrial intervention (PTI) program, but his application was intentionally "lost" by court personnel. Although the prosecutor initially vetoed PTI, Brett ultimately entered the program and completed it. After successfully completing PTI, all charges against Brett were dropped.

On April 18, 2016, Brett filed the first complaint in this matter. On January 26, 2017, Brett filed a first amended complaint before defendants

³ Miranda v. Arizona, 384 U.S. 436 (1966).

⁴ There is no suggestion in the record that Brett has been deemed incompetent and no guardianship order was provided as part of the record on appeal.

responded. The first amended complaint appears to allege six causes of action, to wit: 1) violation of the "Title II of the ADA;" 2) violation of "Section 504 of the Rehabilitation Act;" 3) violation of the "LAD;" 4) disability harassment pursuant to the "ADA, RA, and LAD;" 5) violation of federal and state law "U.S.C. §1983," and the "New Jersey Civil Rights Law"; and 6) injunctive relief pursuant to the "New Jersey Declaratory Judgment Act."⁵

On February 20, 2017, defendants removed the complaint to the United States District Court for the District of New Jersey based on federal question jurisdiction. Thereafter Brett moved to file five amended complaints in the district court; each motion to amend was met with opposition and a motion to dismiss by defendants. After more than two years of motion practice in federal court, Brett voluntarily dismissed all federal causes of action. The district court then remanded the remaining claims to the trial court.

Upon remand, Brett moved before the trial court to file a proposed second amended complaint. The proposed second amended complaint attempted to raise causes of action for 1) New Jersey Law Against Discrimination (NJLAD) discrimination and retaliation, N.J.S.A. 10:5-3; 2) "disability harassment under the LAD"; 3) direct violation of the New Jersey Civil Rights Act (NJCRA),

⁵ The state and federal statutes in the first amended complaint were not cited.

N.J.S.A. 10:6-2; -2(e); and 4) retaliation pursuant to NJCRA; N.J.S.A. 10:6-2(c)-(d); discriminatory and retaliatory practices pursuant to 42 U.S.C. §1983 and N.J.S.A. 10:6-2(c); violation of Article I of the New Jersey Constitution; and demand for "declaratory judgment and restraints."⁶ Defendants filed opposition to the motion to amend but did not file a motion to dismiss the original complaint pursuant to Rule 4:6-2(e). On April 1, 2021, the trial court denied the motion to amend the complaint for reasons stated on the record.

The trial court entered an order denying the motion to amend the complaint and preventing Brett from filing future motions to amend. Brett appeals from that order. We inquired whether the order was final. Only the State defendants responded to the inquiry of finality, claiming there was no "live iteration" of the complaint and the trial court order was final. Neither plaintiff nor the Absecon defendants responded, and no party to this appeal submitted a trial court certification regarding the finality of the order. R. 4:42-2. Thus, despite the procedural posture at bar – a motion to amend the complaint by plaintiff, opposition but no cross-motion to dismiss by defendants, and no order from the trial court dismissing the case – the parties maintain the case was in fact dismissed.

⁶ No statute cited.

An appeal as a matter of right may be taken to the Appellate Division from "final judgments." R. 2:2-3(a)(1). A party is required to seek leave to appeal from orders that do not qualify as final judgments. R. 2:2-4; R. 2:5-6(a). Rule 2:2-3 treats limited categories of orders that do not dispose of all claims against all parties as final judgments. Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 549 (App. Div. 2007) (quoting R. 2:2-3). As we observed in Janicky, "[a]n order may be certified as final pursuant to Rule 4:42-2 only if it satisfies two preconditions: first, it must fall within one of the three numbered subparts of the rule, and second, it must be 'subject to process to enforce a judgment pursuant to R. 4:59 if it were final[.]'" 396 N.J. Super. at 549. This court cannot countenance use of Rule 4:42-2 to secure interlocutory appellate review without first moving for leave to appeal. Id. at 551-52. We have recently revisited and expanded on avenues of relief available to litigants when an order is not certified as final. See Lawson v. Dewar, 468 N.J. Super. 128, 134-35 (App. Div. 2021) (distinguishing motion for reconsideration standard of review for final and interlocutory orders).

Although the trial court properly considered the merits of the proposed amended complaint and the potential prejudice to defendants pursuant to Rule 4:9-1 and Rule 4:5-7, it did not enter an order dismissing the original complaint

with prejudice. When pressed at oral argument about whether a Rule 4:6-2(e) motion was ever filed, neither defendant answered definitively, but instead relied on their submissions. The record before us does not demonstrate a motion to dismiss was ever filed, nor does it appear from the order being appealed any such order dismissing the pleadings was ever entered by the trial court.

We observe, in addition to considering the merits and prejudice imposed by a proposed amended complaint, if an amended complaint would not survive a motion to dismiss pursuant to Rule 4:6-2, that is, if the proposed amended complaint does not state a cause of action, or asserts a claim that is "not sustainable as a matter of law," a court should deny a motion to amend. Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256-57 (App. Div. 1997). However, denying a motion to amend a complaint does not dismiss the original complaint. It prohibits the requested amended pleading from being filed. An underlying complaint still exists after remand. Thus, because we discern from the procedural record there still exists an underlying pending complaint at the trial level, which has never been properly dismissed, the appeal before us was improperly certified as final by the parties. We dismiss the appeal without prejudice and remand to the trial court for further action consistent with our ruling.

Appeal dismissed without prejudice and the complaint is remanded to the trial court. 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