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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3355-20**

RIVERVALE HOMES, LLC,

Plaintiff-Respondent,

v.

**AIDA SANTA LUCIA, a/k/a
AIDA ST. LUCIA, and KYLE
KHOROZIAN, a/k/a K.
VAROUJAN KHOROZIAN,**

**Defendants-Appellants/
Third-Party Plaintiffs,**

v.

**RE/MAX PROPERTIES, COLIN
SOMERVILLE, RIVER VALE
PLANNING BOARD, and
BERGEN COUNTY CLERK,**

**Third-Party Defendants-
Respondents.**

February 1, 2023 – Decided April 24, 2023

Before Judges Berdote Byrne and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5345-18.

Martin V. Asatrian argued the cause for appellant (Asatrian Law Group, LLC, attorneys; Martin V. Asatrian, of counsel; Jeffrey Zajac, on the brief).

Michael J. Forino argued the cause for respondent (Archer & Greiner, PC, attorneys; Michael J. Forino, on the brief).

Howard M. Nirenberg argued the cause for third-party defendants-respondents RE/MAX Properties and Colin Somerville (Nirenberg & Varano, LLP, attorneys; Howard N. Nirenberg, of counsel; Sandra N. Varano, on the brief).

Alice M. Bergen argued the cause for third-party defendant-respondent Bergen County Clerk (DeCotiis, Fitzpatrick, Cole & Giblin, LLP, attorneys; Justin D. Santagata, on the joint brief).

Marc E. Leibman argued the cause for third-party defendant-respondent River Vale Planning Board (Chiesa Shahinian & Giantomasi, PC, attorneys; Marc E. Leibman, on the joint brief).

PER CURIAM

In this appeal, we are asked to consider whether the trial judge erred in failing to recuse himself, failing to reinstate defendants' stricken pleadings for failure to provide discovery, and failing to act impartially. Because we find defendants have not demonstrated the trial court erred, we find no basis to disturb its findings and affirm.

In 2017, defendants Aida Santa Lucia and Kyle Khorozian entered into two separate real estate contracts to buy two properties from plaintiff Rivervale Homes, LLC. The properties formerly constituted one lot, but the Township of River Vale approved the subdivision of the property at 728-732 Rivervale Road on December 17, 2012.

Both contracts contained provisions requiring \$25,000 deposits within ten days after attorney review. After defendants failed to pay the deposits, plaintiff sent legal notices advising time was of the essence and providing new closing dates. When defendants failed to attend closing, plaintiff notified defendants of the breaches and informed them the contracts had been terminated.

Plaintiff thereafter began efforts to sell the properties to a new buyer, eventually selling both. Plaintiff later filed a complaint against defendants asserting claims for breach of contract, breach of the duty of good faith and fair dealing, and misrepresentation, seeking damages in the amount of \$100,002, the difference between the expected purchase price with defendants and the final price paid by the new buyer. Plaintiff also sought damages for unpaid real estate taxes, other ancillary costs, and attorney's fees. In total, plaintiff requested judgment for \$180,236.18.

Although default was initially entered against defendants, it was vacated and on February 27, 2019, defendants filed an answer, affirmative defenses, counterclaim, and third-party complaint against RE/MAX Properties and its agent, Colin Somerville, the River Vale Planning Board, and the Bergen County Clerk. Defendants alleged the properties "did not exist" at the time they signed the contracts for sale and claimed plaintiff committed fraud in misrepresenting the properties as subdivided.

Plaintiff filed an answer to the counterclaim with affirmative defenses, and served discovery demands on defendants, including interrogatories, requests for documents, and notices for depositions. On September 27, 2019, faced with dueling certifications regarding defendants' non-compliance with discovery demands, the trial court denied plaintiff's first motion to strike defendants' pleadings but ordered defendants to appear for depositions within thirty days. The order noted "defense counsel['s] assert[ion] that [defendants] . . . complied with discovery demands."

Khoroizian appeared for his deposition – outside the court ordered thirty-day window – on December 23, 2019, but refused to answer most of plaintiff's questions, claiming they were "irrelevant." Lucia never attended the scheduled deposition. Plaintiff and third-party defendants RE/MAX and its agent

Somerville moved to strike defendants' pleadings a second time, which defendants failed to oppose. As a result, on January 10, 2020, the trial court entered an order granting the unopposed motion to strike defendant's pleadings without prejudice pursuant to Rules 4:23-4 and 4:23-5.

Defendants substituted Martin V. Asatrian, Esq., as their new attorney on January 7, 2020. Defendants moved for reconsideration of the court's January 10, 2020 order, alleging misconduct by their former attorney, which the judge denied in a February 19, 2020 order. The court found the motion to reconsider was inappropriate but permitted defendants to "move by motion to vacate the dismissal and reinstate the [c]omplaint under Rule 4:23-5."

Defendants did neither, and after the sixty-day period provided by Rule 4:23-5(a)(2) expired, plaintiff and third-party defendants moved a third time to strike defendant's pleadings, this time with prejudice. On April 24, 2020, the court denied the motion because counsel represented that Khorozian was "ready, willing and able to have a redeposition." The court stated that failure of Khorozian to attend his deposition "may result in a motion for sanctions to be renewed."

Neither Khorozian nor Lucia attended the scheduled depositions, and plaintiff filed a fourth motion to strike defendants' pleadings. In response to an

email from plaintiff's counsel attempting to schedule depositions, defense counsel stated that his client, Khorozian, had been diagnosed with COVID-19 in April 2020 and was unavailable. On July 24, 2020 the court denied plaintiff's motion without prejudice and defendants' pleadings remained stricken without prejudice. In that order, the court stated:

The naked claim without a medical report by a medical doctor that Kyle K[h]orozian still cannot be deposed because of an April 1, 2020 COVID-19 diagnosis strains credulity. Additionally, the failure of defendant S. Lucia to appear for deposition without any explanation or excuse also appears to be spurious. However, the court will afford an additional six weeks to provide compliance or the instant motion may be renewed.

After defendants again failed to comply, plaintiff filed a fifth motion to strike defendants' pleadings. After hearing arguments on the motion on October 9, 2020, the court struck defendants' pleadings with prejudice pursuant to Rule 4:23-5(a)(2) but denied plaintiff's request for attorney's fees.

On October 29, 2020, defendants moved for reconsideration of the court's October 9, 2020 order, which the court denied. In its accompanying written opinion, the court detailed defendants' pattern in failing to meet their discovery obligations and noted it had denied plaintiff's motions to strike four times before it was ultimately "constrained" to dismiss defendants' pleadings with prejudice.

The court concluded defendants had not established a valid basis for reconsideration, as "mere dissatisfaction with a court's prior ruling is not grounds for a motion for reconsideration." Defendants did not appeal that ruling.

On November 20, 2020, defendants' counsel Asatrian filed a separate complaint against the trial judge. Asatrian alleged the trial judge infringed upon his constitutional rights, raising various claims pursuant to 42 U.S.C. § 1983 in a prior case, A.A. v. Bergen Cath. High Sch., BER-L-1440-18 (the Bergen Catholic case), in which Asatrian represented a family member for a portion of the litigation and was later named as a third-party defendant. Asatrian claimed the trial judge violated his rights to due process in the Bergen Catholic case when the judge ordered him to produce his telephone records as part of discovery. Id. at 8. Asatrian argued the trial judge damaged his reputation and his earning capacity and caused severe emotional distress with physical manifestations. Id. at 13.

On December 29, 2020, defendants moved for the trial judge's recusal based upon Asatrian's complaint filed against the trial judge in the Bergen Catholic case pursuant to Rule 1:12-2, N.J.S.A. 2A:15-49, and Bonnet v. Stewart, 155 N.J. Super. 326 (App. Div. 1978). Defendants contended, similar

to claims made in Asatrian's lawsuit, that the trial judge made inappropriate comments to Asatrian and "adverse rulings to [defense counsel] in [that] case." Counsel further asserted that the trial judge "ruled in an arbitrary and capricious fashion by not allowing . . . Khoroizian to be redeposed as he was ready, willing and able to do."

The trial judge denied defendants' recusal motion on January 22, 2021. In his accompanying written order, he concluded there was "no basis for recusal cited nor any known by the [c]ourt." He noted that "[p]revious dissatisfaction with a [c]ourt's ruling is no basis for recusal," and that defense counsel's "recently filed action entitled Asatrian v. Wilson BER-L-7421-20 (PAS-L-3650-20) is not a basis for disqualification under Canon 3 Rule 3:17."¹

Third-party defendants, River Vale Planning Board, and the Bergen County Clerk, moved for summary judgment on January 29, 2021, which was granted and is not challenged on appeal.

The court held a proof hearing on June 9, 2021, to quantify actual damages as a result of the default judgment. Despite defendants' pleadings being stricken, at the proof hearing Asatrian was allowed to argue the properties were not

¹ That case was transferred to Passaic County and dismissed with prejudice on March 11, 2021. Asatrian appealed the final judgment, and we affirmed. Asatrian v. Wilson, No. A-2278-20 (App. Div. May 17, 2022) (slip op at 5).

subdivided at the time the contracts were executed and therefore the contracts were never valid. After hearing testimony, the court ruled in favor of plaintiff, determining damages amounted to \$180,236.18, which included legal fees and the loss incurred for the resale of the properties after the breaches. The court entered final judgment on June 16, 2021. This appeal followed.

As an initial matter, we note defendants offer arguments related to the judge's recusal in their brief, but do not appeal or cite the order pertaining to recusal in their notice of appeal and amended notice of appeal. The only orders listed in defendants' notice of appeal are the June 9, 2021, and June 16, 2021, orders² entering damages. Defendants make no mention of the order denying the January 22, 2021, motion to recuse, arguing instead the June orders entering damages must be vacated due to the trial judge's alleged disqualification. Defendants are time-barred in appealing the recusal issue in this matter for failing to raise it in a timely manner and their indirect attempt to appeal the issue belatedly does not withstand judicial scrutiny. Nevertheless, for the sake of completeness, we address the recusal argument first and substantively.

² These orders are identical. The court entered one on the day of the proof hearing, and a later order on June 16, 2021.

Defendants argue the trial judge committed reversible error when he denied their motion for recusal and committed "an extraordinary dereliction of his judicial discretion," maintaining the judge made various inflammatory and biased comments in this case and in Bergen Catholic. Defendants also characterize our reversal of this judge's discovery order in Bergen Catholic as "a decision which underscores his inability to perform his judicial duties with the requisite impartiality." We are unpersuaded by these arguments.

Whether a judge should disqualify himself or herself is a matter within the sound discretion of the judge. State v. McCabe, 201 N.J. 34, 45 (2010); Goldfarb v. Solimine, 460 N.J. Super. 22, 30 (App. Div. 2019). "Motions for recusal ordinarily require a case-by-case analysis of the particular facts presented." McCabe, 201 N.J. at 46. The disposition of such a motion is "at least in the first instance, entrusted to the 'sound discretion' of the trial judge whose recusal is sought." Panitch v. Panitch, 339 N.J. Super. 63, 66 (App. Div. 2001). Motions for disqualification, entrusted to the sound discretion of the trial judge, are subject to review for abuse of discretion. Ibid.

Judges must act in a way that "promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Code of Jud. Conduct, r. 2.1;

see also In re Reddin, 221 N.J. 221, 227 (2015). "[J]udges must avoid acting in a biased way or in a manner that may be perceived as partial." DeNike v. Cupo, 196 N.J. 502, 514 (2008). To determine if an appearance of impropriety exists, we ask "[w]ould a reasonable, fully informed person have doubts about the judge's impartiality?" DeNike, 196 N.J. at 517; see also Code of Jud. Conduct, cmt. 3 to r. 2.1. Judges must recuse themselves from "proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned," Code of Jud. Conduct, r. 3.17(B), or if "there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so. . . ." Rule 1:12-1(g).

"Any party, on motion made to the judge before trial or argument and stating the reasons therefor, may seek that judge's disqualification." R. 1:12-2. "A movant need not show actual prejudice; 'potential bias' will suffice." Goldfarb, 460 N.J. Super. at 31. "The mere appearance of bias may require disqualification." State v. Marshall, 148 N.J. 89, 279 (1997). However, "bias is not established by the fact that a litigant is disappointed in a court's ruling on an issue." Id. at 186. "[T]he belief that the proceedings were unfair must be objectively reasonable." Id. at 279.

Relevant here, the Code of Judicial Conduct r. 3.17(E) provides, in pertinent part:

A judge shall not be automatically disqualified upon learning that a complaint has been filed against the judge with the Advisory Committee on Judicial Conduct, litigation naming the judge as a party, or any other complaint about the judge by a party. If, however, the judge concludes that there is a reasonable basis to question the court's impartiality, the judge may recuse himself or herself. A judge shall promptly disclose to the parties to the pending litigation that a complaint has been filed or made.

Defendants claim several instances demonstrate the trial judge's "appearance of impropriety." Specifically, they contend "[The trial judge's] refusal to rule upon defense counsel's request for recusal prior to the proof hearing in the instant case," and the judge's "demeaning treatment" of Asatrian at the June 9, 2021, proof hearing demonstrate bias against Asatrian. Defendants maintain the "totality of circumstances" compels reversal, because "a fully informed person observing the judge's conduct would have doubts about the judge's impartiality." Code of Jud. Conduct, cmt. 3 to 2.1.

A reasonable, fully informed person would have no doubts about the judge's impartiality. See DeNike, 196 N.J. at 517. The trial judge allowed defendants numerous opportunities to comply with discovery requests and

attend depositions. Despite the fact that Rule 4:23-5(a)(2) is mandatory and does not afford the judge discretion where a party fails to make discovery, the trial judge afforded defendants four opportunities over twelve months to comply with discovery obligations. See R. 4:23-5(a)(2) ("The motion to dismiss or suppress with prejudice shall be granted unless a motion to vacate the previously entered order of dismissal or suppression without evidence has been filed by the delinquent party and either the demanded and fully responsive discovery has been provided or exceptional circumstances are demonstrated.") (emphasis added). The record demonstrates the trial judge afforded defendants significant latitude and showed substantial patience with respect to their failure to provide discovery.

Importantly, Asatrian substituted as defendants' attorney after the pleadings had been dismissed without prejudice and after Asatrian had been involved in the Bergen Catholic case. During the entire time Asatrian was involved in this matter, a period just shy of a year, the discovery that would have allowed the court to vacate the dismissal was never produced. Although defendants' pleadings had been stricken, at the proof hearing the trial judge, in his discretion, allowed Asatrian to make substantive opening and closing arguments, and cross examine witnesses. R. 4:43-2(b) ("If, to enable the court

to enter judgment. . . it is necessary to take an account or to determine the amount of damages . . . the court . . . may conduct such proof hearings . . . as it deems appropriate.") Nothing in the record before us demonstrates a lack of impartiality by the trial judge. To the contrary, the trial judge made numerous accommodations to defendants over a substantial period of time despite their recalcitrant behavior.

Asatrian's complaint against the trial judge, filed after the dismissal of the pleadings with prejudice in this case, does not compel a different result. In that case, Asatrian raised similar claims to those defendants raise here. He relied upon the Bergen Catholic case to establish the trial judge's bias in this case, and claimed damages related to diminished earning capacity and emotional distress. On appeal, we held that Asatrian's case was properly dismissed with prejudice by the trial court, as the doctrine of judicial immunity barred his claims against the judge. See Asatrian v. Wilson, No. A-2278-20 (App. Div. May 17, 2022) (slip op. at 5).³

³ Although we remain vigilant of Rule 1:36-3, the general rule for citation to unpublished opinions, we cite the disposition in the ancillary matter for its import and relevance pursuant to the law of the case doctrine. See generally, Pressler and Verniero, Current N.J. Court Rules, cmt. 4 to R. 1:36-3. Plaintiff has not presented substantially different evidence, new controlling authority, or a showing the prior ruling was clearly erroneous, nor is relitigating those issues

Although Asatrian brought the claim while the current case was still "open and pending," recusal was not required pursuant to Code of Jud. Conduct r. 3:17(E), which does not mandate recusal in every case where the judge and a lawyer are adversaries in a lawsuit.

Before Asatrian filed his lawsuit against the judge, defendants' case had been ongoing for over two years, and defendants' pleadings had been stricken for failure to make discovery six weeks prior. Defendants moved to disqualify the trial judge after the pleadings had been dismissed with prejudice and at that point, the only proceeding remaining was the proof hearing to determine damages. The trial judge showed no bias or ill-will toward Asatrian or his clients throughout the litigation, and the proof hearing was conducted in an objective and fair manner.

Defendants further contend our decision in Bergen Catholic corroborates their arguments for recusal. In that case, the trial judge ordered Asatrian to produce his telephone records to the defendants after Asatrian was named as a third-party defendant. Defendants maintain that our reversal of the trial judge's

properly before us on appeal, and we therefore find departure from the law of the prior case inappropriate. See also State v. Njango, 247 N.J. 533, 544 (2021) (identifying Appellate Division ruling as "law of this case" for one issue raised, and binding on remand because of defendant's expectation interest in finality of previous disposition thereof).

discovery order "underscores the egregiousness of [the trial judge]'s treatment of Asatrian in the various cases outlined in the record." This claim lacks any factual or legal support.

In Bergen Catholic, Asatrian represented a family member, A.A., in an action against A.A.'s high school and wrestling coach alleging sexual harassment. After Asatrian's representation ended, one of the defendants filed a third-party complaint naming Asatrian as a defendant, asserting malicious use of process. The defendant alleged Asatrian had made statements during settlement discussions indicating he knew the lawsuit was frivolous and sought to compel Asatrian's cell phone records as part of supplemental discovery. The trial judge granted the discovery motion but placed limitations on attorney-client privileged material. We reversed the judge's order, concluding that it was "based on a mistaken understanding of the law" and did not comply with Rule 1.7-4(a) because the judge failed to provide an "explanation of how or why, given the intrusive nature of the request, he believed these records should be made available." Id., slip op. at 8-10. We reasoned the cell phone records "would only be relevant to ultimately obtain their content," which would likely lead to a breach of the attorney-client privilege and N.J.R.E. 408. Id., slip op. at 11-12.

Defendants argue our decision to reverse the discovery order without remand supports their contention the trial judge is biased against Asatrian. Defendants specifically highlight our statement in Bergen Catholic describing the trial judge's order as "arguably harassing discovery." That statement, however, was unrelated to Asatrian. Rather, we stated the third-party complaint against Asatrian was "premature," as A.A.'s complaint had yet to be resolved. We explained:

Even if [the defendant's] claim is true that Asatrian disparaged A.A.'s causes of action, that does not mean they have been proven to lack merit. This arguably harassing discovery is being pursued on the third-party complaint when it may itself be found to be frivolous, if A.A.'s complaint, or some portion of it, is ultimately deemed meritorious.

Our decision was based on court rules regarding the timing of discovery and is irrelevant to defendants' arguments for recusal. As our Supreme Court has held, "[a]n error by the court in [a] previous proceeding does not necessarily justify an inference of bias and will not, by itself, furnish a ground for disqualification." Marshall, 148 N.J. at 276. Neither does "[a]n adverse ruling in prior proceedings . . . warrant disqualification." Ibid. Indeed, where "[t]here is no showing that the trial judge had any personal or private interest apart from

the fulfillment of his judicial duties," disqualification is inappropriate. State v. Walker, 33 N.J. 580, 592 (1960).

Finally, defendants argue that "[the trial judge]'s demeaning treatment of defense counsel at the proof hearing . . . in which he . . . refused to allow him the allotted ten minutes of time for the opening statement" constituted bias or the appearance of bias. The record indicates, however, the judge allotted ten minutes to both parties, and once counsel for plaintiff completed his opening statements, the court allowed Asatrian to proceed, stating "Mr. Asatrian, we'll give you 10 minutes," to which Asatrian responded, "Thank you, your Honor, for the time. I'm grateful."

With respect to the only issue properly before us, we conclude the trial court entered damages consistent with New Jersey contract law. The court entered judgment for actual damages as the difference between the original contracts and plaintiff's final contract with the ultimate buyer in the amount of \$100,002. The trial court also added \$25,840.26 for property taxes incurred from the time of breach through March 21, 2021, the date of the subsequent closing, \$7,060 for landscaping and snow cleaning costs during that time, \$750 in attorney's fees for closing, and \$46,583.92 in attorney's fees incurred in the

current litigation, based on counsel's certification and as agreed upon in the parties' contracts.

Despite the defendants' defenses having been stricken, the evidence amply supports the fact the Township approved the subdivision of the property prior to defendants signing the contracts. In fact, in approving the subdivision plan, the Board stated "the benefits of the [a]pplication [for subdivision] including compliance with all applicable codes and a development of two lots [to] be more consistent with the neighborhood [and to] substantially outweigh any detriment." The realtor testified he marketed the property as preliminarily subdivided, and any purchaser would simply have to "execute the developer's agreement."

In addition, summary judgment as to River Vale Planning Board and the Bergen County Clerk was entered on March 5, 2021, and defendants did not appeal that order. Similarly, the October 9, 2020, order resulted in the dismissal of the third-party complaint against third-party defendants RE/MAX and Colin Somerville.

The final damages awarded by the judge were not "manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Seidman v. Clifton Sav. Bank, S.L.A., 205

N.J. 150, 169 (2011) (quoting In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)).

Defendants have failed to establish the trial judge's bias toward Asatrian sufficient to require disqualification pursuant to Code of Jud. Conduct r. 3:17(B)(1). Our decision in Bergen Catholic does not support the trial judge's recusal in this case. Defendants suggest the trial judge is personally prejudiced against Asatrian but none of the reasons relied upon by defendants establish personal bias. Indeed, "[o]ur Supreme Court has expressed its disapproval of defendants manipulation of the system to secure the removal of a judge they dislike." Solimine, 460 N.J. Super. at 32 (citing State v. Dalal, 221 N.J. 601, 607-08 (2015)). Asatrian's late substitution as attorney in this case after the pleadings had been dismissed, his lawsuit filed against the trial judge in an unrelated matter shortly after defendants received adverse rulings in this case, and belated, continued efforts to disqualify the trial judge suggest an improper motive.

Defendants do not raise any arguments with respect to plaintiff's breach of contract claim. The record does not establish any reason why the trial judge's findings should be disturbed.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION