SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3741-20

CHRISTOPHER GLEMSER,

Plaintiff-Appellant,

v.

YARON HELMER, JERRY A. CHOLEWKA, and HELMER CONLEY & KASSELMAN, P.A.,

Defendants-Respondents.

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Argued March 1, 2023 – Decided June 2, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1516-18.

Mark J. Molz argued the cause for appellant.

John E. Shields, Jr., argued the cause for respondents (Helmer, Conley & Kasselman, PA, attorneys; John E. Shields, Jr., and William H. Tobolsky, of counsel and on the brief).

PER CURIAM

Plaintiff Christopher Glemser appeals from two July 12, 2021 Law Division orders awarding defendants Yaron Helmer and Helmer, Conley & Kasselman, P.A. (HCK) (collectively, Helmer defendants) counsel fees as a sanction for a discovery violation and for pursing a frivolous claim pursuant to Rule 1:4-8. We affirm.

I.

The underlying facts are not complex. In November 2009, plaintiff, a contractor and repair person, sustained injuries from a slip and fall accident while working on a deck. HCK was retained to represent plaintiff in the personal injury matter, and Helmer assigned defendant Jerry Cholewka[1] to handle the file. In May 2011, Cholewka subsequently filed a lawsuit captioned Glemser v. Haines, Docket No. L-967-11, but did not retain a liability expert. In April, 2014, the matter proceeded to trial and a jury returned a no cause verdict.

After the personal injury action was filed, in July 2013, Helmer signed a proposal prepared by plaintiff to install a backup generator at HCK's Haddon Heights office. The signed proposal noted HCK paid a $3,000 deposit for the generator on July 3, 2013 and another $5,000 deposit on September 9, 2013.

[1] Cholewka is deceased.

However, plaintiff did not install the generator; and, despite the Helmer defendants' demand, the deposits were not returned.

In October 2013, plaintiff contracted to perform work at HCK's Willingboro office. HCK paid $4,500 for the installation of two high efficiency air handlers; however, the installation was never completed. When plaintiff failed to install the air handlers, HCK terminated his services and hired another firm to complete the work for $4,218.

In November 2018, plaintiff filed a complaint against defendants asserting legal malpractice (count one), quantum meruit (count two), and malicious prosecution (count three). Defendants' answers[2] denied plaintiff's claims and asserted a counterclaim for breach of contract and failure to install the generator and two air conditioning units, seeking $12,418 in damages. Plaintiff denied the allegations in his answer to defendants' counterclaim.

On March 19, 2019, defendants' counsel sent a safe harbor letter to plaintiff's counsel. The letter advised plaintiff's counsel of defendants' belief that counts two and three of the complaint were frivolous under Rule 1:4-8(b)(1) and demanded plaintiff withdraw those counts. As to plaintiff's quantum meruit

[2] Defendants' answer to the legal malpractice claim was filed by O' Toole Scrivo, LLC. Defendants' answer to the quantum meruit and malicious prosecution claims was filed by John E. Shields, Jr.

claim, defendants argued the complaint did "very little in the way of specificity regarding the dates or location of work allegedly performed, or the amounts of money claimed by [plaintiff] . . . ." Defendants pointed out that plaintiff "repeatedly acknowledged owing restitution to [HCK] and retain[ed] for his personal use monies paid to him by [HCK] for equipment and services he did not supply or perform." Thus, defendants contended the quantum meruit claim "must . . . be withdrawn."

Defendants further argued the malicious prosecution claim should be withdrawn and stated: "This letter shall serve as notice that if you decline to [withdraw counts two and three], an application for sanctions, including all counsel fees incurred in the defense of [c]ounts [two] and [three] from April 14, 2019 and thereafter will be filed at the conclusion of this action."

During discovery, issues arose regarding the deposition of plaintiff's engineering expert, Craig Moscowitz, and service of his report which resulted in several case management conferences. A September 25, 2020 case management order required expert depositions to be completed by November 25, 2020. The parties sought court intervention when they were unable to obtain dates for Moscowitz's deposition. In a December 17, 2020 case management order, the parties were directed to complete Moscowitz's deposition on January

13, 2021. On the morning of January 12, 2021, defense counsel confirmed Moskowitz's deposition and ensured all counsel had the Zoom invitation. Later that afternoon at 4:53 p.m., plaintiff's counsel notified all counsel Moskowitz "was unavailable" without explanation. The deposition was subsequently rescheduled to February 10, 2021

Thereafter, in a letter to the court, defendants' counsel sought to bar Moskowitz's testimony. In response, plaintiff's counsel advised the court that: "As soon as [he] heard that Mr. Moscowitz was unavailable to attend his deposition [he] notified all counsel." During another case management conference on January 25, 2021, plaintiff's counsel represented to the court because Moscowitz was "very busy" the January 13 court-ordered deposition was not conducted.

After the completion of discovery, defendants separately moved for summary judgment. Defendants' summary judgment motion related to plaintiff's legal malpractice claim which was denied. The court also denied plaintiff's cross-motion for a negative inference regarding spoliation of evidence; namely, the failure to retain an expert prior to the demolition of the deck. Thereafter, the parties filed a stipulation of dismissal with prejudice and without costs as to the legal malpractice claim.

Defendants also moved for summary judgment as to counts two and three of the complaint which was granted by the court. Plaintiff has not appealed from the order granting summary judgment in favor of defendants on those counts.

On July 16, 2021, having prevailed on their motion for summary judgment, defendants moved for sanctions under Rule 1:4-8(b)(1).

Three days later, defendants moved for sanctions and legal fees against plaintiff's counsel related to the discovery violation regarding Moscowitz's deposition. Defendants sought discovery sanctions arising from (1) the last-minute cancellation of Moscowitz's deposition; and (2) counsel for plaintiff's untruthful explanation for the cancellation because Moscowitz testified that the reason for the cancellation was nonpayment of his fee by plaintiff's counsel.

In opposing defendants' motions, plaintiff's counsel certified his representations to the court were "forthright and honest." Counsel also stated that he was advised by Moscowitz's office that the expert was not available because he had a "full" schedule. Plaintiff's counsel also filed a letter in support of his contention that Moscowitz was paid a retainer of $5,800 prior to the January 13 scheduled deposition.

Following oral argument, on July 12, 2021, the trial court issued two orders and a well-reasoned statement of reasons granting defendants' motions for discovery and frivolous litigation sanctions.

As to the discovery sanctions, the trial court awarded defendants $2,720.00. Citing Gonzalez v. Safe & Sound Security Corp., 185 N.J. 100, 115 (2005) and Fik-Rymarkiewicz v. University of Medicine & Dentistry of N.J., 430 N.J. Super. 469, 480 (App. Div. 2013), the court found "[p]laintiff's counsel willfully chose not to disclose the reason the January 13, 2021 [expert] deposition date was missed" and that plaintiff's counsel stated the expert was "busy" when "instead [the expert] had not been paid for his appearance." The court highlighted Moscowitz's February 10, 2021 deposition testimony that the previous deposition date had been cancelled for a "logistical/financial reason" because he had not been paid prior to the deposition and therefore it was cancelled. The court also noted Moscowitz stated that "we did notify [plaintiff's] office well in advance that we hadn't received payment of our deposition fees to prepare and appear, and we kept asking them when [were] going to get the check, knowing that my appearance was scheduled for a certain day, and they were noncompliant until after -- unfortunately after that deposition date." Thus, the

court concluded defendants were "entitled to an award of counsel fees for the required preparation for the deposition" of the expert.

Additionally, the court determined defense counsel's hourly rate of $450 per hour was "reasonable." The court further concluded sanctions "[were] also appropriate given the circumstances, as . . . [plaintiff's counsel] was, at worst, willfully untruthful with the [c]ourt, or at best did not provide a truthful complete picture about the reason for the cancellation and rescheduling of the court-ordered deposition." Relying on the factors in Williams v. American Auto Logistics, 226 N.J. 117, 123-25 (2016), the court found: (1) plaintiff's counsel "ha[d] not shown any good cause as to why [] Moscowitz was not produced as ordered"; (2) because the deposition was confirmed by defendants the day before the deposition and it was cancelled "very late in the day" by [plaintiff's counsel], the second factor weighed against plaintiff; (3) giving plaintiff "every reasonable inference" about the breach in the court rule, that factor should be weighed neutrally; (4) the last minute cancellation of the deposition did cause harm to defendants and prejudiced counsel; and (5) because the delay in the deposition was relatively short, this factor should be weighed neutrally. The court concluded sanctions were warranted against plaintiff's counsel and awarded $720 in attorney's fees for his comportment and an additional $2,000

for his unacceptable conduct toward the court and his adversaries, for a total of $2,720.

In a separate order which addressed defendants' frivolous litigation motion, the court determined sanctions were appropriate as to count two but not as to count three citing Rule 1:4-8, Bove v. AkPharma Inc., 460 N.J. Super. 123, 148 (App. Div. 2019), and DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226 (App. Div. 2000). The court concluded defendants' safe harbor letter satisfied the requirements of Rule 1:4-8(b) as it "included the basis for that belief, a demand that the claims be withdrawn, and gave notice that if the claims were not withdrawn, an application for sanctions would follow." Concerning count two, the court found a December 6, 2019 order barred plaintiff "from introducing any and all evidence supporting his claims for damages pertaining to recovery of lost personal income or lost business profits" which resulted in plaintiff lacking evidentiary support to prove his claim. The court further found when plaintiff was "extensively" questioned at his deposition, he "admitted over and over that he could not give an amount that he was owed by [d]efendant." The judge noted at plaintiff's deposition, he remained unable to provide any proof or testimony to support his claim. Lastly, plaintiff admitted in responses

to defendants' statement of material facts that defendants did not owe him any money for the work performed.

The judge concluded plaintiff and his counsel should have determined after plaintiff's deposition that "[c]ount [two] was unproveable" and of their "obligation" to withdraw the claim. Finding thirty days a reasonable and appropriate time to allow for the withdrawal of count two, the court awarded defendants' attorney's fees incurred after September 10, 2020, against plaintiff and his counsel.

The trial court assessed the reasonableness of defendants' counsel fees. The court found defendants' counsel billable hours after September 10, 2020 until the "case closed" totaled 112.1 hours. The court multiplied the total billable hours by the reasonable $450 hourly rate which equaled $50,445, and added, $1,614.28 in costs for a total $52,059.28. The court found "each of . . . [p]laintiff's three [c]ounts . . . [were] separate and distinct" and that defendants "expended time and energy in defending all three [c]ounts throughout this time period." Thus, the court concluded it was "fair and reasonable" to approximate that defendants spent equal time on each count, the court divided the total among the three counts. Therefore, the total fees and cost amount attributed to count two was $17,353.10. The court did not find count three was frivolous, as the

"plaintiff and his attorney had a reasonable, good faith belief in the merit" of the count and thus declined to impose sanctions.

II.

On appeal, plaintiff contends defendants violated the Rules of Professional Conduct (RPCs), specifically RPC 1.8, by hiring plaintiff to perform construct work at the law firm's offices when he was a client of the firm; the court erred in awarding fees for a discovery violation; and the court abused its discretion in awarding Rule 1:4-8 sanctions.

We "accord substantial deference to a trial court's disposition of a discovery dispute." Brugaletta v. Garcia, 234 N.J. 225, 240 (2018). Thus, we defer to a trial judge's discovery rulings absent "an abuse of discretion or a judge's misunderstanding or misapplication of the law." Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017).

"An abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Kornbleuth v. Westover, 241 N.J. 289, 301 (2020) (quoting Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2014)). "We will 'decline[] to interfere with [such] matter of discretion unless it appears that an injustice has been done.'" St. James AME

Dev. Corp. v. City of Jersey City, 403 N.J. Super. 480, 484 (App. Div. 2008) (alterations in original) (quoting Cooper v. Consol. Rail Corp., 391 N.J. Super. 17, 23 (App. Div. 2007)).

We begin with the discovery sanctions award. We review a trial court's decision on sanctions imposed for violating a court order under an abuse of discretion standard. Kornbleuth, 241 N.J. at 301. "Sanctions imposed by a trial court will not be disturbed on appeal if they are just and reasonable under the circumstances." Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 365 (App. Div. 1998). "In assessing the appropriate sanction for the violation of one of its orders, the court must consider a number of factors, including whether the plaintiff acted willfully and whether the defendant suffered harm, and if so, to what degree." Gonzales, 185 N.J. at 115.

We are satisfied the trial court did not abuse its discretion in awarding discovery sanctions to defendants. The court concluded plaintiff's counsel "willfully chose" not to disclose the reason Moscowitz's deposition did not occur on January 13 because Moscowitz was not paid in advance of his deposition appearance.

We are satisfied the court appropriately considered the factors in Williams in awarding an additional $2,000 in fees. The court carefully weighed each

factor and based on sufficient evidence in the record determined plaintiff's lack of compliance with the court's discovery order, the last-minute cancellation of the plaintiff's expert's deposition, and the harm and prejudice to all other counsel as a result of that cancellation warranted the imposition of sanctions. Therefore, we are convinced the trial court properly exercised its discretion in awarding sanctions. Calabrese v. Trenton State Coll., 162 N.J. Super. 145, 151-52 (App. Div. 1978) aff'd, 82 N.J. 321 (1980) (citing Lang v. Morgan's Home Equip. Corp., 6 N.J. 333 (1951)).

We turn next to the trial court's award of sanctions for frivolous litigation. We review a trial court's imposition of frivolous litigation fees for an abuse of discretion. Reversal is warranted when "'the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.'" Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 577 (App. Div. 2016) (citation omitted) (citing Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)).

"Sanctions for frivolous litigation against a party are governed by the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1." Bove, 460 N.J. Super. at 147. The Frivolous Litigation Statute provides that a court may award

reasonable attorney fees to a prevailing party in a civil action "if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous." The statute establishes two bases for concluding an action was frivolous:

> (1) The complaint, counterclaim, cross-claim[,] or defense was commenced, used[,] or continued in bad faith, solely for the purpose of harassment, delay[,] or malicious injury; or
>
> (2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim[,] or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification[,] or reversal of existing law.
>
> [N.J.S.A. 2A:15-59.1(b).]

Rule 1:4-8 does not authorize a court to sanction a represented party, like plaintiff; instead, it authorizes a court to sanction an "attorney or pro se party." R. 1:4-8(a)-(c); see also Toll Brothers, Inc. v. Twp. of W. Windsor, 190 N.J. 61, 69 (2007). Rule 1:4-8 and the Frivolous Litigation Statute are "interpreted restrictively" with sanctions awarded "only in exceptional cases." Bove, 460 N.J. Super. at 151.

Under Rule 1:4-8(b)(1), a moving party must send a notice and demand, which shall:

> (i) state that the paper is believed to violate the provisions of this rule, (ii) set forth the basis for that belief with specificity, (iii) include a demand that the paper be withdrawn, and (iv) give notice, except as otherwise provided herein, that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand.

Here, the court did not abuse its discretion in finding defendants satisfied the procedural requirements of the Rule in their safe harbor letter to plaintiff's counsel. The letter plainly stated defendants believed plaintiff violated the provisions of Rule 1:4-8 and set forth the basis of its belief with specificity. Defendants pointed to the lack of evidentiary support repeatedly underscored by plaintiff's own testimony as to count two; demanded counts two and three be withdrawn; and provided notice an application for sanctions would be made if the counts were not withdrawn.

Here, the court concluded plaintiff's quantum meruit claim was frivolous because of plaintiff testified he "could not give an amount that he was owed by [d]efendant[s]" and his inability to "provide documentation or testimony" to support his claim. The court's decision to award sanctions was supported by the record and the judge provided a detailed explanation in support of the award. Given plaintiff's acknowledgment that he could not provide evidence in support of the amounts allegedly owed by defendants, there was sufficient evidence to

support the trial court's decision—that the quantum meruit claim was "unproveable" and plaintiff and his counsel had and "obligation" to withdraw the claim.

Further, it was reasonable for the court to divide the time spent on each of the three counts equally; and thus, attribute one-third of the billed hours to count two, as the court found the three counts in plaintiff's complaint were "separate and distinct" as count one sounded in negligence, count two sounded in contract, and count three sounded in an intentional tort. Therefore, the $17,353.10 attributed by the court to count two was not an abuse of discretion. We see no basis to disturb the trial court's ruling.

Finally, we decline to consider plaintiff's argument, raised for the first time on appeal, that defendants violated RPC 1.8 by engaging plaintiff to perform construction services when he was the firm's client. It is well-settled that "'our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Plaintiff did not raise this issue before the

trial court when defendants moved for sanctions, and it does not substantially implicate the public interest.

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

Affirmed.