SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2566-21

DAVID KRATKA,

Plaintiff-Appellant,

v.

JTI REAL ESTATE, LLC, and
JOE LAWRENCE,

Defendants-Respondents,

and

SEAN MCDONOUGH and
JILL LAWNICK,

Defendants.

Submitted October 24, 2023 – Decided February 26, 2024

Before Judges Sumners and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0510-18.

Maribel Josefina Allen, attorney for appellant.

Respondents have not filed a brief.

PER CURIAM

Plaintiff David Kratka appeals from an April 4, 2022 Law Division order, denying his motion for reconsideration of an August 24, 2021 order that barred the testimony of his proposed experts, and a November 19, 2021 order that granted the summary judgment dismissal of his complaint against defendants JTI Real Estate, LLC, and its managing member, Joe Lawrence. For the reasons that follow, we dismiss the appeal.

The facts alleged in plaintiff's complaint are straightforward. The course of the four-year litigation, however, can best be described as convoluted. We therefore briefly recite the facts that spurred the litigation and unravel the pertinent events in chronological order from the record before the motion judge.

In October 2016, plaintiff and JTI executed a contract of sale for a single-family residence in Morristown. Pursuant to the terms of the contract, plaintiff agreed to purchase the property in "as is" condition. Prior to the closing, plaintiff's inspector, David Appleby of DRA Contracting, LLC, discovered termite damage. Thereafter, JTI permitted plaintiff to investigate the infestation further by "cut[ting] small holes in the sheetrock" provided plaintiff repaired the holes. JTI agreed to remediate the termite damage and provide plaintiff a one-

year warranty for treatment of any reinfestation. After plaintiff completed a walkthrough, he closed on the property.

Contending defendants failed to remediate the termite damage, in April 2018, plaintiff filed suit, asserting various claims, including consumer fraud, negligence, and breach of contract.[1] In their answer, defendants asserted affirmative defenses and a counterclaim against plaintiff. Defendants also filed a third-party complaint against the termite company for negligence and breach of contract.

Months after the close of discovery, the third-party defendants were dismissed on summary judgment. Pertinent to this appeal, the motion judge determined the reports of plaintiff's purported experts, Appleby and Edward G. Taylor of Taylor Exterminating, LLC, were net opinions. In particular, the judge found the reports failed to reveal the experts' qualifications or the bases for their opinions. Nor did the reports indicate the applicable standard of care, whether the termite company breached the standard of care, or how the company

[1] Plaintiff also named Sean McDonough and Jill Lawnick as defendants but they were dismissed from the litigation and are not parties to this appeal. Accordingly, all references to defendants in our opinion are to JTI and Lawrence.

improperly treated the investigation that caused the damages claimed by plaintiff.

Thereafter, another judge granted, in part, defendants' ensuing summary judgment motion, dismissing plaintiff's negligence and emotional distress claims, and denying defendants' motion as to plaintiff's claims for fraud, consumer fraud, and breach of contract. The memorializing order reflected plaintiff abandoned his personal injury and extreme emotional distress claims. The order also denied defendants' "oral request" to bar plaintiff's "remaining [e]xpert [r]eports."

On June 28, 2021, the same judge who decided the reconsideration motion denied defendants' contested motion to bar the reports and testimony of plaintiff's proposed experts: Appleby, Taylor, and Rick Levasseur, owner of Complete Improvements. In his statement of reasons, the judge noted the prior judge had determined two of plaintiff's experts' reports were inadmissible net opinions. However, because defendants failed to provide any of plaintiff's expert reports to support their motion, the judge was unable to consider their contention that plaintiff's third expert "suffer[ed] from the same deficiencies." The judge therefore denied defendants' motion without prejudice.

The following week, plaintiff's attorney, John Charles Allen, was suspended from the practice of law. See Matter of Allen, 250 N.J. 360, 360-62 (2022) (noting Allen was suspended on July 6, 2021 and modifying the Disciplinary Review Board's (DRB) disbarment recommendation for "an indeterminate suspension from practice that prohibits [Allen] from seeking reinstatement to practice for a minimum of five years . . . for [Allen's] unethical conduct"). Several months transpired before Allen notified his client, the court, and his adversary about the suspension.

In the meantime, defendants' motions to bar plaintiff's experts and for the summary judgment dismissal of his complaint were unopposed. According to the August 24, 2021 order provided on appeal, the same judge who entered the reconsideration order, granted defendants' motion to bar plaintiff's expert witnesses. However, the transcript of the judge's oral decision was not provided to the motion judge and is not included in the record before us.

Conversely, the motion record included the written statement of reasons of the assignment judge, who granted summary judgment and issued the memorializing November 12, 2021 order. In essence, the judge viewed the allegations set forth in the complaint in a light most favorable to plaintiff as the non-moving party, see Brill v. Guardian Life Insurance Co. of America, 142 N.J.

520, 536 (1995), and denied summary judgment on liability regarding plaintiff's misrepresentation or fraud claims without prejudice. Based on plaintiff's factual allegations, the judge also found it unlikely that an expert was necessary to demonstrate "[d]efendants fraudulently or negligently misrepresented the status of the terminate damage remediation" they had performed. However, the judge concluded expert testimony was necessary to prove plaintiff's damage claims. Noting another judge had barred plaintiff from presenting expert testimony, the judge dismissed the complaint.

Nearly three months later, on February 5, 2022, Allen and his wife, Maribel J. Allen,[2] executed a substitution of attorney. Around the same time, Maribel untimely moved for reconsideration of the August 24, 2021 order barring plaintiff's experts and the November 19, 2021 order granting the summary judgment dismissal of the complaint.

As part of her moving papers, Maribel provided Allen's "certification in support of [his] client's opposition to vacate" the August 24, 2021 and November 19, 2021 orders. Allen claimed he "checked [his] file and record" but could not

[2] Because the attorneys bear the same surname, we refer to Maribel by her first name for ease of reference, intending no disrespect.

locate a copy of defendants' motion to bar plaintiff's experts. He also detailed his "extraordinary medical issues and ailments."

Allen acknowledged he appeared before the DRB "on a private calendar matter concerning a [f]ee [a]rbitration" and a "temporary suspension was imposed." Allen asserted: "For this reason, I believe that I was blocked from e-courts and was not sent notices through the e-courts system."

However, Allen acknowledged he received via mail defendants' summary judgment motion on September 29, 2021. Noting the return date was eight days later, Allen claimed he called defense counsel for consent to adjourn the motion in view of his "unfortunate circumstances," but counsel refused to do so. Allen then called the court and explained to the law clerk his "circumstances" and insufficient time to respond to the motion. But there is no indication in Allen's certification that he advised the law clerk about his suspension from the practice of law.

According to Allen's certification, the law clerk indicated the motion would be adjourned but could not provide a return date. Instead, the law clerk instructed Allen "to address [his] medical issues and that [he] would be contacted at some later date to check on [his] medical circumstances and discuss and advise of a new motion date allowing time for the preparation an[d]

submission of an opposition to the motion." Allen claimed the court never contacted him and he later learned defense counsel failed to contact him regarding a new date. "As a result, the motion was heard and decided as unopposed."

Allen also asserted: "I have made arrangements for Maribel J. Allen, Esquire to take over representation of Mr. Kratka in this mat[t]er so that my unfortunate circumstances do not cause any problems or delays going forward." (Emphasis added). But see R. 1:20-20(b)(11) ("Even if requested by a client, the disciplined or former attorney may not recommend an attorney to continue the action"). Although Allen's certification does not specify the date on which these "arrangements" were made, as stated above, the substitution of attorney was not filed with the court until February 2022.

In his certification, without citation to the record, Allen detailed plaintiff's claims against defendants. Allen also asserted, without citation to the expert reports, that each expert was fully qualified to render an opinion on damages:

> In pertinent parts[,] each discusses the damages observed to the property, the cause of said damages, the fact that these damages were easily discoverable by a repair professional once the damaged areas were uncovered, and a proper professional analysis is done. Furthermore, the experts address how these damages and failures to make repairs were covered up and hidden from sight and made undiscoverable because

> [of] these deceitful actions. Plaintiff's experts each has the requisite experience and knowledge to be confirmed and accepted by the [c]ourt as experts and their reports address and explain the facts and information sufficiently to allow a lay person, and more importantly, a lay juror and/or finder of fact to understand and comprehend the facts, information, testimony[,] and evidence that will be presented by [p]laintiff during trial.

Oral argument on the reconsideration motion was held virtually. Maribel appeared on behalf of plaintiff and, with the judge's consent, Allen participated as a "witness," but was not placed under oath.

Allen acknowledged he was suspended in July 2021. He thought he had advised the court he was suspended when he called in September 2021, but was not "certain," and confirmed he did not do so in writing. Allen further acknowledged he failed to inform plaintiff of his suspension status until around "January or February of 2022" and, as such, his client believed he was represented during the time the underlying motions were decided. Allen claimed he told defense counsel about his suspension telephonically in July and on another occasion, but confirmed he did not do so in writing. In response, during the hearing, defense counsel denied Allen's representations, countering he first learned of the suspension in Allen's certification supporting the present motion.

Pertinent to our disposition of this appeal, Allen also claimed he had not been aware of the notice requirements under the Rules of Court following his suspension from the practice of law. Allen said he was "addressing that issue with the Office of Attorney Ethics." See R. 1:20-20(b)(11) (requiring, in pertinent part, a suspended attorney to "promptly give notice of the suspension" to the client, opposing counsel, and the assignment judge of the vicinage in which the action is pending); see also RPC 5.5(a)(1) (prohibiting an attorney from practicing law while ineligible).

Contending plaintiff was not at fault for failing to respond to the underlying motions, Maribel argued "in the interest of justice and equity, [plaintiff] should be allowed to respond to the motion." Defense counsel countered that plaintiff failed to argue the merits of either motion. Moreover, both judges granted the motions after "full consideration" of the issues raised. In reply, Maribel argued plaintiff's experts were qualified.

Immediately thereafter, the judge issued an oral decision, denying the motion. The judge concluded plaintiff's reconsideration motion was untimely pursuant to Rule 4:49-2, and that the rule is "non-relaxable." See R. 1:3-4(c). To provide a complete record, the judge also considered the substance of plaintiff's motion. The judge considered the detailed statement of reasons

accompanying the summary judgment order, but noted plaintiff failed to provide the transcript of his oral decision that accompanied the order granting defendants' motion to bar plaintiff's experts. The judge reasoned:

> I can only grant reconsideration of these two orders when the decisions represent a clear abuse of discretion based on plainly incorrect reasoning, or failure to consider evidence, or a good reason for the court to reconsider new information. In a case where I'm not provided with the reasoning for my own decision and where [the assignment judge] makes a decision where he has been supplied no information, it is not possible for me to find that either of us has abused our discretion based on plainly incorrect reasoning. It's not pointed anywhere in either of our decisions what is plainly incorrect.

Maribel filed the present appeal on behalf of plaintiff, raising four arguments: issues of fact precluded summary judgment; service of the summary judgment motion was defective; summary judgment was erroneously granted because plaintiff's experts were well-qualified; and plaintiff did not have an opportunity to be heard on summary judgment.

Ordinarily, "we are loath to visit the sins of the lawyer upon the innocent client." SWH Funding Corp. v. Walden Printing Co., 399 N.J. Super. 1, 14 (App. Div. 2008); see also Parker v. Marcus, 281 N.J. Super. 589, 594 (App. Div. 1995); Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190, 196 (App. Div. 1985). "We are also mindful of the well-established public policy

disfavoring final dispositions based solely on procedural irregularities." SWH Funding Corp., 399 N.J. Super. at 14.

In the present matter, however, our review is hamstrung for two reasons. Initially, it appears from the record provided on appeal that Allen failed to "promptly" notify plaintiff of his suspension and "advise [him] to obtain another attorney and promptly substitute that attorney" in the pending action. R. 1:20-20(b)(11). Instead, contrary to the same rule, by his own admission Allen "made arrangements for Maribel" – his wife – to assume plaintiff's representation. In essence, therefore, Allen wrongly "recommend[ed] an attorney to continue the action." See ibid. Nor is there a sworn statement – or any indication from plaintiff – that it was his choice to continue the matter with Maribel as his attorney. Accordingly, we are not confident Maribel was authorized to represent plaintiff before the motion court on this appeal.[3]

[3] We also have concerns about the certification Allen filed with the motion court while he was suspended. For example, although Allen indicated he "previously represented . . . [p]laintiff in this matter," he then referred to plaintiff as "my client[]." Further, in paragraphs two through thirty and thirty-five through forty-one, Allen detailed plaintiff's allegations underlying the complaint and the arguments regarding the challenged orders. In paragraph forty-one, Allen "respectfully requeste[d] that that Mr. Kratka's motion be granted in its entirety, the complaint be reinstated[,] and the matter be scheduled for trial." See RPC 5.5(a)(1).

Assuming without deciding Maribel was authorized to represent plaintiff, she was required to include in the appellate appendix: "the judgment, order or determination appealed from or sought to be reviewed or enforced," R. 2:6-1(a)(1)(C), but also "any opinions or statement of findings and conclusions," R. 2:6-1(a)(1)(D), and "such other parts of the record . . . as are essential to the proper consideration of the issues," R. 2:6-1(a)(1)(I). Thus, the failure to provide an adequate record, as required by Rule 2:6-1, independently precludes us from reviewing the arguments on the merits. We are not "obliged to attempt review of an issue when the relevant portions of the record are not included." Cmty. Hosp. Group, Inc. v. Blume Goldfaden Berkowitz Donnelly Fried & Forte, P.C., 381 N.J. Super. 119, 127 (App. Div. 2005). See also State v. Cordero, 438 N.J. Super. 472, 489 (App. Div. 2014).

Dismissed.