JOSEPH M. LISANTI, JR. v. AMPER, POLITZINER & MATTIA, P.C.

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-4886-06T34886-06T3

JOSEPH M. LISANTI, JR.,

ROSEMARIE LISANTI, LISANTI

ENTERPRISES, L.L.C., LISANTI

REALTY CORP., LISANTI REALTY

OF ARIZONA, INC., TEXAS

TRUCKING CORP., JL TRUCKING,

L.L.C., ARIZONA FREIGHT HAULERS,

INC., and NEW JERSEY

TRUCKING CORP.,

Plaintiffs-Appellants,

v.

AMPER, POLITZINER & MATTIA, P.C.,

ALLEN D. WILEN, CPA, and ROBERT

KEANE, CPA,

Defendants-Respondents.

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Submitted February 4, 2009 - Decided

Before Judges Lyons and Waugh.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L- 3184-04.

Peter A. Ouda, attorney for appellants.

Greenbaum, Rowe, Smith & Davis, LLP, attorneys for respondents (William D. Grand, of counsel, Olivier Salvagno, on the brief).

PER CURIAM

The underlying complaint in this litigation is for accounting malpractice. The issue on appeal, however, is whether the trial court correctly dismissed plaintiffs' complaint without prejudice after barring them from presenting expert testimony at trial because they failed to serve a timely expert report. Because we find the trial court properly acted within its discretion in enforcing its deadlines for serving the expert report, we affirm. The following factual and procedural history is relevant to our consideration of the issues advanced on appeal.

Plaintiffs, Joseph and Rosemarie Lisanti, brother and sister, own and operate several companies, seven of which are also plaintiffs in this case. The Lisantis' former counsel, Marc F. Desiderio and Loel Seitel, began representing them in March 2003, during the course of bankruptcy actions filed by several corporate entities owned by the Lisantis. Both Desiderio and Seitel represented the Lisantis in those matters and the related adversary proceedings through February 2007.

On November 19, 2004, Desiderio and Seitel filed suit on plaintiffs' behalf against defendants Amper, Politziner & Mattio, P.C., an accounting firm, and Allen Wilen and Robert Keane, accountants at that firm, alleging malpractice. Plaintiffs did not provide a track assignment notice in their record on appeal. However, it is assumed that the court assigned the complaint to Track III because it was a professional negligence claim. R. 4:24-1(a). As such, plaintiffs were entitled to 450 days of discovery. The discovery period on plaintiffs' claim was set to close on June 25, 2006.

In January 2006, a federal grand jury sitting in Florida indicted Desiderio and Seitel for money laundering, obstruction of justice and "causing a person to making [sic] a false statement to a federal law enforcement official."

On June 5, 2006, plaintiffs filed a stipulation extending time for discovery pursuant to Rule 4:24-1(c). Defendants consented to extend the discovery period to August 24, 2006.

On July 13, 2006, defendants filed a motion seeking an order setting dates for the service of expert reports. On August 7, 2006, the trial court entered an order compelling plaintiffs to serve their expert reports "on or before September 15, 2006," and requiring defendants to serve their expert reports no later than October 15, 2006. The trial court also extended the discovery deadline to October 24, 2006, and ordered plaintiffs to conduct their depositions of defendants "within the month of September, upon proper notice by Rule."

Plaintiffs served notices for the depositions of defendants Keane and Wilen on August 14, 2006. The parties scheduled Keane's deposition for September 13, 2006, but, on September 11, 2006, defendants advised plaintiffs that Keane could not appear as scheduled. Defendants requested that the deposition be rescheduled for the weeks of either September 18 or September 25, 2006. Plaintiffs began taking Wilen's deposition on September 15, 2006. At that time, the parties agreed that both Wilen and Keane would be available for depositions the week of September 18, 2006.

The September 15, 2006, deadline to serve the expert report passed without plaintiffs complying with the trial court's order. Plaintiffs did not file a motion requesting more time to serve the report.

On September 19, 2006, plaintiffs' counsel, Seitel, advised defendants that that he was not available during the weeks of September 18 or September 25 for Keane's deposition. Defendants' counsel responded by letter, advising Seitel that the trial court's August 7, 2006, order required that depositions be completed by the end of September. Seital did not respond. On October 3, 2006, defendants notified Seitel by letter that Wilen was available for the conclusion of his deposition on October 18, 2003. Again, plaintiffs' counsel did not respond. The extended discovery period ended on October 24, 2006, and plaintiffs did not file a motion for an extension.

On October 26, 2006, the court set a trial date, January 22, 2007.

Based on plaintiffs' failure to serve their expert's report by September 15, 2006, as per the trial court's August 7, 2006, order, defendants, on October 31, 2006, filed a motion to bar plaintiffs' expert's testimony at trial. Plaintiffs did not file a cross-motion requesting additional time to serve their expert report, nor did they produce a report at

that time. The trial court entered an order on December 15, 2006, granting defendants' motion "unless the reports have since been served or are served prior to December 31, 2006." (Emphasis in original). In response to this order, on December 29, 2006, Desiderio served defendants' counsel with a letter he drafted and signed outlining his understanding of the opinions of "plaintiffs' accounting expert." Because this letter was not in compliance with Rule 4:17-4(e), which governs expert reports, plaintiffs did not meet the December 31, 2006, deadline and, as such, were barred from introducing any expert testimony at trial.

Because plaintiffs could not establish professional negligence claims without an expert, defendants moved to dismiss plaintiffs' complaint on January 2, 2007. The trial court granted defendants' motion and dismissed plaintiffs' complaint without prejudice on February 9, 2007.

Plaintiffs filed a motion for reconsideration on March 2, 2007. The court found "nothing new was submitted that was previously considered and the plaintiffs did not submit any information that would meet the stringent requirement for reconsideration . . . ." Moreover, the trial court considered plaintiffs' failures to abide by its orders, specifically noting that they did not serve an expert report and failed to complete defense depositions by the end of September. The trial court found "defense counsel conscientiously worked to reschedule the defense depositions during the balance of September . . . . The deposition did not resume but it does not appear that defense counsel was at fault." As such, the trial court denied the motion.

Plaintiffs have since retained new counsel and now appeal the order denying their motion for reconsideration and present the following argument for our consideration:

POINT ONE

The trial court mistakenly exercised its discretion in barring appellants from serving their accounting malpractice reports.

We first recognize that within the notice of appeal, appellants denominated the order denying the motion for reconsideration, as opposed to the earlier order for judgment, as the subject of this appeal. Judge Pressler's comment to Rule 2:5-1(f)(1) states that "it is clear that it is only the judgments or orders or parts thereof designated in the notice of appeal which are subject to the appeal process and review." Pressler, Current N.J. Court Rules, comment 6 on R. 2:5-1(f)(1) at 565 (2009); see W.H. Indus. v. Fundicao, 397 N.J. Super. 455, 458-59 (App. Div. 2008) (holding that the appellate

court will not review the order that generated the motion for reconsideration unless it is included in the notice of appeal). However, plaintiffs' case information statement makes clear that this is a matter in which the motion for reconsideration implicates the substantive issues underlying the order for judgment. Tara Enter., Inc. v. Daribar Mgmt. Corp., 369 N.J. Super. 45, 60 (App. Div. 2004). Therefore, we elect to address plaintiffs' argument regarding the trial court's order of dismissal.

The central issue on plaintiffs' appeal turns on whether the trial court's adherence to the deadlines it set for plaintiffs to complete discovery and serve their expert's report was correct under the circumstances. Plaintiffs argue that because both of their former attorneys were indicted during the course of this litigation, and because the case is "enormously complicated," the trial court should have, sua sponte, extended the time to comply with its orders rather than dismissing their complaint without prejudice. In failing to do so, plaintiffs argue the trial court abused its discretion and acted contrary to the goals of the amendments to the Court Rules known as "Best Practices."

The project known as "Best Practices," which resulted in significant rule amendments effective September 2000, was undertaken by the Conference of Civil Presiding Judges in order to insure "the statewide uniformity of pleading, discovery, and trial practice as well as to provide a relatively certain trial date." Pressler, supra, comment 2.3 on R. 1:1-1 at 26; Leitner v. Toms River Regional Schools, 392 N.J. Super. 80, 90 (App. Div. 2007). Best Practices was enacted to "counteract an unfortunate and increasingly dilatory, causal and desultory approach by some members of the bar to their litigation responsibilities . . . ." Tucci v. Tropicana Casino, 364 N.J. Super. 48, 53 (App. Div. 2003). However, the guidelines are not "inflexible, unbending dictates, but vest significant discretion with the trial courts to determine on a case-by-case basis if a discovery period should be extended and, if so, what deadlines and conditions should be set." Leitner, supra, 392 N.J. Super. at 90.

In this case, defendants filed a motion to compel discovery pursuant to Rule 4:24-2, specifically seeking a date for plaintiffs to produce their expert's report. Rule 4:17-4(e) required plaintiffs to submit an expert's report and allows the propounder of an unanswered interrogatory asking for an expert's report to move for the fixing of a day certain by which the information must be supplied. Pressler, supra, comment to R. 4:17-4 at 1424. The order may provide for the exclusion of expert testimony if the deadline is not observed. Ibid.; see also R. 4:23-5 (authorizing the court to exclude

testimony of an expert whose report is not timely furnished as required by Rule 4:17-4).

The trial court entered such an order on August 7, 2006, requiring the expert report to be served by September 15, 2006. Plaintiffs missed this deadline and, importantly, did not file a motion requesting more time to comply. When defendants subsequently filed a motion to exclude plaintiffs' expert testimony on October 31, 2006, plaintiffs failed to file a cross-motion for an extension. Moreover, Rule 4:24-1(c), which sets forth the time to complete discovery, provides that "[n]o extension of the discovery period may be permitted after [a]

. . . trial date is fixed, unless exceptional circumstances are shown." Thus, because a trial date had been set, Rule 4:24-1(c) would have barred the trial court from granting any additional discovery time absent a showing of such "exceptional circumstances."

Nevertheless, on December 15, 2006, the trial court sua sponte gave plaintiffs a last opportunity to produce a report by December 31, 2006. They again failed to produce a report or request additional time. Following this failure by plaintiffs, the trial court granted defendants' motion to dismiss for failure of proof, dismissing plaintiffs' complaint without prejudice on February 9, 2007.

Plaintiffs never filed any motion requesting more time to produce a report and still have never produced one. Despite this lack of diligence on plaintiffs' former counsel's part, plaintiffs argue the trial court applied an "inflexible" interpretation of the Best Practices rules. Instead of dismissing their complaint, plaintiffs argue, the trial court should have extended the time to serve the report, regardless of plaintiffs' failure to timely file a motion requesting such relief. Plaintiffs also contend that this extension was warranted because their attorneys' lack of diligence can be attributed to their indictments, though this assertion and information was not before the trial court, nor is it, therefore, part of the record on appeal. See R. 2:5-4; N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278 (2007).

In support of this contention, plaintiffs cite Tucci v. Tropicana Casino, supra, 364 N.J. Super. 48. In that case, the plaintiffs sued under a negligence theory after falling in an improperly leveled elevator. Id. at 50. The trial court entered an order requiring the plaintiffs' attorney to serve their expert's report by a certain date. Id. at 50-51. In order to provide that report, the expert needed to inspect the elevator. The plaintiffs' attorney, with the consent of the defendants, had the inspection two weeks after the

deadline for the service of the report. Id. at 51. As such, the plaintiffs produced the report thirty-nine days after the deadline, approximately two months before the trial date. Id. at 51-53. The defendants then filed a motion to bar the plaintiffs' expert testimony by reason of the late report, which the trial court granted. Id. at 51. The trial court later dismissed the plaintiffs' complaint with prejudice. Ibid. The plaintiffs filed a motion for reconsideration in which their attorney explained in his certification that he had been preoccupied during the course of the litigation because his mother was terminally ill. Ibid. The trial court denied that motion. Ibid. Specifically, the trial court considered the plaintiff's failure to seek relief from the deadline for the expert report or otherwise move for an extension of the discovery end-date. Ibid.

We reversed, finding "the judge's perceptions provided an insufficient basis for the ultimate sanction of dismissal with prejudice . . . ." Ibid. When the failure to serve a report is caused by "legitimate problems," such as the inability to schedule an inspection, and an attorney's non-attendance is with "good and sufficient reason," the "ultimate sanction" of dismissal with prejudice should be a last resort. Id. at 52. However, we stated "a major concern of the Best Practices rules was the establishment of credible trial dates by the avoidance of last-minute . . . adjournments by reason of incomplete discovery." Id. at 53. Because the trial date was still more than two months away, we found that "[i]t does not appear that that concern was substantially implicated here." Id. at 54.

Plaintiffs also cite Ponden v. Ponden, 374 N.J. Super. 1 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005), an attorney malpractice case, in support of their contention. There, the plaintiff served an expert report on the last day of discovery, before a trial date had been set. Id. at 7. The defendant filed for summary judgment, arguing that the report did not comport with the court rules. Ibid. The plaintiff filed a motion requesting time to produce another report and submitted a certification in support of that motion. In that certification, the attorney explained that the file he received from the plaintiff's former counsel did not contain information about the discovery end-date. Ibid. The trial judge denied the plaintiff's motion. After finding that the report consisted "only of a net opinion," the judge refused to extend the discovery cutoff date and granted the defendant's motion for summary judgment. Id. at 7.

In reversing the trial court, we held that because "the court had not scheduled a trial date, and because there was no evidence that the scheduling of such a date was imminent and would be delayed by the brief extension of discovery sought by plaintiff,

the salutary purposes of the 'Best Practices' rule amendments were neither impacted nor jeopardized." Id. at 11. Importantly, we noted, "the absence of an arbitration or trial date at the time of the trial judge's ruling is of critical significance in a court's exercise of its discretion to extend discovery." Id. at 9.

Plaintiffs also cite Leitner v. Toms River Regional Schools, supra, 392 N.J. Super. 80. In that case, the plaintiffs sued Toms River Regional Schools (TRRS) under the Law Against Discrimination (LAD) and the Americans with Disabilities Act (ADA). The plaintiffs' complaint incorrectly identified four of the defendants and counsel for TRRS refused to accept service. Id. at 82-83. The trial court assigned the case to Track III and set a discovery end-date. Id. at 83. As that date approached, the plaintiffs' attorney sent TRRS's counsel a letter asking for the correct names of the defendants. Ibid. Counsel for TRRS refused to cooperate and the plaintiffs' attorney filed for a motion to extend discovery pursuant to Rule 4:24-1(c). Id. at 84. The trial court denied the motion, finding that the plaintiff's had not shown that "good cause" existed for the extension. Id. at 85. TRRS then filed a motion to dismiss, which the court granted. Ibid.

Again, we reversed, holding "in the absence of a fixed trial . . . date, and recognizing that parties without any reason can consensually extend discovery by sixty days, that the measure as to what constitutes good cause under R. 4:24-1(c) is not high." Id. at 93. We went on to note that "[w]hat is required [to extend discovery] is a cogent reason which is consistent with the aims and goals of Best Practices . . . ." Ibid.

These cases are all distinguishable from the facts before us. In the cases plaintiffs cite, the parties seeking to extend discovery had not already been granted numerous extensions. Here, the trial court had previously extended discovery and gave additional time to file the report before sanctioning plaintiffs for their noncompliance. Furthermore, in Tucci, the plaintiffs did eventually serve their report. Here, plaintiffs have never produced a report despite being given several opportunities to do so and have failed to demonstrate how the indictments of their attorneys prevented them from complying.

Most significantly, in this case, the trial court had scheduled trial for January 22, 2007, less than a month after its December 31, 2006, final deadline for plaintiffs to serve the expert report. In both Ponden and Leitner, no trial date has been set, and in Tucci, the attorney served the report more than two months before trial when "the trial date could have been adjourned." Tucci, supra, 364 N.J. Super. at 53. The absence of an imminent trial was crucial to our holding in each of those opinions because, had trial dates been

set, any motion to extend the time would have been barred absent "exceptional circumstances," pursuant to Rule 4:24-1(c). See Report of the Conference of Civil Presiding Judges on Standardization and Best Practices, Recommendation 4.1, 156 N.J.L.J. 80, 82 (April 5, 1999) (emphasizing the import of a clear discovery end-date because once a "trial date is set, no more discovery must occur, unless authorized by the court on a showing of 'exceptional circumstances'").

Plaintiffs contend Desiderio's and Seitel's indictments do qualify as "exceptional circumstances" under Rule 4:24-1(c). The rule does not define "exceptional circumstances," but, in O'Donnell v. Ahmed, 363 N.J. Super. 44, 51-52 (Law Div. 2003), the Law Division defined the phrase to mean legitimate problems beyond mere attorney negligence, inadvertence or the pressure of a busy schedule. In Rivers v. LSC Partnership, 378 N.J. Super. 68 (App. Div.), certif. denied, 185 N.J. 296 (2005), we likened the phrase "exceptional circumstances" to "extraordinary circumstances," which was defined in Flagg v. Township of Hazlet, 321 N.J. Super. 256, 260, (App. Div. 1999), as "something unusual or remarkable." Rivers, supra, 378 N.J. Super. at 78. Importantly, we noted that "an excessive workload, reoccurring problems with staff, or delays arising out of efforts to resolve a matter through negotiations are not sufficient to justify an extension of time." Id. at 79.

Plaintiffs' argument that Desiderio's and Seitel's indictments qualify as "exceptional circumstances" lacks merit. First, this is not a case where plaintiffs filed a motion to extend discovery after the discovery period had ended. Plaintiffs never filed such a motion and now argue that the trial court should have continued to grant them extensions sua sponte. Also, plaintiffs have failed to provide any evidence that their attorneys' indictments actually affected their case.

Both in Tucci, supra, and Ponden, supra, the plaintiffs' attorney explained his failure to comport with the trial court's orders through certifications. Tucci, supra, 364 N.J. Super. at 51; Ponden, supra, 374 N.J. Super. at 7. Here, plaintiffs' former counsel never submitted any certification or proofs showing that their indictments distracted them from this litigation, nor have plaintiffs produced any proof that Desiderio and Seitel were non-responsive or absent during the course of their representation. The trial court was never presented with evidence of the indictment, nor do we have anything before us that suggests plaintiffs were not aware of Desiderio's and Seitel's situation, but continued to employ them as their attorneys anyway.

Moreover, while Desiderio and Seitel may have been distracted during the course of this litigation, defendants note that both attorneys "during the entire pendency of this case before the trial court . . . aggressively litigated the Lisanti Bankruptcy Actions and the associated Adversary Proceedings in the Bankruptcy Court on behalf of the same clients . . . as are the Plaintiffs here . . . ." In fact, Desiderio and Seitel, during their representation of plaintiffs in the bankruptcy actions, took depositions on January 31 and February 1, 2007, one month after the trial court's December 31, 2006, deadline to submit the expert report.

Notably, the trial court dismissed plaintiffs' complaint without prejudice. Plaintiffs' attorneys therefore had the option of producing their expert's report and then filing a motion to reinstate their claim. The fact that they took depositions shortly after the trial court's dismissal strongly suggests that, regardless of their indictments, Desiderio and Seitel were capable of at least attempting to salvage plaintiffs' complaint.

Lastly, plaintiffs argue that Desiderio's and Seitel's indictments were beyond plaintiffs' control and they should not be prejudiced by the actions (or lack thereof) of their attorneys. While plaintiffs acknowledge that they most likely have a malpractice complaint against Desiderio and Seitel, they argue that it is unlikely that their former attorneys are insured and, therefore, any judgment plaintiffs would receive would be uncollectible.

In essence, plaintiffs argue that "the sins of the advocate should not be visited on the blameless litigant . . . ." Aujero v. Cirelli, 110 N.J. 566, 573 (1988). We have addressed this issue in Leitner, supra, where we stated "[c]ourts . . . are not unfamiliar with situations where enforcing a rule, in an exercise of their discretion and in the face of the litigant's counsel's failings, may severely prejudice the litigant. Leitner, supra, 392 N.J. Super. at 89. When deciding whether a rule should be enforced, we instructed judges to balance the desire to protect the litigant against "the court's strong interest that management of litigation, if it is to be effective, must lie ultimately with the trial court and not counsel trying the case." Id. at 89-90 (quoting Kosmowski v. Atlantic City Med. Ctr., 175 N.J. 568, 574 (2003)) (internal quotations omitted).

Here, again the paramount goal of Best Practices, to "provide a relatively certain trial date," should be considered. Pressler, supra, comment 2.3 on R. 1:1-1 at 26. While plaintiffs may be left with little practical recourse as a result of their attorneys' actions, the trial court was within its discretion to consider that trial was less than one month away and plaintiffs' counsel had been given numerous opportunities to comply. Based

on these circumstances, the trial court did not err by protecting the court's "strong interest" in managing the litigation and dismissing it without prejudice.

Moreover, the United States Supreme Court has made it clear that clients carry responsibility in monitoring their attorneys. The Court held that "[s]urely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit." Link v. Wabash R. Co., 370 U.S. 626, 634 n.10, 82 S. Ct. 1386, 8 L. Ed.2d 734, 740 (1962); see also Baumann v. Marinaro, 95 N.J. 380, 397 (1984) (discussing the U.S. Supreme Court's stance that clients are often bound by their counsel's inaction). The Court went on to find that "keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant." Ibid. Here, plaintiffs are sophisticated business people who own and manage several corporations. They may not simply abdicate all responsibility for monitoring their case.

Based on the rapidly approaching trial date in this case, and the various extensions the trial court had already granted, the court did not abuse its discretion in enforcing its own deadlines. Moreover, the trial court was well within its discretion by exercising the sanctions permitted by Rules 4:17-4 and 4:23-5 when plaintiffs repeatedly failed to comply with its orders. Therefore, we discern no legitimate reason to second-guess the trial court and subject defendants to further costs and unnecessarily prolong this litigation. We, therefore, affirm.

Affirmed.

The New Jersey Supreme Court disbarred both attorneys on January 6, 2009. Notices to the Bar, 195 N.J.L.J. 197, 53 (Jan. 19, 2009).

Rule 4:24-1(c) states, in pertinent part, that the parties may consent to extend the time for discovery "for an additional 60 days by stipulation filed with the court or by submission of a writing signed by one party and copied to all parties, representing that all parties have consented to the extension."

Rule 4:17-4(e) requires, in pertinent part, that the party must attach an exact copy of the entire report rendered by the expert and the report must contain a complete statement of that person's opinions and the basis therefor. The report must also include

the facts and data considered in forming the opinions, as well as the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years, and whether compensation has been or is to be paid for the report and testimony and, if so, the terms of the compensation. Desiderio's letter fell far short of these requirements and plaintiffs do not appeal the trial court's finding that it was inadequate.

Plaintiffs filed their appeal on May 24, 2007. Defendants filed a motion to dismiss, arguing that the appeal was time barred pursuant to Rule 2:4-1(a) and that they were not properly served with the notice of appeal, pursuant to Rule 2:5-1(a). We granted defendants' motion on July 17, 2007.

On August 2, 2007, plaintiffs filed a motion for reconsideration pursuant to Rule 4:49-2 and also filed a motion for substitution of counsel. At that time, Desiderio and Seitel's law licenses had been suspended due to their indictments. As such, plaintiffs argued that it was reasonable to extend the time for filing their appeal. On November 5, 2007, we granted plaintiffs' motions and reinstated the appeal.

Footnote continued on next page.

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February 26, 2009