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Reply to: Oakland Office

October 4, 2018

Via E-courts filing and First Class Mail
Honorable Peter F. Bariso, Jr., A.J.S.C.
Superior Court of New Jersey
Hudson County Courthouse
595 Newark Avenue
Jersey City, New Jersey 07306

Re: Jacqueline Rosa v. Borough of Leonia, et al.
Docket No. HUD-L-00607-18

Dear Judge Bariso:

Our firm represents Defendant Borough of Leonia ("the Borough") in the above matter, along with Brian Chewcaskie, Esq., the Borough Attorney. Kindly accept this letter brief in lieu of a more formal brief as the Borough's opposition to the State of New Jersey Department of Transportation's ("the DOT") motion for leave to amend its complaint. The Borough opposes the DOT's motion on the grounds that the claims in the DOT's initial complaint have already been adjudicated by the Court, and because any claims based upon new Ordinances recently adopted by the Borough after summary judgment has been granted must be filed as a new complaint, which should be equitably and judicially barred due to the Borough's reliance upon the Court's prior decision to enact same.

First, the DOT's proposed amended complaint includes identical claims in the First through Fifth Counts that were already the subject of the Court's Order dated August 30, 2018 granting summary judgment to the DOT. This Order disposed of the DOT's separate consolidated Complaint in its entirety and essentially adjudicated all issues set forth by the DOT to challenge the Borough's Ordinances, 2017-19 and 2018-5. The DOT, however, did not move to reopen the Judgment pursuant to Rule 4:50-1, nor did it move to reconsider the Order on the grounds that there was any clear error in the Court's decision or matters which the Court overlooked.

In this respect, the law is clear that a complaint cannot be amended once summary judgment has been entered by the Court. In Stalina v. D. Constr. Corp., 2012 WL 3140233 (App. Div. 2012) (annexed hereto as Exhibit A), the Appellate Division ruled, "[l]ogically, one cannot amend a complaint that no longer exists. Consequently, a plaintiff may not obtain leave to amend under *Rule* 4:9–1 after summary judgment is entered, unless the judgment is vacated upon a motion for reconsideration under *Rule* 4:49–2, or a motion to set aside a judgment under *Rule* 4:50–1.". Stalina noted the existence of unequivocal federal authority for its holding. Id. at *4-5 (citations omitted); See also Jang v. Boston Scientific Scimed., Inc., 729 F. 3d 357, 367-68 (3d Cir. 2013) (holding that when a party seeks leave to amend a complaint after judgment has been entered, it must also move to set aside the judgment because the complaint

cannot be amended while the judgment stands); Ahmed v. Dragovich, 297 F. 3d 201, 207-08 (3d Cir. 2002) (ruling that although Rule 15 allows a court to permit amendments freely "when justice so requires," the liberality of the rule is no longer applicable once judgment has been entered). Thus, in light of the Court's prior judgment on the First through Fifth Counts, the DOT's motion to reassert those claims anew is legally untenable, and the motion for leave to amend must be denied as there is no motion to reconsider the grounds on which the Court had invalidated the Borough's Ordinances on August 30, 2018. Nor is a different result warranted as the result of the Borough's pending Motion for Reconsideration as the Borough's Motion does not does not challenge the substantive grounds for the Court's ruling, but rather only challenges the procedure and scope of the results of the ruling as to the previous Ordinances.

Second, as it pertains to the claims contained in Counts Six through Ten, the DOT acknowledges that these are claims based on new Ordinances that were adopted by the Borough after summary judgment was granted to the DOT. Additionally, the Borough has 30 days to submit the new Ordinances to the DOT for approval. Thus, these claims do not arise out of the same facts and circumstances as the invalidated Ordinances at issue in the prior Complaint, but rather presents a new claim. Pursuant to Court Rule 4:9-4, a court may permit a party to serve a supplemental pleading setting forth transactions or

occurrences which took place after the date of the pleading sought to be supplemented. However, as there is no motion to file a supplemental complaint before the Court, such leave cannot be granted. Furthermore, any motion to file a supplemental pleading suffers from the same defect as the DOT's motion to file an amended complaint, namely that the prior complaint has been disposed of on summary judgment and the DOT is no longer an active party to this matter so as to be entitled to supplement the Complaint with these new claims.

As a result of the above, the Borough recognizes that the DOT has the right to file a new complaint based upon the new Ordinances and to make any challenge that they wish to same. See Rule 4:69-6(a) (requiring that an action in lieu of prerogative writs be commenced not later than "45 days after the accrual of the right to review, hearing or relief claimed."). What the Borough objects to is the manner in which the DOT has chosen to make such a challenge to the newly-enacted Ordinances because it bypasses the approval procedure set forth in N.J.S.A. 39:4-8a, and instead improperly requests this Court to instead issue an advisory opinion that the Borough's actions are illegal…a ruling that the DOT acknowledges that the Court did not make when deciding the DOT's motion for summary judgment on the ordinances in existence at the time of the Court's decision. Nor is such relief one that the Legislature has authorized in Title 39 as appropriate grounds for disapproving an adopted traffic regulation of a municipality.

Moreover, equitable and/or judicial estoppel should apply to bar the DOT from attempting to challenge the new ordinances on the same grounds they raised in their motion for summary judgment because the Borough relied upon the Court's prior decision to enact said Ordinances. Although equitable estoppel is rarely invoked against a governmental agency, it is appropriate to be applied in circumstances that would not prejudice essential government functions and where injustice and wrong may result to one who with good reason and in good faith has relied upon such conduct. Sellers v. Board of Trustees of the Police and Firemen's Retirement System, 399 N.J. Super. 51, 58 (App. Div. 2005). Here, the Borough would be prejudiced from any challenge to the new Ordinances since they were enacted in reliance upon and in accordance with the Court's decision on August 30, 2018, which decision did not find that the Borough was not acting beyond its powers in the primary sense and void, but only that its actions were voidable in the secondary sense. See Id. For all of these reasons, the DOT's motion to amend the complaint with Counts Six through Ten based upon the very same challenges to the new Ordinances must be denied.

Based upon the foregoing, the Borough respectfully requests the Court to deny the DOT's motion for leave to file the amended complaint as presently included as an exhibit to its motion papers in its entirety.

Thank you for your kind consideration to this matter as well as to the Borough's Motion for Reconsideration, which, as Your Honor is aware, must be decided as the Ordinances existed at the time of the Court's decision on August 30, 2018.

Respectfully submitted,

Ruby Kumar-Thompson
RUBY KUMAR-THOMPSON, ESQ.

Enclosure (1)
RKT:cas
cc: Jacqueline Rosa, Esq. (via eCourts filing)
Phillip J. Espinoza, Esq. (via eCourts filing)
Brian Chewcaskie, Esq. (via eCourts filing)

EXHIBIT A

2012 WL 3140233
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Dashi SLATINA and Vjollca Slatina, Plaintiffs–Appellants,
v.
D. CONSTRUCTION CORP. and Armored, Inc., Defendants,
and
Newport Associates Development Company, Defendant–Respondent.

Submitted Jan. 19, 2012.
|
Decided Aug. 3, 2012.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L–1182–08.

Attorneys and Law Firms

Clark Law Firm, PC, attorneys for appellants (Gerald H. Clark, of counsel and on the brief).

Bivona & Cohen, P.C., attorneys for respondent (Kevin J. Donnelly, of counsel and on the brief).

Before Judges SAPP–PETERSON and OSTRER.

Opinion

PER CURIAM.

***1** Dashi Slatina suffered serious injuries when a masonry wall he was erecting toppled on him. He timely filed suit against Newport Associates Development Company (Newport), who he alleged was the owner and or general contractor. Over two years after the suit was filed, Newport obtained summary judgment dismissing the complaint with prejudice. Newport initially admitted in its answer to the complaint that it owned the property "at all relevant times" but in its summary judgment motion, Newport argued successfully it was not liable because it had sold the property the year before the accident to Shore Club North Urban Renewal Company, LLC (Shore North Urban), which hired Shore Club North Construction Company, LLC (Shore North Construction) to erect the building. Promptly after judgment, plaintiff moved to reinstate the complaint to enable him to amend it to add the actual owner and general contractor. Finding no basis to reconsider summary judgment under *Rule* 4:49–2, the court denied the motion to amend because the complaint remained dismissed.

Under the circumstances that we discuss below, we conclude justice demands that the judgment dismissing the complaint be vacated pursuant to *Rule* 4:50–1(f), for the purpose of enabling plaintiff to amend to add the actual owner and general contractor. We therefore reverse.

I.

This appeal requires us to consider the relationship of some of the business entities within what is known as the LeFrak Organization, [1] and to scrutinize the course of the litigation, and the manner in which it was disclosed that plaintiff brought suit against the wrong party as owner and general contractor.

It is undisputed that Slatina was injured on January 6, 2007, while working on a condominium construction project at One Shore Lane in Jersey City. He filed his complaint on March 3, 2008. In addition to naming his employer, D Construction Corp., he claimed negligence against Armored, Inc. (Armored), and Newport. He alleged Newport "owned, leased, maintained, managed, operated and/or controlled certain piece(s) of real property, located at 1 Shore Lane, Jersey City, New Jersey."

In its May 2008 answer, Newport denied that allegation "except admit[ed] that at all relevant times, the defendant NEWPORT ASSOCIATES DEVELOPMENT COMPANY, owned certain real property, located at 1 Shore Lane, Jersey City, New Jersey." In response to the allegation that "at all relevant times," both Newport and Armored "were under a duty to use care to properly maintain the premises in a safe and suitable condition and to inspect for any dangerous conditions on the premises[,]" Newport "denie[d] knowledge or information sufficient to form a

belief" as to the allegation. Although Newport included among its defenses that plaintiff had failed to join indispensable parties, counsel certified, pursuant to *Rule* 4:5–1(b)(2), "no other party should be joined."

In its responses to Uniform Interrogatories—Form C, *see Rule* 4:17–1(b), Appendix II, served in January 2009, Newport did not contradict its original admission that it was the owner. In response to interrogatory 3, which seeks additional information about a third-party action, Newport referred to its defenses and cross-claims in its answer to the complaint. Newport also denied negligence, but did not address ownership. In response to interrogatory 4, which requests the identity of persons with knowledge of relevant facts, Newport referred to, among others, all persons or entities named in the parties' discovery, but did not expressly name the property owner or construction firm.

***2** On the other hand, in its response to form interrogatory 13 requesting insurance information and copies of policies, Newport disclosed multiple insurance policies covering the project. Many policies with effective dates of May 2006 listed Shore North Urban and Shore North Construction as the only named insureds. However, a month after Slatina's injury, numerous endorsements were issued that added Newport as a named insured. In February 2007 endorsements, Shore North Urban was described as the sponsor, Shore North Construction was described as the general contractor, and Newport was included without further description.[2] The endorsements also added Shore Manager Corp. (Shore Manager), which was described as the corporate manager of Shore North Urban. In January 2008 endorsements, LeFrak Organization, Inc. was added as a named insured.

In D Construction's answers to Form C interrogatories, it included representatives of Newport among its list of persons with knowledge, but did not name Shore North Urban or Shore North Construction. The answers were certified by Carmen Rullo, vice-president.

Pursuant to a January 22, 2010 scheduling order, discovery was extended to May 15, 2010, depositions were to be completed by February 22, 2010, and liability expert reports were to be served by March 19, 2010 by plaintiff and April 23, 2010 by defendant.[3] Trial was scheduled for June 7, 2010.

At a deposition on January 6, 2010, Rullo stated that he understood that Newport was the general contractor of the construction project where Slatina was injured. But he could not articulate a basis for his statement. In the same deposition, Rullo also identified "Shore Club Construction" as the general contractor. Marked at the deposition was a purchase order from "Shore Club Construction Company" dated January 23, 2006 authorizing D Construction to supply labor, material and supervision in connection with installation of masonry blocks, however, it referenced work at the Shore Club South tower, not Shore Club North.

Also deposed January 6, 2010 was Sheila Mason, who initially stated she was employed as a construction superintendent for Newport, which had employed her for over twenty-three years. However, defense counsel interjected questions, eliciting a clarification that "[e]very building has another company. And I worked for that building when I'm doing a building." She then stated she worked for "Shore South Construction" in January 2007, which she then restated as "Shore Club Construction Company." She explained that two buildings were under development, known as Shore South and Shore North (which was where Slatina was injured). Although she later worked for Shore North Construction, she was not employed there when the accident occurred, but she responded to the accident scene when called.

She described Newport as the "main office" as distinct from one of the general contractors, but she generally professed ignorance regarding whether Newport had an ownership interest in the construction firms. She confirmed that she sent payroll and timesheets to Newport. While she worked as a superintendent for building-specific construction companies, she personally received paychecks from a different entity whose name included the word "Newport" but was not "Newport Associates Development Company."

***3** In responses to supplemental interrogatories certified on February 25, 2010 by Paul Bozzo, who described himself as "Associate Counsel with the LeFrak Organization," Newport provided detailed charts of the ownership structure of Newport, Shore North Urban and Shore North Construction. Newport denied it was a general contractor, denied its employees were engaged in the construction project, and denied it entered into a

contract for the construction of the building at One Shore Lane.

At a subsequent deposition on March 5, 2010, Bozzo expressly stated that Newport did not own One Shore Lane; Shore North Urban did. He explained that the "LeFrak Organization" is not itself a "legal entity" but refers to various business entities that are owned and operated by the LeFrak family. Although he rejected characterizing Newport as a LeFrak Organization entity, he stated that a LeFrak entity owned 50.425 percent of Newport.[4] Newport transferred One Shore Lane to Shore North Urban for reported consideration of over $4 million, as evidenced by a deed dated March 13, 2006 and marked as an exhibit. The business entities owning Newport and Shore North Urban were not the same, but he stated Richard LeFrak was the ultimate owner of Shore North Urban, as well as Shore North Construction.[5] Shore North Urban entered into a general construction contract with Shore North Construction dated March 1, 2006, which was marked at the deposition. Vice Presidents of Shore Club Manager Corp. (Shore Manager) executed the contract for each of the two parties. Bozzo explained that Shore Manager served as the corporate manager for each of the two limited liability companies.

On April 7, 2010, Newport filed its motion for summary judgment. Newport relied on Bozzo's testimony, the deed transferring the property from Newport to Shore North Urban, and the construction contract between Shore North Urban and Shore North Construction. Newport argued the complaint should be dismissed "because the facts of this case demonstrate that Newport Associates Development Company did not own the property at the time of plaintiff's accident, and was not the general contractor at the site."

On May 7, 2010, Slatina's attorney filed an ex parte motion seeking to be relieved as counsel and seeking adjournment of the motion for summary judgment to enable Slatina to retain new counsel.[6] A week later, he nonetheless filed opposition to the motion for summary judgment consisting of "an attorney certification in opposition," in which he argued there were disputed issues of fact regarding Newport's supervisory role, citing statements in the Mason and Rullo deposition. Counsel for Newport responded with an "attorney's certification of counsel in reply to plaintiffs' opposition," emphasizing Bozzo's testimony, and highlighting that neither Mason nor Rullo, as they conceded in their testimony, were personally knowledgeable about the relationships among the involved business entities.[7]

*4 The court granted Newport's motion by order entered May 14, 2010.[8] Two weeks later, the presiding judge granted plaintiffs' counsel's application to be relieved after reviewing two certifications in camera, although noting on his order the case was closed.

On June 3, 2010, Slatina's present counsel filed his motion to reinstate the complaint, and for leave to file an amended complaint. The proposed amended complaint named Shore North Urban and Shore North Construction, Shore Manager Corp., LeFrak Organization, Inc., and various other entities as well as various fictitiously named parties. Although not formally styled as a motion for reconsideration under *Rule* 4:49–2, the court agreed to consider it as such.

The court determined that absent a pre-existing complaint, a plaintiff has nothing to amend and a motion to amend must be denied, citing *Falco v. Community Medical Center,* 296 *N.J.Super.* 298 (App.Div.1997). The court also concluded the only way to restore the complaint would be upon a reconsideration, or if judgment were vacated after an appeal. Applying those principles, the court held there was no basis to reconsider the grant of summary judgment as the court did not overlook any facts or law pertaining to the merits of the decision as to Newport, citing *D'Atria v. D'Atria,* 242 *N.J.Super.* 392 (Ch. Div.1990). Consequently, the court denied the motion for leave to amend, as judgment has already been correctly entered.

Plaintiff appeals and presents the following points for our consideration:

I. IN THE INTEREST OF JUSTICE PLAINTIFFS SHOULD HAVE BEEN FREELY GRANTED LEAVE TO FILE A FIRST AMENDED COMPLAINT TO CORRECT THE MISIDENTIFICATION OF PARTIES PURSUANT TO RULES 4:9–1; 4:9–3.

A. The Amended Complaint Should Have Been Deemed to Relate Back to the Original Complaint.

B. Newport's Failure to Disclose the Apparent Misidentification Issue in its Answer Violated Rule 4:5–1(b)(2).

C. Defendant's Arguments Should Have Been Rejected.

II. THE CLAIMS AGAINST NEWPORT SHOULD ALSO HAVE BEEN REINSTATED, AT LEAST UNTIL THE CONCLUSION OF DISCOVERY.

II.

Logically, one cannot amend a complaint that no longer exists. Consequently, a plaintiff may not obtain leave to amend under *Rule* 4:9–1 after summary judgment is entered, unless the judgment is vacated upon a motion for reconsideration under *Rule* 4:49–2, or a motion to set aside a judgment under *Rule* 4:50–1. We are unaware of a reported New Jersey decision expressly stating that principle. *Cf. Falco, supra,* 296 *N.J.Super.* at 325–26 (court properly denied plaintiff's motion for leave to amend following grant of summary judgment on all counts where plaintiff did not allege essential facts to support cause of action). However, we are guided by the broad agreement of federal courts, in applying analogous Federal Rules of Civil Procedure, that "[o]nce a final judgment has been entered, the district court lacks power to rule on a motion to amend unless the party seeking leave first obtains relief under *Rule* 59(e) or 60." 3–15 James W. Moore et al., Moore's Federal Practice—Civil ¶ 1513[2] (3d ed.1997) (citing cases). *See also* 6 Charles Alan Wright, et al., *Federal Practice & Procedure,* § 1489 (2010) (same and citing cases). *Fed.R.Civ.P.* 59(e) and *Fed.R.Civ.P.* 60 are analogous to our *Rule* 4:49–2 and *Rule* 4:50–1. We have deemed federal courts' interpretation of analogous federal rules persuasive authority. *See Baumann v. Marinaro,* 95 *N.J.* 380, 390–91 (1984) (relying on federal court interpretation of *Fed.R.Civ.P.* 59(e), in interpreting *Rule* 4:49–2); *Saldana v. City of Camden,* 252 *N.J.Super.* 188, 194 n. 1 (App.Div.1991).

***5** A court in its discretion may construe a motion to amend after entry of judgment as incorporating a motion to reconsider or set aside a judgment. *Camp v. Gregory,* 67 *F.*3d 1286, 1290 (7th Cir.1995) ("absent a showing of prejudice to the defendants, we believe that the district court retains the discretion to treat a *Rule* 15(a) motion [to amend] as one also made under *Rules* 59 or 60"). On the other hand, explicit reference to the court rule, and in the case of the *Rule* 4:50–1, the specific subsection, would assist the court and the opposing party in evaluating the motion.

The liberality with which our courts treat motions to amend, *see, e.g., Kernan v. One Washington Park Urban Renewal Assoc.,* 154 *N.J.* 437, 456 (1998), would not apply equally to such motions post-judgment, because of the countervailing policy favoring finality of judgments. *See Combs v. PriceWaterhouse Coopers, L.L.P.,* 382 *F.*3d 1196, 1205–06 (10th Cir.2004). *See also Federal Practice & Procedure, supra,* § 1489. Unexcused delay in seeking the amendment until after judgment is a ground to deny leave. *Diersen v. Chicago Car Exch.,* 110 *F.*3d 481, 489 (7th Cir.1997); *Federal Practice & Procedure, supra,* § 1489, n. 17 (unreasonable delay is grounds for denial). On the other hand, the court should also further the policy favoring the determination of cases on the merits. *United States ex rel. Roop v. Hypoguard U.S., Inc.,* 559 *F.*3d 818, 824 (8th Cir.2009). *See also Lawlor v. Cloverleaf Memorial Park Assoc.,* 56 *N.J.* 326, 340–41 (1970) ("courts should be liberal in allowing amendments to save actions if possible, from the bar of Statute of Limitations and should disregard technical objections in the effort to determine the real issues on their merits and do substantial justice between litigants") (quotation and citation omitted). *Cf. also Crispin v.. Volkswagenwerk, A.G.,* 96 *N.J.* 336, 338 (1984) (referring to the "paramount policies of our law" to afford a party "an opportunity to have the claim adjudicated on the merits").

We are mindful that we review a motion for leave to amend under an abuse of discretion standard. *Notte v. Merch. Mut. Ins. Co.,* 185 *N.J.* 490, 501 (2006). The same standard of review applies to a court's decision to deny a motion for reconsideration under *Rule* 4:49–2. *Cummings v. Bahr,* 295 *N.J.Super.* 374, 389 (App.Div.1996) (abuse of discretion standard applied). The trial court correctly concluded that Slatina could not amend his complaint without first setting aside the judgment and restoring the complaint. The trial court also correctly applied the well-established standard for determination of a motion for reconsideration. *D'Atria, supra,* 242 *N.J.Super.* at 401 (stating that reconsideration should be utilized where (1) the court has based its decision "upon a palpably incorrect or irrational basis;" (2) it is obvious the court "did not consider, or failed to appreciate the significance of probative, competent evidence[;]" or alternatively, the

party presents "new or additional information ... which it could not have provided on the first application"). *See also Cummings, supra,* 295 *N.J.Super.* at 384–85. In so doing, the court reached the unassailable conclusion that it had not erred in granting Newport dismissal with prejudice because it had not erred as a matter of law, nor had it overlooked evidence previously presented.

***6** However, we conclude the trial court has broader discretion than it exercised, to consider whether, in the interests of justice, it was appropriate to restore the complaint, for the purpose of enabling plaintiff to add additional parties. Under the circumstances, plaintiff was entitled to relief from the judgment pursuant to *Rule* 4:50–1(f), which empowers a court to relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment or order."

The court has broad discretion to grant relief under subsection (f) to address exceptional circumstances. *Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n,* 74 *N.J.* 113, 122 (1977); *Court Inv. Co. v. Perillo,* 48 *N.J.* 334, 341 (1966) (the boundaries of subsection (f) "are as expansive as the need to achieve equity and justice"). In *Baxt v. Liloia,* 155 *N.J.* 190, 210–11 (1998), the Court allowed plaintiff, in an action against a bank's attorney for professional misconduct, to reopen under *Rule* 4:50–1(f) the underlying action by the bank against the plaintiff, which had been dismissed after settlement, for the limited purpose of seeking fees against the bank's attorney.

We conclude comparable relief is warranted here. The judgment should be reopened not for the purpose of relitigating plaintiff's claim against Newport, but to provide a vehicle for the amendment. The record is insufficient to enable us to determine whether plaintiff has met any of the specific grounds for relief under *Rule* 4:50–1(a)–(e). In view of Newport's initial admission of ownership in its answer to the complaint, and its omission of any reference to the actual owner and general contractor in its interrogatory responses, we conceivably might deem it excusable that plaintiff failed to move to amend until Newport disclosed the deed and construction contract in 2010. *Cf. R.* 4:50–1(a) (allowing relief from a final judgment because of "surprise, or excusable neglect"). However, the record does not reflect why plaintiff did not move to amend thereafter, although concededly the time period was relatively brief before Newport itself moved for summary judgment. We are unaware of why Slatina's original lawyer sought to be relieved, and whether those reasons were related in anyway to the failure to move to amend before judgment was entered. The record is also insufficient to address whether the initial admission of ownership, and subsequent denial, satisfies *Rule* 4:50–1(c), which authorizes relief from a judgment on the basis of "fraud ... misrepresentation, or other misconduct of an adverse party."

Nonetheless, denial of relief would work an injustice that we cannot ignore, and which *Rule* 4:50–1(f) empowers the court to address. Slatina timely brought suit against Newport, apparently believing it to be the owner and or general contractor. Newport initially admitted it owned the property where Slatina was injured. Its interrogatory answers, and its counsel's *R.* 4:5–1(b)(2) certification did not expressly deny ownership, nor identify the actual owner and general contractor, which are ultimately linked by common ownership. While the insurance policies named Shore North Urban and Shore North Construction, they also included Newport as a named insured, albeit pursuant to post-accident endorsements. Denial of relief would enable Shore North Urban and Shore North Construction to avoid responding on the merits to a lawsuit, largely as a result of the delayed disclosure by Newport, a related entity. The catch-all rule should be used here to further the policy of promoting decisions on the merits. *See Davis v. DND/ Fidoreo, Inc.,* 317 *N.J.Super.* 92, 100–01 (App.Div.1998) ("*R.* 4:50–1(f) calls for the exercise of sound discretion, 'guided by equitable principles, and in conformity with the prescription that any doubt should be resolved in favor of the application to set aside the judgment to the end of securing a trial upon the merits.' ") (quoting *Goldfarb v. Roeger,* 54 *N.J.Super.* 85, 92 (App.Div.1959) (additional internal quotation and citation omitted). Newport would also suffer no prejudice, as the complaint would be restored solely for the purpose of allowing the amendment, and not to subject Newport anew to potential liability.

***7** Also, favoring relief is the promptness with which plaintiff, through new counsel, acted in seeking restoration of the complaint after judgment was entered. *Reg'l Constr. Corp. v. Ray,* 364 *N .J.Super.* 534, 541 (App.Div.2003) (affirming finding of excusable neglect "when examined against the very short time period between the entry of default judgment and the motion

to vacate"); *Jameson v. Great Atl. & Pac. Tea Co.,* 363 *N.J.Super.* 419, 428 (App.Div.2003) (noting the "speed and diligence with which A & P moved to attempt to vacate the default judgment"), *certif. denied,* 179 *N.J.* 309 (2004); *Morales v. Santiago,* 217 *N.J.Super.* 496, 504–05 (App.Div.1987) (reversing denial of motion to vacate because, among other factors, "[s]ellers moved to vacate the judgment soon after it was entered").

Finally, we do not address the issue whether the amended complaint, once filed and served, will relate back to the date of the original pleading. *See R.* 4:9–3. Notwithstanding the significant relevant evidence in the record on that issue, the newly-named defendants should have an opportunity to be heard on whether "they received such notice" of the action that they would not be prejudiced in maintaining a defense, and whether they "knew or should have known that, but for a mistake concerning the identity of the property party," the action would have been brought against them.

Reversed. We do not retain jurisdiction.

All Citations

Not Reported in A.3d, 2012 WL 3140233

Footnotes

1 Paul Bozzo described the LeFrak Organization as the informal appellation of various formal business entities controlled by Richard LeFrak.

2 Apparently, at some point before February 2007, Shore Club North Construction Company, LLC was renamed Shore North Construction Company, LLC, and Shore Club North Urban Renewal Company, LLC was renamed Shore North Urban Renewal Company, LLC.

3 Apparently, plaintiff did not timely serve a liability expert's report.

4 According to the chart marked at the deposition, Simon Newport Limited was a 49.425 percent partner; EGLIMC, LLC was a one percent partner; and LF Newport Jersey Limited Partnership was a 49.575 percent partner, whose ninety-nine percent partner was LF Delaware NJ Limited Partnership, which Bozzo described as a Richard S. LeFrak entity. Nonetheless, Bozzo testified, "[T]he LeFrak entity owns 50 .425 percent" of Newport. "[T]hat chain [of ownership ultimately leading to Richard S. LeFrak] ... would own 99 percent of LF Newport Jersey Limited Partnership, which in turn owns 50.425 of Newport Associates Development Company."

5 Shore North Urban's ninety-nine percent member was Shore Equity LLC, whose ninety-nine percent member was S–R Capital Realty Associates, LLC, whose ninety-nine percent member was Stone Capital Realty LLC, whose three thirty-three percent members were RSL 2005 Family Trust, Harrison LeFrak GST Trust, and James LeFrak GST Trust. Shore North Construction's ninety-nine percent member was RL Capital Realty Assoc., LLC, whose ninety-nine percent member was Richard S. LeFrak. The one percent member was Shore Manager Corp., which was one hundred percent owned by RL Corporate Holdings, LLC, whose hundred percent member was Richard S. LeFrak.

6 The motion is not included in the record.

7 We note that argument is appropriately included in a brief, not a certification of counsel. *See* Pressler & Verniero, *Current N.J. Court Rules,* comment on *R.* 1:6–5 (2012) ("The function of briefs is the written presentation of legal argument based on facts already of record.").

8 It is undisputed that Newport was the sole remaining defendant. The record does not include the order dismissing Armored, Inc. D Construction had obtained summary judgment dismissing the claims against it by order entered March 19, 2010.

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