

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2050-14T2

TIMOTHY PEEK and
MARGARET DENNISON,

Plaintiffs-Appellants.

v.

ERROU LUO,

Defendant-Respondent.

Argued February 22, 2016 – Decided September 1, 2016

Before Judges Messano, Simonelli, and
Summers.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-
4394-13.

Jason Rindosh argued the cause for
appellants (Bedi Rindosh and Greenberg &
Young, P.C., attorneys; Mr. Rindosh, on the
brief).

Christian Merlino argued the cause for
respondent (Weiner Lesniak LLP, attorneys;
Mr. Merlino, on the brief).

PER CURIAM

Plaintiff Timothy Peek appeals from the Law Division's
order granting summary judgment to defendant Errou Luo on the
basis that plaintiff's claim for personal injuries did not
satisfy N.J.S.A. 39:6A-8(a) requirements for non-economic

losses.¹ Having considered the parties' arguments in light of the record and applicable legal standards, we affirm.

I.

On June 16, 2012, plaintiff was riding his bicycle when he was involved in a collision with a motor vehicle operated by defendant. Plaintiff subsequently filed suit against defendant alleging that he suffered permanent injuries from the accident.

Following discovery, defendant filed a motion for summary judgment contending plaintiff did not satisfy the verbal threshold requirements of N.J.S.A. 39:6A-8(a) by demonstrating he had a permanent injury due to the accident. After argument, the motion court issued an oral decision granting the motion on the ground that plaintiff did not provide an expert report certifying that he sustained a permanent injury. The court rejected plaintiff's contention that he had objective evidence of a permanent injury based upon an affidavit by his treating physician Dr. Jeffrey Rosenberg. The affidavit provided that plaintiff's permanent injury consisted of a callous scarring of his lung caused by multiple rib fractures, and decreased lung function. Rosenberg's opinion was based upon his treatment and

¹ Plaintiff's wife, Margaret Dennison, who filed a per quod claim, also appeals. Since her claim is wholly derivative of her husband's, we therefore use the singular "plaintiff" throughout the balance of this opinion.

observation of plaintiff, plaintiff's medical records, and review of CT scans and X-ray images of plaintiff's chest. The court reasoned that the CT scans made "absolutely no mention of any callous or scarring," and "no objective evidence of such scarring or callous" was presented, consequently there is no "permanent injury upon which the plaintiff can [satisfy] . . . the [verbal] threshold." The court also explained that the affidavit did not identify any loss of lung function, nor did it show any cause for decreased lung function.

Plaintiff subsequently filed a motion for reconsideration or to vacate the summary judgment order. In support, plaintiff submitted an affidavit by Dr. Roger A. Berg, who reviewed the same records and imagery as Rosenberg, and opined that plaintiff suffered a permanent injury of displaced fractures of four ribs. During argument, plaintiff's counsel also requested the court consider that this was his first New Jersey verbal threshold case, and urged in the interests of justice that the court reinstate plaintiff's complaint.

The court denied the motion. In an oral decision, the judge rejected consideration of a "brand new expert report" that asserted an entirely new claim of displaced fractures. The judge reasoned that "[i]t is not a standard for reconsideration or vacating an [o]rder [where] a party had evidence all

along[,]" that would have been sufficient to meet the verbal threshold requirements. This appeal followed.

II.

Before us, plaintiff contends that the motion court erred in dismissing his claim on summary judgment because he satisfied the verbal threshold requirements of N.J.S.A. 39:6A-8(a) through Rosenberg's affidavit. Plaintiff argues that after the summary judgment motion was granted, his counsel had discovered that under Villanueva v. Lesack, 366 N.J. Super. 564, 569 (2004), displaced fractures are considered self-defining injuries and therefore no showing of permanency is required for recovery of non-economic damages.

Plaintiff also argues that the court abused its discretion in denying his motion to reconsider or vacate the summary judgment order because his counsel's admitted mistake in not submitting an expert report establishing a permanent injury until after summary judgment was granted amounts to exceptional circumstances under Rule 4:50-1. Plaintiff relies upon Jansson v. Fairleigh Dickinson University, 198 N.J. Super. 190 (App. Div. 1985), Parker v. Marcus, 281 N.J. Super. 589 (App. Div. 1995), certif. denied, 143 N.J. 324 (1996), and Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90 (App. Div. 2014), to support the contention that he is blameless and that his

attorney's mistake warrants vacating the summary judgment order. We are unpersuaded by plaintiff's arguments.

Initially, we must reject defendant's contention that plaintiff's appeal of the summary judgment order is untimely because it was not filed within forty-five days of the order. As noted, following entry of the order, plaintiff filed a motion to vacate or reconsider the order. In accordance with Rule 2:4-3(e), a timely motion for reconsideration tolls the running of the time to appeal until entry of the order disposing the reconsideration motion. Accordingly, we will address the merits of plaintiff's challenge to the summary judgment order.

Appellate review of a ruling on a motion for summary judgment is de novo, applying the same standard governing the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). Thus, we consider, as the motion judge did, "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 406. If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013). We review

issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

In order to vault the verbal threshold, a physician must certify that, "the automobile accident victim suffered from a statutorily enumerated injury." Davidson v. Slater, 189 N.J. 166, 181 (2007) (citing N.J.S.A. 39:6A-8(a)). Relevant to our inquiry, such injuries include, "displaced fractures" and "a permanent injury within a reasonable degree of medical certainty." N.J.S.A. 39:6A-8(a). The permanency opinion must be based on "objective clinical evidence," ibid., a standard that is the equivalent of the "'credible, objective medical evidence'" standard described in Oswin v. Shaw, 129 N.J. 290, 314 (1992). DiProspero v. Penn, 183 N.J. 477, 495 (2005) (quoting Oswin, supra, 129 N.J. at 314).

We agree with the motion court's determination that plaintiff failed to satisfy the verbal threshold. Plaintiff did not provide a physician's opinion that his injuries were permanent based upon the use of objective, credible medical evidence. Rosenberg's affidavit contended there was callous scarring on plaintiff's lungs caused by multiple rib fractures. However, there was no objective evidence of such in the CT scans or other object diagnostic test. There was also no assertion

that the fractures were displaced in a manner that would overcome the verbal threshold.

Next, we address the denial of plaintiff's motion to vacate or reconsider the summary judgment order. Rule 4:50-1(a)-(e) authorizes a court to relieve a party from a final judgment or order for reasons such as: mistake or inadvertence; certain newly discovered evidence; fraud; the judgment or order is void; or the judgment or order has been satisfied. Subsection (f) of Rule 4:50-1 provides a catch-all provision that authorizes a court to relieve a party from a judgment or order for "any other reason justifying relief from the operation of the judgment or order." The essence of subsection (f) is to achieve equity and justice in exceptional situations that cannot be easily categorized. DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 269-70 (2009) (citing Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)).

We review a court's determination of a Rule 4:50-1 motion under an abuse of discretion standard. U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). There is "an abuse of discretion when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Ibid. (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

As for a trial court's denial of a motion for reconsideration, we have determined that

[r]econsideration itself is a matter within the sound discretion of the [c]ourt, to be exercised in the interest of justice[.] It is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion, but should be utilized only for those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence.

[Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (citation omitted).]

Therefore, we will not disturb a judge's denial of a motion for reconsideration absent an abuse of discretion. Id. at 289.

Applying these standards, we conclude that the judge did not mistakenly exercise her discretion to deny reconsideration or vacation of the summary judgment order dismissing plaintiff's complaint. The judge's initial decision was correct because, based on the record at that time, plaintiff did not provide objective, credible medical evidence proving a permanent injury. In his reconsideration request, plaintiff did not submit any new evidence that was not available when he opposed summary judgment. Plaintiff essentially seeks "a second bite of the apple" due to his attorney's error. Plaintiff submitted a

different physician's certification to establish a qualifying injury in order to address the deficiency that caused his complaint to be dismissed. Under these circumstances, we cannot conclude the judge abused her discretion.

Plaintiff's reliance upon Jansson, Parker, and Ridge at Back Brook, LLC is misplaced. Those matters all involve situations where an attorney or a pro se litigant failed to adhere to a court procedural rule, and we found exceptional circumstances under Rule 4:50-1(f) to vacate a dismissal of a complaint or claim. In Jansson, we identified four factors² to consider whether a dismissal based upon an attorney's failure to provide timely interrogatory answers should be vacated. Jansson, supra, 198 N.J. Super. at 193-97. In Parker, we reversed the trial court's ruling and vacated dismissal of a lawsuit due to an attorney's failure to appear at an arbitration hearing and tell the plaintiff about the dismissal. Parker, supra, 281 N.J. Super. at 591. And, in Ridge at Back Brook, LLC, we vacated a summary judgment order and remanded the matter for the trial court to apply the Jansson factors in consideration of a defendant's motion to vacate dismissal of his


² "(1) the extent of the delay [between dismissal of case and motion to reopen], (2) the underlying reason or cause, (3) the fault or blamelessness of the litigant, and (4) the prejudice that would accrue to the other party." Jansson, supra, 198 N.J. Super. at 195.

claim that was due to his failure to understand discovery rules prior to entry of judgment. Ridge at Back Brook, LLC, supra, 437 N.J. Super. at 95, 101.

In this case, plaintiff's complaint was dismissed for substantive reasons – he did not show that he had a permanent injury based upon credible, objective evidence. Plaintiff relies upon cases where dismissal was due to counsel or a pro se litigant failing to adhere to a court rule. The motion court denied relief from the dismissal because plaintiff presented an entirely different theory, or basis, to vault the verbal threshold. After summary judgment was granted dismissing plaintiff's complaint, he cannot revive his action by making a new argument with the same facts to satisfy the deficiency identified in the previous ruling. This is not an exceptional circumstance pursuant to Rule 4:50-1(f) that warrants relief from summary judgment.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION