NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1883-06T3

BASHAR SABBAGH,

Plaintiff-Appellant,

v.

FITCHBURG MUTUAL
INSURANCE COMPANY,

Defendant-Respondent.

Submitted July 31, 2007 - Filed Auqust 9, 2007

Before Judges Gilroy and Lihotz.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5622-05.

Bashar Sabbagh, appellant pro se.

Methfessel & Werbel, attorneys for respondent (Stephen R. Katzman, of counsel; Mr. Katzman and Benjamin R. Messing, on the brief).

PER CURIAM

This matter concerns first-party fire insurance claims under a homeowner's insurance policy issued to plaintiff Bashar Sabbagh by defendant Fitchburg Mutual Insurance Company. Plaintiff appeals from the November 17, 2006, order of the Law Division that denied his motion to reinstate the complaint and

granted defendant's motion to dismiss the complaint with prejudice. We affirm.

Plaintiff was the owner of a single-family dwelling located at 670 Shawnee Drive, Franklin Lakes, that was insured for fire loss by defendant. Coverages and limits of liability under the policy included: 1) $490,000 for loss of the primary residential dwelling; $49,000 for loss of other structures; $343,000 for personal property; and $245,000 for loss of use of the residential dwelling. All losses were subject to a $500 deductible. Policy Endorsement FMRC-13 07 92, which pertained to settlement of losses to buildings, including the residential dwelling, provided in pertinent part, as follows:

> **2.** If you comply with the provisions of this endorsement and there is a loss to a building insured under **COVERAGE A, SECTION I - CONDITION 3. LOSS SETTLEMENT** paragraph **b.** is deleted and replaced by paragraph **b., c., d.** and **e.** as follows:
>
> **b.** Buildings under COVERAGE A or B at replacement cost without deduction for depreciation. We will pay no more than the smallest of the following, amounts for equivalent construction:
>
> (1) the replacement cost of the building or any parts of it;
>
> (2) the amount actually and necessarily spent to repair or replace the building or any parts of it;

(3) the applicable limit of liability whether increased or not, adjusted in accordance with paragraph 1. above.

c. We will pay no more than the actual cash value of the damage until actual repair or replacement is completed.

d. You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis and then make claim within 180 days after loss for any additional liability on a replacement cost basis.

e. In order for us to pay the replacement cost, the damaged building must be repaired or replaced by you on the "residence premises" or some other location within a reasonable time but not more than two years from the date of loss.

On January 28, 2004, plaintiff's home was destroyed by fire. Following plaintiff's claim for loss of the residential dwelling, defendant made payment based on an actual cash value basis. Defendant's construction contractor determined the replacement cost of the dwelling at $500,122.50. Under defense counsel's letter of September 30, 2004, defendant tendered a check in the amount of $343,985.75, representing the replacement cost, less a holdback of $155,636.75 ($8,000 for architectural fees not yet incurred and a 30% depreciation factor of

$147,636.75) and the deductible of $500. The letter of September 30, 2004, advised plaintiff that pursuant to designated sections of the insurance policy that plaintiff could recover part or all of the holdback, provided plaintiff complied with the claim provisions contained in endorsement of FMRC-13 07 92.

On August 4, 2005, plaintiff filed a complaint for the holdback, loss of personal property and loss of use of the dwelling, asserting that "[a]ll conditions precedent to accrual of liability have been performed or have occurred." On September 9, 2005, defendant served plaintiff with interrogatories and a demand for production of documents pertaining to all three claims. On December 6, 2005, defendant filed a motion to dismiss the complaint because plaintiff failed to provide answers to the interrogatories and to respond to the demand for documents. On December 29, 2005, plaintiff served uncertified answers to interrogatories, but did not respond to the demand for documents. The answers to interrogatories asserted a claim for loss of personal property in the amount of $4,000. However, the claim was not supported by documentation, nor did the answers to interrogatories assert a claim for loss of use. On January 6, 2006, an order was entered directing plaintiff to serve certified responses to the interrogatories and demand for documents within thirty days. Because plaintiff

failed to comply, defendant filed a motion on February 14, 2006, seeking to enforce the order compelling discovery. Plaintiff cross-moved for a protective order. On April 7, 2006, a consent order was entered directing plaintiff to provide more specific answers to twenty-five designated interrogatories by March 31, 2006.

On April 24, 2006, the court conducted a settlement/pre-trial conference in anticipation of a May 3, 2006, trial date. Because plaintiff had not provided any proofs that he was entitled to the holdback or that repairs or reconstruction of the dwelling had commenced, the court administratively dismissed the action on that day.[1] On June 9, 2006, an order was entered reinstating the complaint, fixing a new case management conference date of July 12, 2006, and directing plaintiff to serve defendant by the new case management date with the "cost for reconstruction," providing that if the discovery was not served by that case management conference date, the complaint would be dismissed.

On June 15, 2006, plaintiff amended his answers to interrogatories by including an architectural management agreement to rebuild the residential dwelling, dated January 23, 2006, but not signed until April 21, 2006. On July 12, 2006, an

[1] A copy of the April 24, 2006, order of dismissal was not included in the appeal appendix.

order was entered relieving plaintiff's counsel of record and dismissing the complaint for failure to provide discovery, as directed under the order of June 9, 2006. On July 24, 2006, an amended order was entered dismissing the complaint without prejudice for plaintiff's failure to comply with the order of July 12, 2006, and directing that plaintiff "shall supply proofs of the actual cost of reconstruction of his fire damaged home by October 12, 2006[,] or the [c]omplaint will be dismissed with prejudice."

On or about October 4, 2006, plaintiff, pro se, filed a motion to reinstate the complaint asserting that he had complied with the order of July 24, 2006, submitting another copy of the same architectural management agreement previously provided to the court on June 15, 2006. Defendant opposed and cross-moved to dismiss with prejudice for failure to comply with the July 24, 2006, order.

On the day prior to the return date of the cross-motions, plaintiff submitted copies of miscellaneous receipts and the fronts of machine-copied checks, without proofs that the checks had been cashed. Plaintiff also submitted a third copy of the architectural management contract that contained an amendment dated October 18, 2006, together with an invoice of the same date that stated:

> Due for Construction Management services to be rendered for the construction of your residence to be located at 670 Shawnee Drive, Franklin Lakes, New Jersey, per our proposal dated January 23, 2006, for a period of fifteen (15) months beginning October 18, 2006 . . . 15 months @ $10,000 per month [$150,000].

Although plaintiff asserted a claim for loss of use and loss of personal property, no documents were supplied to the court in support of those claims. On October 20, 2006, the motion judge advised plaintiff that he was not going to reinstate the complaint and would provide plaintiff with a written opinion in support of his decision. On November 17, 2006, the judge rendered a written opinion denying plaintiff's motion and granting defendant's motion dismissing the complaint with prejudice pursuant to Rule 4:23-5(a)(2).

On appeal, plaintiff argues: "The court[']s decision to dismiss the plaintiff[']s complaint, with prejudice, was arbitrary and unreasonable and therefore should be reversed and the case should be remanded to the trial court for a full plenary hearing." Plaintiff contends that he complied with the court's order of July 24, 2006, by providing the cost of reconstruction of his dwelling "by submitting documents from Bleeker Architectural Group, LLC." Plaintiff asserts that the trial court erroneously dismissed his claims for loss of personal property and loss of use of the dwelling.

Trial courts have the "inherent discretionary power to impose sanctions for failure [of a party] to make discovery." Aetna v. Imet Mason Contractors, 309 N.J. Super. 358, 365 (App. Div. 1998). Appellate courts utilize the abuse of discretion standard when reviewing a trial court's decision dismissing a complaint with prejudice for failure to comply with discovery orders. Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 517 (1995); Kolczycki v. City of East Orange, 317 N.J. Super. 505, 512 (App. Div. 1999). Accordingly, appellate courts will not interfere with the trial court's decision "unless an injustice appears to have been done." Abtrax Pharmaceuticals, supra, 139 N.J. at 517. Simply stated, discovery sanctions will not be disturbed on appeal provided they are just and reasonable under the facts of the case. Grubbs v. Knoll, 376 N.J. Super. 420, 435 (App. Div. 2005).

The trial judge properly dismissed the complaint with prejudice. R. 4:23-5(a)(2). Rule 4:23-5(a)(1) permits a party aggrieved by an adversary's failure to comply with a demand for answers to interrogatories or demands for documents, as well as demands for medical examinations, to move for "an order dismissing or suppressing the pleading of the delinquent party," which "[u]nless good cause for other relief is shown," shall be granted by "an order of dismissal or suppression without prejudice." Rule 4:23-5(a)(2) provides, in pertinent part, that

where "an order of dismissal . . . without prejudice has been entered pursuant to Paragraph (a)(1) of this rule and not thereafter vacated, the party entitled to discovery may, after the expiration of ninety days from the date of the order, move . . . for an order of dismissal . . . with prejudice."

We are satisfied that the trial judge's decision to dismiss the complaint with prejudice was fair and reasonable because of plaintiff's numerous violations of the discovery orders, including the order of July 24, 2006, which had placed plaintiff on notice that he would suffer the ultimate sanction of dismissal if he continued to violate the orders compelling discovery. The trial court had entered orders compelling discovery on January 6, 2006, April 7, 2006, June 9, 2006, resulting in the order of July 24, 2006. Plaintiff failed to comply with the orders compelling answers to interrogatories and production of documents. There is simply no basis for plaintiff to argue that the trial court abused his discretion in dismissing the complaint with prejudice in light of plaintiff's repeated failure to abide by reasonable and just court orders.

Plaintiff argues that his last-minute attempt to comply with the July 24, 2006, order by providing a copy of the architectural management agreement, with the architect's invoice, dated two days' prior to the return date of the motion,

indicating that the architectural firm would charge for future services at $10,000 per month, fulfilled his discovery obligations. We disagree. The fact that an architect may provide services post October 18, 2006, is not proof of funds expended in the reconstruction of plaintiff's home within two years from the date of the loss.[2]

Plaintiff asserts that even if the court properly dismissed his claim for the depreciation holdback, the court should not have dismissed his claim for loss of personalty and loss of use of the dwelling. Not so. Plaintiff's claims are document driven. Accordingly, defendant propounded tailored interrogatories and demand for documents pertaining to all three claims. The court's orders of January 6, 2006, April 7, 2006, and June 9, 2006, directed defendant to supply answers to interrogatories and documents relating to all three claims, and plaintiff failed to comply.

Affirmed.

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[2] Plaintiff contended that he should not be bound b[illegible] limitation period contained in the policy, requ[illegible] present proofs of reconstruction within two years [illegible] fire loss, because of delay in receiving the actu[illegible] payment from defendant. While not acknowledging the validity of this argument, even if the time period was to be extended to September 30, 2004, the date the check was tendered by defendant, plaintiff failed to present proof of funds expended in the reconstruction of his home two years from that date.