

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1837-14T2

HYUN K. KIM,

Plaintiff-Appellant,

v.

TERESA M. SUAREZ and  
FRANK LUKAS,

Defendants-Respondents.

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Submitted December 8, 2015 – Decided January 13, 2016

Before Judges Fisher and Currier.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2844-13.

Law Offices of Andrew Park, P.C., attorneys for appellant (Jason D. Ginsberg, of counsel and on the briefs).

Law Offices of James C. Dowden, attorneys for respondents (Emad G. Iskaros, on the brief).

PER CURIAM

Plaintiff Hyun Kim appeals from the November 21, 2014 order granting the dismissal of her complaint with prejudice. After considering the contentions advanced on appeal, we affirm.

In April 2013, Kim filed a complaint alleging personal injuries as the result of an automobile accident. During the

course of discovery, Kim was scheduled to appear for a defense examination. After she failed to attend the exam, defendants Teresa Suarez and Frank Lukas<sup>1</sup> filed a motion to dismiss the complaint without prejudice or, in the alternative, to compel the examination for a specific date. An order followed, compelling Kim to appear for an exam in July 2014.

Although a subsequent order extended the discovery end date to September 10, 2014, it did not alter the July exam date. The order stated that "no further extensions shall be granted barring exceptional circumstances." Kim did not appear for the July exam.

Upon the filing of Suarez's motion to dismiss the complaint without prejudice for failure to appear for the exam, an order was entered denying the dismissal, but compelling Kim to appear for an exam in September 2014. She again failed to appear for the scheduled examination.

Suarez filed a motion to dismiss the complaint with prejudice for failure to comply with a court order and failing to attend the exam. The trial judge granted the motion and dismissed the complaint with prejudice stating

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<sup>1</sup> Lukas owned the vehicle which was being operated by Suarez at the time of the accident. We refer to the defendants collectively as Suarez.

I'm dismiss[ing] with prejudice. . . . I gave the alternate relief [in the previous order].

. . . .

[A] court ordered IME . . . was then not complied with. The fact that you then violated my court order or your client violated my court order, is the reason I'm dismissing it with prejudice.

The order noted that Kim's "continued failure to appear for [the] IME which was court ordered after motion to dismiss without prejudice and after discovery end date requires dismissal with prejudice."

Kim moved for reconsideration, which was denied in a written decision of November 21, 2014. This appeal followed.

Kim argues on appeal that the trial judge did not comply with the two-step process set forth in Rule 4:23-5, requiring preliminarily dismissal of the complaint without prejudice. We find this argument to be without merit.

After two and a half years of discovery, and three scheduled examinations for which Kim did not appear (two of the exams were court-ordered), the trial judge was permitted to dismiss the complaint with prejudice under Rule 4:23-2(b)(3).

As the judge stated:

The Court was aware of the procedural posture of this matter on October 10, 2014, wherein it had already declined Defendants' motion to dismiss without prejudice for

failure to attend the IME. In the alternative, as a less harsh penalty to [Kim], the Court ordered that [she] attend an IME on September 16, 2014. [Kim] failed to attend the Court-ordered IME, and attributes that failure to a "miscommunication." . . . [Kim] violated an express [o]rder of this Court. Therefore, the Court was certainly within the scope of Rule 4:23-2(b) when it dismissed the complaint with prejudice.

The judge reviewed and considered the evidence Kim submitted in support of her reconsideration motion at the time of the denial. Accordingly, the trial judge did not overlook or fail to appreciate the significance of the evidence. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

Kim failed to comply with two court orders. The trial judge properly exercised the discretion accorded him under Rule 4:23-2(b)(3) in dismissing the case with prejudice.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION