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November 29, 2021

VIA eCourts and Regular Mail
The Honorable Joseph A. Turula, P.J. Cv.
W.J. Brennan Courthouse
583 Newark Avenue, 2nd Floor
Jersey City, New Jersey 07306

Re: Stacie Percella v. City of Bayonne, et al.
Docket No. HUD-L-00177-18

Dear Judge Turula:

Kindly accept this letter brief, in lieu of a more formal brief, in opposition to Plaintiff Stacie Percella's ("Plaintiff") Motion to Compel Defendant's to Provide More Specific Responses to Plaintiff's Demand for Production of Documents, Compel the Depositions of Bernadette Nestico ("Nestico"), Joseph DeMarco ("DeMarco"), James Davis ("Davis"), Donna Russo ("Russo"), Gay Chmielewski ("Chmielewski"), Gary La Pelusa ("La Pelusa"), Allan Roth, Esq. ("Roth") and Ellen Horn, Esq. ("Horn"), and to Extend Discovery for 120 Days.

At the outset, the Appellate Division remanded this matter and instructed the Court to "determine if any evidentiary hearing is required" regarding Plaintiff's failure to abide by multiple Court Orders and failure to produce discovery. See Certification of V. Gerbino, Exhibit J at p. 41. Accordingly, since no evidentiary hearing has occurred, Defendant cannot confirm or deny whether Plaintiff is not in default in respect to discovery. See Certification of V. Gerbino, ¶ 19 (improperly labeled 15). Due to the many discovery transgressions by Plaintiff, Defendant City of

Bayonne has been unable to ascertain whether Plaintiff has produced all of her text messages and/or iMessages at issue in this matter.

STATEMENT OF FACTS

On February 23, 2018, Plaintiff Stacie Percella filed an Amended Complaint with the Superior Court of New Jersey, Hudson Vicinage, alleging violations of the New Jersey Law Against Discrimination ("LAD") against Defendant City of Bayonne. See Certification of N. Sullivan, Exhibit A.

On February 3, 2020, following briefing by both Parties, Judge Espinales-Maloney dismissed Plaintiff's Amended Complaint with prejudice pursuant to R. 4:23-5(a)(2) and R. 4:23-2. See Certification of N. Sullivan, Exhibit B. On February 24, 2020, Vincent Gerbino, Esq. filed his substitution of attorney on behalf of Plaintiff, replacing prior attorney Elizabeth T. Foster, Esq. See Certification of N. Sullivan, Exhibit C. On February 24, 2020, Plaintiff filed a Motion for Reconsideration of the Court's February 3, 2020 Order. See Certification of N. Sullivan, Exhibit D.

On May 22, 2020, the Court, after briefing, denied Plaintiff's Motion for Reconsideration, but acknowledged that dismissal under R. 4:23-5(a)(2) was improper. See Certification of N. Sullivan, Exhibit E. Subsequently, the Plaintiff filed an appeal with the Appellate Division and the Appellate Division issued an opinion on May 28, 2021 reversing and remanding this matter to the Trial Court. See Certification of N. Sullivan, Exhibit F.

On June 15, 2021, Vincent Gerbino, Esq., served the Subpoenas on Allan Roth, Esq. and Ellen Horn, Esq. regarding this matter. See Certification of N. Sullivan, Exhibit G. Additionally, on that day, Mr. Gerbino served the Notices for the depositions of DeMarco, Davis, Chmielewski,

Russo and La Pelusa. See Certification of N. Sullivan, Exhibit H. On June 21, 2021, Mr. Gerbino, served a Deposition Notice for the deposition of Nestico. Ibid.

On July 2, 2021, the undersigned submitted a letter to Mr. Gerbino, informing him that the discovery end date in this matter has lapsed and the Plaintiff has not sought an extension of discovery. See Certification of N. Sullivan, Exhibit I. As such, the undersigned indicated that the Defendant maintains the aforementioned Notices and Subpoenas are improper. Ibid. On July 2, 2021, Mr. Gerbino responded to the undersigned's letter and disagreed with the Defendant's position regarding the discovery end date. See Certification of N. Sullivan, Exhibit J.

On July 12, 2021, Defendant City of Bayonne filed a Motion to Quash the Notice in Lieu of a Subpoena ("Notices") to Bernadette Nestico ("Nestico"), Joseph DeMarco ("DeMarco"), James Davis ("Davis"), Donna Russo ("Russo"), Gay Chmielewski ("Chmielewski"), and Gary La Pelusa ("La Pelusa") and Subpoena Duces Tecum ("Subpoena") of Allan Roth, Esq. ("Roth") and Ellen Horn, Esq. ("Horn"). See Certification of N. Sullivan, Exhibit K. On July 28, 2021, Judge Anthony V. D'Elisa, J.S.C. issued an Order directing Defendant to withdraw the motion and ordering "[n]o addition al discovery is permitted in this matter until further Order of this Court." Ibid.

Now approximately 20 months after the discovery end date has passed and approximately six months after the Appellate Division reversed and remanded Judge Espinales-Maloney's decision, Plaintiff make her motion for further discovery. For the reasons stated below, the Defendant City of Bayonne respectfully requests the Court deny Plaintiff's motion.

LEGAL ARGUMENT

POINT I

THE DISCOVERY PERIOD HAS LAPSED AND PLAINTIFF HAS NOT SOUGHT TO EXTEND DISCOVERY

A. Plaintiff Seeks Discovery Outside of the Discovery Period which is Improper Under the Court Rules

Pursuant to Court Rule 4:24-1(a), all proceedings permitted under R. 4:10-1 to R. 4:23-4 "shall be completed within the time for each Track." Under R. 4:23-1(c), if the parties cannot agree to a sixty (60) day extension of discovery, or if a longer extension is sought, "a motion for relief shall be filed with the Civil Presiding Judge or designee in Track I, II, and III cases . . . and made returnable prior to the conclusion of the applicable discovery period." Ibid. At that time, the moving party is required to append copies of "all previous orders granting or denying an extension of discovery or a certification stating that there are none." Ibid. If good cause is shown, "the court shall enter an order extending discovery." Ibid. Further, "[a]ny proposed form of extension order shall describe the discovery to be completed, set forth proposed dates for completion, and state whether the adverse parties consent." Ibid.[1]

As this Court is aware, depositions are permitted by R. 4:14-1, which is an enumerated Rule that "shall be completed within the time for each Track." If an appeal has been taken of a trial court order, "the trial court, on motion, may allow the taking of depositions of witnesses to perpetuate their testimony for use in the event of further trial court proceedings." R. 4:11-2.

Here, the discovery end date in this matter, after at least one extension, was March 20, 2020. On February 3, 2020, following briefing by both Parties, Judge Espinales-Maloney

[1] Plaintiff's Proposed Order does not describe the discovery to be completed, does not set forth proposed dates for completion, and does not state where the adverse party has consented. See Plaintiff's Proposed Order. As such, Plaintiff's Proposed Order does not comply with R. 4:23-1(c) and her Motion to Extend Discovery must be denied.

dismissed Plaintiff's Amended Complaint with prejudice pursuant to R. 4:23-5(a)(2) and R. 4:23-2. See Certification of N. Sullivan, Exhibit B. On February 24, 2020, Vincent Gerbino, Esq. filed his substitution of attorney, replacing Plaintiff's prior attorney Elizabeth T. Foster, Esq. See Certification of N. Sullivan, Exhibit C. On that day, Plaintiff filed a Motion for Reconsideration of the Court's February 3, 2020 Order. See Certification of N. Sullivan, Exhibit D. In her brief for Reconsideration, Plaintiff acknowledged the March 20, 2020 discovery end date, but did not seek to stay discovery while the Court was Reconsidering its Order nor did she seek, in the alternative, to extend discovery pending the Court's Reconsideration. Ibid.

On May 22, 2020, the Court denied Plaintiff's Motion for Reconsideration, but acknowledged that dismissal under R. 4:23-5(a)(2) was improper. See Certification of N. Sullivan, Exhibit E. Subsequently, the Plaintiff appealed, and the Appellate Division issued an opinion on May 28, 2021. See Certification of N. Sullivan, Exhibit F. The Appellate Division reversed and remanded the trial court's decision. Ibid. However, in rendering its opinion, the Appellate Division did not order additional discovery in this matter. Ibid. In fact, the Appellate Division held:

> We therefore vacate the February 3, 2020 dismissal order and remand for reconsideration of defendant's motion in accordance with the standard applicable under the Rule. The court may in its discretion permit the submission of additional papers by the parties and shall hear oral argument. The court shall determine if an evidentiary hearing is required. We do not offer an opinion on the merits of defendant's motion. The remand court shall decide the motion based on the record presented.
>
> [Id. at p. 40-41].

During the pendency of the appeal, Plaintiff did not move before this Court to take depositions, as permitted by the Court Rules. See R. 4:11-2.

Further, pursuant to R. 2:9-5(a), "neither an appeal, nor motion for leave to appeal, nor a proceeding for certifications, nor any other proceeding in the matter shall stay proceedings in any

court in a civil action[.]" A stay may be ordered by the trial court pursuant to R. 2:9-5(b). R. 2:9-5(a). A motion for a stay of a civil action prior to the oral argument in the Appellate Division, or of submission to the Appellate Division for consideration without argument, "shall be made first to the court which entered the judgment or order. Thereafter the motion should be made to the appellate court." R. 2:9-5(b).

It is undisputed, Plaintiff did not move for a stay of the proceedings while the Plaintiff was appealing this Court's February 3, 2020 and May 22, 2020 Orders.

As such, although the Court dismissed Plaintiff's Amended Complaint with prejudice on February 3, 2020, Plaintiff did not seek to stay the proceedings to preserve the discovery period, did not seek to extend discovery as part of her motion for reconsideration, Plaintiff did not seek to take discovery while appealing the Court's Orders, Plaintiff did not request a stay while the appeal was pending before the Appellate Division, and the Appellate Division did not order further discovery.

Therefore, based on these reasons, Plaintiff's Motion to Compel should be dismissed with prejudice because Plaintiff is improperly seeking discovery outside of the discovery period in violation of the Court Rules and Plaintiff failed to utilize the Court Rules in order to complete the discovery requested during the pendency of her appeal.

B. Plaintiff has Failed to Demonstrate Exceptional Circumstances Requiring an Extension of Discovery

Good cause under R. 4:24-1(c) has been understood to be a flexible term and "its meaning is not fixed and definite." Leitner v. Toms River Regional School, 392 N.J. Super. 80, 87 (App. Div. 2007)(citing Tholander v. Tholander, 34 N.J. Super. 150, 152 (Ch. Div. 1955)). However, "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." R. 4:24-1(c). A trial or arbitration date is critical to

the trial judge's determination of whether to grant an extension of the discovery period under R. 4:24-1(c). Ponden v Ponden, 374 N.J. Super. 1, 9 (App. Div. 2004).

Here, the Court has fixed a trial date of February 14, 2022. As such, in order to extend discovery, Plaintiff must show exceptional circumstances. See Bender v. Adelson, 187 N.J. 411, 427 (2006)(finding exceptional circumstances rather than good cause must be shown if an extension is sought after notice of an arbitration or trail date.). Exceptional circumstances, under R. 4:24-1(c), is generally defined as:

> Some showing that the circumstances presented were clearly beyond the control of the attorney and the litigant seeking an extension of time. An excessive work load, recurring problems with staff, a desire to avoid expense associated with discovery, or any delays arising out of extended efforts to resolve [the] matter through negotiations generally will not be sufficient to justify an extension.
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> [Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 473 (App. Div. 2005)(quoting Zadigan v. Cole, 369 N.J. Super. 123, 132 n. 8 (Law. Div. 2004))]

The factors to be considered by a trial court in determining whether a request to extend time for discovery should be granted after the scheduling of a trial date include:

> First, as with motions considered within the original discovery period, any application should address the reasons why discovery has not been completed within [the] time [allotted] and counsel's diligence in pursuing discovery during that time. Any attorney requesting additional time for discovery should establish that he or she did make effective use of the time permitted under the rules. A failure to pursue discovery promptly, within the time permitted, would normally be fatal to such a request. Second, there should be some showing that the additional discovery or disclosure sought is essential, that is that the matter simply could not proceed without the discovery at issue or that the litigant in question would suffer some truly substantial prejudice. Third, there must be some explanation for counsel's failure to request an extension of the time for discovery within the original discovery period. Finally, there generally must be some showing that the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
>
> [Ibid.(quoting Vitti v. Brown, 359 N.J. Super. 40, 51 (Law Div. 2003))].

In order to claim there are some exceptional circumstances requiring the extension of discovery, Plaintiff incorrectly cites to the facts of this matter. Specifically, Plaintiff makes two claims, "Defense counsel cancelled and refused to produce defendant and individual employees of the City of Bayonne for depositions," See Certification of V. Gerbino ¶1, and "Defense counsel consistently disregards the Order Judge Bariso set forth in his November 8, 2019 Order[.]" Id. at ¶¶ 11; 15.

However, these accusations by Plaintiff are not based on the facts in the record. On October 23, 2019, following receipt of the Notices of Depositions, Teresa M. Lentini, Esq. drafted a letter to Elizabeth T. Foster, Esq., former attorney for Plaintiff, informing her Ms. Lentini was unavailable for the dates proposed but suggested November 12, 13, or 14 for the depositions of James Davis, Deborah Falciani, Donna Russo, Joseh DeMarco, Gary Chmielweski and Bernadette D'Angelo. See Certification of N. Sullivan, Exhibit L. Defendant City of Bayonne is unaware of Plaintiff rescheduling the depositions for November 12, 13, or 14 or another day prior to the discovery end date. It is not disingenuous for Plaintiff to argue that Defendant's refused to produce the requested deponents, when, as demonstrated in Ms. Lentini's letter, Defendant requested different dates and Plaintiff failed to re-schedule the depositions.

Additionally, on December 3, 2019, Ms. Lentini sought to re-depose Plaintiff pursuant to a Notice of Deposition to occur on January 14, 2020. See Certification of N. Sullivan, Exhibit M. Ms. Lentini asked for a response within five days if Plaintiff was unavailable. Ibid. On December 20, 2019, Ms. Foster responded that she was unavailable for the January 14, 2020 deposition date. See Certification of N. Sullivan, Exhibit N. Subsequently, Ms. Lentini filed a Motion to Dismiss which was granted by Judge Espinales-Maloney. See Certification of N. Sullivan, Exhibit O. The basis for Judge Espinales-Maloney's decision to grant Defendant's Motion to Dismiss with

Prejudice was based on Plaintiff's failure to produce discovery and failure to abide by Judge Bariso's Order, ironically, the Order Plaintiff disingenuously argues that Defendant is refusing to follow. Id.

Based on this, it is clear Defendant City of Bayonne proposed new dates to Plaintiff for depositions, which Plaintiff did not schedule, and Defendant attempted to re-depose Plaintiff, which Plaintiff's counsel could not attend, and Judge Espinales-Maloney subsequently granted Defendant's Motion to Dismiss, later overturned by the Appellate Division.

As such, Defendant City of Bayonne has not refused to produce witnesses for depositions in this matter. Any statement by Plaintiff regarding such, is not based on the facts in the record.

Plaintiff does not make any additional arguments regarding the exceptional circumstances necessary, under Vitti, for the Court to grant an extension of discovery after a trial date has been set. See Certification of V. Gerbino ¶1-20 (improperly labeled 16). Plaintiff does not make any arguments that the discovery still sought is essential to the case at hand and the matter cannot proceed without any additional discovery. In fact, Plaintiff does not even argue she will be prejudiced if the Court does not permit her to seek additional discovery. Further, as demonstrated in the section above, Plaintiff has failed to utilize the Court Rules to stay and/or extend discovery during the pendency of her appeal. Finally, Plaintiff makes no argument that the circumstances presented were "clearly beyond the control of the attorney and litigant" because Plaintiff has failed numerous times to abide by Court Orders and Plaintiff has failed to follow the Court Rules in order to obtain, stay and/or extend discovery during the appeal of this matter.

Therefore, Plaintiff has failed to demonstrate exceptional circumstances requiring discovery to continue approximately 20 months after the discovery end date and approximately six months after the Appellate Division rendered its decision in this matter.

POINT II

PLAINTIFF'S SUBPOENAS AND NOTICES SHOULD BE QUASHED, OR IN THE ALTERNATIVE A PROTECTIVE ORDER SHOULD BE ISSUED LIMITING THE DEPOSITIONS TO INFORMATION RELEVANT TO THE AMENDED COMPLAINT

Assuming, *arguendo*, the Court does not believe discovery in this matter ended on March 20, 2020, the Subpoenas and Notices in this matter should be quashed, or in the alternative a protective order should be issued limiting the questions during the depositions to information relevant to the Amended Complaint.

Under New Jersey Rules of Court 1:9-2, a court may, on motion, quash or modify a subpoena if compliance would be "unreasonable or oppressive." R. 1:9-2; see also State v. Cooper, 2 N.J. 540, 556-57 (1949) (determining that a subpoena duces tecum could be quashed if it is unreasonable or oppressive). Under either Rule 1:9-2, the determination of whether to quash or modify a subpoena is based upon reasonableness and oppression. In addition, there must be a substantial showing that the evidence sought by a subpoena is relevant and material to the case, as required by R. 4:10-2. Wasserstein v. Swern & Co., 84 N.J. Super. 1, 7 (App. Div.), cert. denied, 43 N.J. 125 (1964).

Rule 4:10-3 "allows a party from whom discovery is sought to obtain relief from the court to limit that discovery in appropriate situations." Serrano v. Underground Utils. Corp., 407 N.J. Super. 253, 267 (App. Div. 2009). Pursuant to R. 4:10-3, on motion by a party, the court may, for good cause shown, or by stipulation of the parties, make any order that justice requires to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense," for reasons such as, but not limited to:

a) That the discovery not be had;
b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
e) That discovery be conducted with no one present except persons designated by the court;
f) That a deposition after being sealed be opened only by order of the court;
g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
h) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as direct by the court.

[Ibid.]

Rule 4:10-3 requires a movant seeking to quash a subpoena to show "good cause" why the subpoena would cause "annoyance, embarrassment, oppression, or undue burden or expense." R. 4:10-3; Hammock by Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 368 (1995).

A. The Subpoenas of Roth and Horn Should be Quashed because Plaintiff seeks Privileged Information.

Although the City does not represent Roth or Horn, the subpoenas served by Plaintiff seek privileged information from Roth and Horn regarding their representation of the City and the subpoenas should be quashed as a matter of law. At the outset, the subpoena does not specify the subject matter of the testimony sought with specificity. See Certification of N. Sullivan, Exhibit G. Further, to the extent there is any specificity in the subject matter sought by Plaintiff, the subpoena seeks information that is not reasonably calculated to lead to any additional admissible evidence about any of Plaintiff's claims and, therefore, violates R. 1:9-2 and R. 4:10-2. This subpoena is issued for the sole purpose of annoying, harassing, and/or embarrassing Roth and Horn.

In the context of this litigation, the only involvement of Horn is that she served as a Hearing Officer on behalf of the City of Bayonne and rendered a decision regarding disciplinary charges

against Plaintiff on December 2, 2016. See Certification of N. Sullivan, Exhibit P. Accordingly, the only involvement of Mr. Roth is that he represented the City of Bayonne during an Office of Administrative Law appeal involving disciplinary charges against Plaintiff. See Certification of N. Sullivan, Exhibit Q.

As such, the subpoenas of Roth and Horn are not reasonably calculated to lead to the discovery of any admissible evidence regarding any claim or defense related to Plaintiff's allegations. Further, the subpoenas fail to specify the subject matter of the testimony sought from Roth and/or Horn. The only conceivable topics that could be raised by Plaintiff during a hypothetical deposition of Roth and/or Horn are topics related to Roth's and Horn's representation of the City of Bayonne. As such, this line of questioning would clearly implicate attorney-client privilege and even if Roth and/or Horn wanted to break any attorney-client privilege, the privilege is not theirs to waive.

Therefore, the subpoenas of Roth and Horn are not reasonable calculated to lead to admissible evidence, do not specify the subject matter of the deposition, seek Roth and/or Horn to divulge attorney-client privileged information, and are an attempt to harass and intimidate Roth and Horn.

Therefore, for these reasons, the Subpoenas should be quashed.

B. Deposition Notice of Gary La Pelusa Should Be Quashed Because Any Such Deposition Has No Relevance To This Matter.

As this Court is aware, on or about October 18, 2019, prior counsel for Plaintiff, Elizabeth T. Foster, Esq., served a subpoena on Councilman La Pelusa. See Certification of N. Sullivan, Exhibit M. In response, on October 23, 2019, prior counsel for the City, Teresa M. Lentini, Esq., emailed Ms. Foster requesting the basis for her subpoena of Councilman La Pelusa. See Certification of N. Sullivan, Exhibit R. In response, Ms. Foster stated she was "seeking Mr.

Lapelusa's deposition in the context of his private landscaping company. This has nothing to do with him being a city councilman and we are not asking him questions about his work on the city council." Ibid. In response, Ms. Lentini stated "[p]lease provide an offer of proof as to what an alleged 'private landscaping company' has to do with plaintiff's amended complaint." Ibid. In response, Ms. Foster stated, "Mr. Lapelusa has a landscaping client named Chet Nigowski, and was aware of some dispute with Mr. Nigowski about a tree. He previously informed Mr. Davis and my client about it." Ibid.

Subsequently, Ms. Lentini filed a Motion to Quash the subpoena of Councilman La Pelusa on November 5, 2019. See Certification of N. Sullivan, Exhibit S. The motion was later withdrawn. See Certification of N. Sullivan, Exhibit T.

In her Amended Complaint, Plaintiff does not make any allegations against the Defendant City of Bayonne regarding Chet Nigowski, Councilman La Pelusa, and/or a tree. See Certification of N. Sullivan, Exhibit A. Plaintiff, through her prior counsel, has presented her reasoning for seeking to depose Councilman La Pelusa, which is a ploy to simply annoy, harass, and/or embarrass Councilman La Pelusa about his private business and/or personal life. The deposition of Councilman La Pelusa is wholly unrelated to any claim or defense regarding Plaintiff's Amended Complaint and her LAD allegations.

Therefore, the Notice of Councilman La Pelusa should be quashed because it is unreasonable and/or oppressive and is not reasonably calculated to lead to admissible discovery related to any of Plaintiff's LAD claims.

C. The Remaining Notices Should Be Limited Pursuant to a Protective Order to Questions Only Relevant to the Amended Complaint.

Pursuant to R. 4:10-3(d), a party may seek a protective order requiring that "certain matters not be inquired into, or that the scope of the discovery be limited to certain matters."

The Defendant requests that the Notices of Nestico, DeMarco, Davis, Russo, and Chmielewski are limited to matters relevant and pertinent to the Plaintiff's Amended Complaint. As this Court is aware, this is a highly contentious, and politicized, litigation involving numerous individuals and their careers and positions. The voluminous amount of discovery exchanged in this matter, clearly indicates the involvement, if any, of these individuals in the current litigation. As with Councilman La Pelusa, any potential depositions should not be permitted to inquire into the personal lives of these individuals, which is wholly unrelated to this litigation.

Therefore, the Defendant respectfully requests that the depositions in this matter, if any, are limited to relevant information regarding Plaintiff's Amended Complaint.

CONCLUSION

For the reasons stated above, Plaintiff's Motion to Compel and to Extend Discovery for 120 should be DENIED.

Respectfully Submitted,

FLORIO PERRUCCI STEINHARDT
CAPPELLI TIPTON & TAYLOR, LLC

Dated: November 29, 2021

By: _____
Nicholas A. Sullivan, Esquire
Attorneys for Defendant,
City of Bayonne