

[Web](#) [Images](#) [Videos](#) [Maps](#) [News](#) [Shopping](#) [Gmail](#) [more](#) ▾[Scholar Preferences](#) | [Sign in](#)

Google scholar

barry v. barry, october 29, 2010

Search

[Advanced Sch](#)

Read this case

How cited

Barry v. Barry, NJ: Appellate Div. 2010

MICHELLE BARRY, Plaintiff,
v.
SCOTT BARRY, Defendant-Respondent.
LAW FIRM of HOFFMAN DIMUZIO, Appellant.

No. A-1699-09T2.

Superior Court of New Jersey, Appellate Division.Submitted: September **29, 2010.**Decided: **October 29, 2010.**

Hoffman DiMuzio, attorneys for appellant. (Craig W. Kugler, on the brief).

David S. Rochman, attorney for respondent.

Before Judges Cuff and Fasciale.

PER CURIAM.

The law firm Hoffman DiMuzio (Hoffman) appeals from a November 6, 2009 order denying its motion to intervene in this matrimonial case. Hoffman represented plaintiff, Michelle **Barry**, when the parties divorced in 1998. Hoffman sought intervention to reargue the merits of a motion it contends plaintiff's current counsel and the court mishandled. The issue presented on appeal is whether Hoffman may intervene to mitigate its damages in a potential legal malpractice lawsuit. We affirm. Intervention was not warranted because the application was untimely, primarily because the time to reconsider the prior order expired and may not be enlarged.

In 1998, Hoffman obtained a final judgment of divorce that entitled plaintiff to half of defendant, Scott **Barry's**, pension benefits. In **October** 2008, plaintiff learned that defendant had been receiving pension benefits for ten years without her knowledge. Plaintiff questioned Hoffman why she had not received her share of defendant's pension. Hoffman admitted it did not timely serve a qualified domestic relations order (QDRO) with the State Division of Pensions (Division).

After Hoffman conceded that the failure to file the QDRO and consequent non-payment were its fault, it attempted to correct the mistake. On November 3, 2008, Hoffman filed an amended supplemental order to the final judgment of divorce. In December 2008, the Division informed plaintiff that she would receive a pension benefit check monthly. From January 2009 forward plaintiff has received a monthly check. Hoffman took no further action.

On March 4, 2009, plaintiff's present attorney sought payment of ten years of pension benefits from defendant that plaintiff had not received. The motion was filed in Gloucester County. Plaintiff's counsel did not serve Hoffman with the motion. On March 20, 2009, the motion judge denied plaintiff's request for prior pension benefits and transferred the case to Burlington County where plaintiff resided. Two months later, on May 20, 2009, plaintiff's

counsel served Hoffman with the March 20 order. Hoffman received the order on May 22.

Plaintiff neither moved to reconsider nor filed an appeal from the March 20 order. Hoffman took no action in the matter until it filed a motion to intervene and reargue the merits of plaintiff's unsuccessful motion on **October 8**, 2009. Hoffman contended that plaintiff's counsel neglected to argue that defendant was unjustly enriched, and that the motion judge erred by not establishing a constructive trust. Hoffman argued that, although it failed to serve the QDRO for ten years, the divorce decree clearly provided plaintiff was entitled to half of defendant's pension.

On November 6, 2009, a Burlington County judge denied Hoffman's motion to intervene.^[1] He found that because plaintiff failed to reconsider or appeal the March 20 order, he would not revisit whether she was entitled to the previous ten years of pension benefits.

On appeal, Hoffman argues that (1) the court erred by not allowing it to intervene and reargue plaintiff's motion; (2) defendant was unjustly enriched because he retained plaintiff's share of pension benefits; (3) the court erred by not establishing a constructive trust for plaintiff; (4) the divorce decree should be enforced; and (5) Rule 4:50-1 entitled Hoffman to amend the March 20 order.

The November 6 motion judge correctly treated Hoffman's motion to intervene as a motion for reconsideration because Hoffman contended that the March 20 motion judge erred by not granting plaintiff reimbursement for ten years of pension benefits. Rule 4:49-2 governs motions for reconsideration and provides in relevant part:

Except as otherwise provided by R. 1:13-1 (clerical errors)[,] a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it.

It is undisputed that Hoffman failed to satisfy the time limitation of Rule 4:49-2. Hoffman received the March 20 order on May 22, 2009, and filed its motion on **October 8**, 2009.

Hoffman did not request permission to file its motion out of time, but even if it did, the twenty-day time limitation under Rule 4:49-2 may not be enlarged. Although Rule 1:1-2 permits relaxation of the rules of court to secure a just determination, enlargement of the Rule 4:49-2 twenty-day time deadline is prohibited by Rule 1:3-4(c). Accordingly, Rule 1:1-2 cannot be applied here to enlarge the twenty-day time limitation.

Hoffman also contends that he is entitled to relief from the March 20 order pursuant to Rule 4:50-1. We disagree. Rule 4:50-1 provides relief from an order to "a party or the party's legal representative." Hoffman is neither a party nor, any longer, counsel for plaintiff.^[2] Hoffman filed its **October 8**, 2009 motion to limit its potential exposure in an expected legal malpractice lawsuit, not because plaintiff rehired the firm to pursue the unpaid benefits. If plaintiff were granted the unpaid pension benefits, any damages resulting from Hoffman's negligence would be reduced. Although plaintiff would benefit from a ruling amending the March 20 order, Hoffman does not represent plaintiff. Therefore, Rule 4:50-1 is inapplicable.

Rule 4:50-1 was not intended to seek rehearing or reconsideration of an order. Rather, Rule 4:50-1:

[I]s a carefully crafted vehicle intended to underscore the need for repose while achieving a just result. It thus denominates with specificity the narrow band of triggering events that will warrant relief from judgment if justice is to be served.

Only the existence of one of those triggers will allow a party to challenge the substance of the judgment.

[DEG LLC v. Fairfield Twp., 198 N.J. 242, 261-62 (2009).]

The rule applies only by "(a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence . . . (c) fraud . . . misrepresentation . . . (d) the judgment or order is void . . . (e) has been satisfied, released or discharged, or . . . it is no longer equitable . . . or (f) any other reason justifying relief." R. 4:50-1(a)-(f). Hoffman relies on sections (a) and (f), but neither apply.

Section (a) "is intended to provide relief from litigation errors `that a party could not have protected against.'" DEG LLC, supra, 198 N.J. at 263 (quoting [Cashner v. Freedom Stores, Inc.](#), 98 F.3d 572, 577 (10th Cir. 1996)). No such litigation error is presented here. Therefore, Hoffman cannot rely on section (a).

Finally, "[t]he very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." DEG LLC, supra, 198 N.J. at 270 (quoting [Court Inv. Co. v. Perillo](#), 48 N.J. 334, 341 (1966)). Hoffman neglected to file the QDRO and seek reconsideration of the March 20 order timely. Hoffman's own mistake cannot be categorized as "exceptional."

In any event, Hoffman could not successfully seek intervention under Rule 4:33-1 (intervention as of right) or Rule 4:33-2 (permissive intervention) because the intervener must act in a timely manner. The record manifestly demonstrates that Hoffman did not satisfy that requirement.

After a thorough review of the record and consideration of the controlling legal principles, we conclude that Hoffman's remaining arguments are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

[1] It appears that the judge issued a tentative decision pursuant to Rule 5:5-4(e). The November 6, 2009 transcript indicates that "the tentative [decision] was accepted and made a final order of the court."

[2] Hoffman failed to produce on appeal a substitution of attorney, or any other document indicating that plaintiff rehired the firm as her counsel.

[Go to Google Home](#) - [About Google](#) - [About Google Scholar](#)

©2010 Google