

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2478-08T3

MICHAEL J. KING, COORDINATOR
OF REALSMART THE LEAGUE FOR
REAL SMART GROWTH,

Plaintiff-Appellant,

v.

HARMONY TOWNSHIP LAND USE
BOARD AND KENNETH AND
PATRICIA BEERS,

Defendants-Respondents,

and

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Defendant.

Submitted June 16, 2010 - Decided July 27, 2010

Before Judges Chambers and Kestin.

On appeal from Superior Court of New Jersey,
Law Division, Warren County, Docket No.
L-259-08.

Daniel E. Somers, attorney for appellant (R.
William Potter, on the brief).

Lyn Paul Aaroe, attorney for respondent
Harmony Township Land Use Board.

Florio Perrucci Steinhardt & Fader, L.L.C.,
attorneys for respondents Kenneth and
Patricia Beers (Steven R. Srenaski, on the
brief).

PER CURIAM

In this action in lieu of prerogative writs, plaintiff,
Michael J. King, coordinator of REALsmart, The League For Real
Smart Growth, appeals from the order of December 5, 2008,
dismissing the complaint with prejudice for failing to provide
transcripts. We reverse and remand.

Plaintiff, then pro se, commenced this action in lieu of
prerogative writs on May 30, 2008, to challenge the approval by
the Harmony Township Land Use Board (the Board) of defendants
Kenneth and Patricia Beers's application for a minor subdivision
and site plan. In July, 2008, the Beers, joined by the Board,
moved to dismiss the complaint because plaintiff had failed to
accompany the complaint with a certification that transcripts
had been ordered as required by Rule 4:69-4. In his opposition
to the motion, plaintiff reviewed the costs of transcription,
and requested permission to have transcribed only the
"necessary" portions of the tapes or, in the alternative, that a
speed typist and not a certified court reporter be allowed to
transcribe the tapes. The Board's attorney objected to this
approach. By order dated August 29, 2008, the trial court

denied the motion, but ordered plaintiff to provide defendants with a copy of the transcripts within forty-five days of the order.

By letter dated September 25, 2008, plaintiff requested that the necessity of obtaining transcripts, due to their expense, be delayed until certain issues raised in Beers's answer be resolved because resolution of those issues did not rely on the transcripts. Counsel for the Board objected and advised the court that on October 1, 2008, plaintiff made the deposit for reproduction of the tapes of the hearings. By letter dated October 21, 2008, counsel for the Beers renewed his request to the court to dismiss the complaint for failure to secure the transcripts. Plaintiff wrote to the court on October 22, 2008, requesting that the Board be required to pay for the transcripts and setting forth his reasons why the Board should be responsible for the cost.

On November 11, 2008, the Beers moved to dismiss the complaint with prejudice for failure to state a claim upon which relief may be granted due to plaintiff's failure to provide the transcripts. Plaintiff, who had proceeded to order the transcripts, advised the court on December 3, 2008, that portions of the tapes could not be transcribed due to audibility problems. He attached to his correspondence a letter dated

December 3, 2008, from the transcription agency advising that due to the "poor quality" of the tapes, only a partial transcription could be made.

The trial court granted the defense motion to dismiss the complaint with prejudice because plaintiff had not attached the required certification to the complaint indicating that the transcripts had been ordered and had not provided the transcripts within the forty-five days allowed by the August 29, 2008 order.

We reverse, concluding that it was a mistaken exercise of discretion to dismiss the complaint with prejudice under the circumstances here. Certainly, dismissal was not warranted for the failure to include with the complaint a certification that the transcript had been ordered. The Rules are subject to relaxation in the interests of justice, Rule 1:1-2, and the violation of this procedural rule by failing to attach the certification should not be fatal to this case. Indeed, here the trial judge initially did relax Rule 4:69-4 by denying the first motion to dismiss the complaint and giving plaintiff forty-five days to provide the transcripts.

Plaintiff's inability to obtain the complete transcripts due to the poor quality of the tapes did not justify dismissal of the complaint. See Scardigli v. Borough of Haddonfield

Zoning Bd. of Adjustment, 300 N.J. Super. 314, 323 (App. Div. 1997) (reversing and remanding a trial court's decision which rested on an incomplete transcription and directing that, on remand, the court could attempt to reconstruct the record or remand to the board of adjustment for it to reconstruct the record or, if reconstruction is not possible, for a new hearing). Rather, efforts should have been made to confirm whether, indeed, the transcript could not be obtained and if not, to reconstruct the record. See ibid.; see also Pressler, Current N.J. Court Rules, comment 6 on R. 1:2-2 (2010).

While plaintiff delayed ordering the transcripts, he appeared to do so because he was exploring alternatives in order to reduce that expense. From the record, it does not appear that the trial court held a case management conference as required by Rule 4:69-4. At such a conference, the necessity of the transcripts and consideration of plaintiff's alternatives could have been addressed, and, presumably, much of the delay in obtaining the transcripts could have been avoided. For all of these reasons, we reverse the order of December 5, 2008, dismissing the complaint with prejudice.

We note that considerable time has been spent by counsel in the briefs to this court addressing the substantive issues presented by plaintiff's complaint. We do not address these

points because they have not been ruled upon by the trial court. The trial court dismissed the complaint because plaintiff had not met the transcript requirements and that is the only issue we have considered.

Reversed and remanded.

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



CLERK OF THE APPELLATE DIVISION