NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2009-03T5

CITY OF LONG BRANCH, a municipal corporation of the State of New Jersey,

Plaintiff-Appellant,

v.

FRED A. STRAHLENDORF and DOROTHY K. STRAHLENDORF, as Trustees U/A/D April 25, 1996, A Revocable Living Trust,

Defendants-Respondents.

Argued October 20, 2004 - Decided NOV 19 2004

Before Judges Fall, Payne and C.S. Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. MON-L-3927-02.

Paul V. Fernicola argued the cause for appellant (Bowe & Fernicola, attorneys; Mr. Fernicola, of counsel and on the brief).

William J. Ward argued the cause for respondents (Carlin & Ward, attorneys; Mr. Ward, John J. Carlin, Jr. and Arthur G. Warden, III, of counsel and on the brief).

PER CURIAM

In this condemnation action, the jury rendered a verdict, on July 15, 2003, determining that defendants were entitled to

$500,000 in just compensation for the taking of their property by the City of Long Branch. Final judgment, based on this verdict, was entered on July 24, 2003, but the City did not file its notice of appeal until November 6, 2003, over 100 days later. Because the notice of appeal was filed beyond the time permitted by rule, and was not tolled in the interval, we will not consider the City's arguments on the merits but will instead dismiss the appeal.

A simple calculation of the amount of time that elapsed -- from the entry of the final judgment until the filing of the notice of appeal -- reveals that the outermost time limit of seventy-five days for filing an appeal, established by R. 2:4-1 and R. 2:4-4, was greatly exceeded. Notwithstanding, the City argues that its appeal was timely because (1) a post-judgment motion filed in the trial court tolled the time to appeal, (2) this court previously found the appeal timely, and (3) defendants' failure to serve a copy of the final judgment upon the City's attorney for a significant period of time after its entry also caused a tolling of the time to appeal. We reject all these arguments for the following reasons.

I

The record on appeal reveals that the City filed a motion for a new trial on October 10, 2003. The trial judge correctly

refused to rule on the motion because the City had filed its notice of appeal prior to the return date, thus depriving the trial court of jurisdiction. See R. 2:9-1.

R. 4:49-1 requires that, to be timely, a motion for a new trial must be filed no later than twenty days after "the return of the verdict of the jury." Since the jury's verdict was announced on July 15, 2003, the motion filed on October 10, 2003 was time-barred[1] and its filing could not cause a tolling of the time to file an appeal.[2]

In an attempt to avoid these consequences, the City argues that its motion was also based on R. 4:49-2, which provides that 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" (emphasis added). Claiming that its

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[1]R. 1:3-4(c) prohibits the extending of the time to file a motion for a new trial, even for extenuating circumstances. See Baumann v. Marinaro, 95 N.J. 380, 388 (1984); Moich v. Passaic Terminal & Transp. Co., Inc., 82 N.J. Super. 353, 361 (App. Div. 1964).

[2]R. 2:4-3(c) states that "the time for taking an appeal shall be tolled . . . [i]n civil actions by the timely filing and service of a motion to the trial court for rehearing or to amend or make additional findings of fact pursuant to R.1:7-4; or for judgment pursuant to R.4:40-2; or for a new trial pursuant to R.4:49-1; or for rehearing or reconsideration seeking to alter or amend the judgment or order pursuant to R.4:49-2. The remaining time shall again begin to run from the date of the entry of an order disposing of such a motion."

attorney was not served with the final judgment until September 22, 2003, the City contends that the motion was timely. It is certainly true that if the motion filed on October 10, 2003 was based on R. 4:49-2 it would have been timely filed and would have also tolled the time to file an appeal. But an examination of the motion reveals that it was not based upon R. 4:49-2 and can only be viewed as a motion for a new trial based on R. 4:49-1.

In attempting to convince us that its motion also sought relief pursuant to R. 4:49-2, the City alludes to the motion's request for remittitur. This argument is without merit, however, since remittitur is a remedy that a trial judge may, at times, issue when the jury has awarded excessive damages as an alternative to granting a new trial. Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 491 (2001); Tomaino v. Burman, 364 N.J. Super. 224, 230-31 (App. Div. 2003), certif. denied, 179 N.J. 310 (2004). A request for remittitur is not to be equated with a motion for rehearing or reconsideration of a judgment or order. It is, instead, an attack on the sufficiency or legitimacy of a jury's verdict on damages and, thus, falls within the ambit of R. 4:49-1.

Moreover, the basis for the City's motion was that some of defendants' factual contentions, urged during the course of the

trial, were contrary to law and tainted the jury's verdict. The factual basis for the City's post-judgment motion was, as the City argued in its motion papers, the alleged erroneous argument of defendants, during trial, that the City was the cause of the blighted surrounding neighborhood and that the City's benign neglect altered the value of defendants' property. As explained in the reply brief submitted to the trial judge, the City asserted in its post-judgment motion that defendants' argument "to the jury that they could consider the cause of these conditions constituted a fundamentally and legally invalid approach." This argument was, if correct, a reason why the trial judge might have permitted a new trial, but it does not serve as a legitimate attack on the accuracy or sufficiency of the July 24, 2003 judgment that faithfully adhered to the jury's verdict. Indeed, the fact that the City's arguments in this court also relate solely to the admission or exclusion of evidence at trial[3] further demonstrates that the City's post-

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[3]In its brief on the merits, the City contends:

> I. THE TRIAL COURT ERRED WHEN IT PERMITTED THE JURY, OVER THE OBJECTION OF THE APPELLANT, TO CONSIDER THAT THE CAUSE OF THE PHYSICAL CONDITION OF THE NEIGHBORHOOD IN WHICH THE CONDEMNED PROPERTY WAS LOCATED WAS THE "BENIGN NEGLECT" OF THE CITY OF LONG BRANCH. THIS ERROR PERMITTED THE JURY TO DISREGARD THE EVIDENCE REFLECTING THE ACTUAL
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> (continued)

judgment motion should be characterized as only a R. 4:49-1 motion and not as a R. 4:49-2 motion.

A motion to amend the judgment, as authorized by R. 4:49-2, does not call into question a jury verdict but instead is geared toward questioning whether a judgment, entered as a result of that verdict, should be amended or altered because it was not faithful to the verdict. The City's post-judgment motion did not question the accuracy or correctness of the judgment's memorialization of the jury's verdict; instead, the City only argued that the jury's verdict was tainted by improper factual contentions or erroneous evidence rulings made during the course of trial. As such, the City's motion cannot be considered to be

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> PHYSICAL CONDITION OF THE CONDEMNED PROPERTY'S NEIGHBORHOOD WHICH LED TO THE JURY AWARDING JUST COMPENSATION ON AN ERRONEOUS LEGAL PRINCIPLE.
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> II. THE TRIAL COURT ERRED WHEN IT PRECLUDED THE PLAINTIFF FROM CROSS-EXAMINING THE DEFENDANT'S APPRAISER REGARDING HIS ONLY COMPARABLE SALE LOCATED IN THE CITY OF LONG BRANCH BEING AFFECTED BY THE PROPERTY'S PROXIMITY TO SERVICES TO [SIC] A HOUSE OF WORSHIP REQUIRING WALKING FOR WORSHIPPERS.

The content of these arguments further illuminates the fact that the City, by way of its post-judgment motion, only presented arguments as to why it might have been entitled to a new trial. Nowhere in the papers filed in the trial court, or in the briefs submitted in this court, does the City suggest that the July 24, 2003 judgment does not properly reflect the jury's verdict.

a R. 4:49-2 motion and, as a result, its filing could not toll the time to file an appeal.

II

The City also argues that this court previously determined that its appeal was timely. That is true, but the prior ruling of this court is not conclusive on the matter.

Defendants filed with this court a motion to dismiss the appeal because of the inordinate passage of time and the failure of the City to toll the time to appeal. The motion panel granted that motion on February 4, 2004, stating:

> Rule 4:49-1(b) requires a motion for a new trial to be made within twenty days after announcement of the verdict or judgment [in a non-jury matter]. The new trial motion here was not timely, and an untimely motion does not toll the time for appeal. The appeal was therefore filed beyond the maximum seventy-five day period required by R. 2:4-1(a) and 2:4-4(a).

The City thereafter moved for reconsideration. The motion panel granted that motion on March 19, 2004, stating: "In view of the motion made pursuant to R. 4:49-2, the time for appeal was tolled and this appeal is therefore timely." The motion panel did not explain why it believed the City's post-judgment motion should be characterized as a R. 4:49-2 motion, and, indeed, the City has provided nothing to support such a

contention other than its own self-serving invocation of R. 4:49-2 in the reply brief it filed in the trial court.

We are not bound by the March 19, 2004 order since it was interlocutory and subject to revision at any time prior to the entry of this court's final judgment. See Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 356 (App. Div. 2004) (courts are not bound to slavishly follow erroneous interlocutory orders). Defendants continued to pursue the timeliness issue in their brief on the merits, as was their right, and, because we are not bound by the motion panel's rulings, the issue is squarely presented to us for a full and final consideration of its merits. For the reasons outlined in the first section of this opinion, we conclude that the appeal was time-barred.

III

The City lastly contends there is significance to defendants' delay, until September 22, 2003, in serving an executed copy of the final judgment upon the City. This fact, of course, does not relate to the timeliness of the City's

motion for a new trial, since such a motion is triggered by the jury's verdict and not by the entry of judgment.[4]

But the City argues that the late service of the judgment bears upon the timeliness of his notice of appeal. We reject this contention. The time to file a notice of appeal is triggered by the date of entry of the final judgment. See R. 2:4-1(a) ("Appeals from final judgments of courts . . . shall be taken within 45 days of their entry") (emphasis added); see also Beck v. Beck, 239 N.J. Super. 183, 189 (App. Div. 1990); Pogostin v. Leighton, 216 N.J. Super. 363, 370 (App. Div. 1987). This time period may not be extended except upon a motion demonstrating "good cause and the absence of prejudice," and then only "for a period not exceeding 30 days." R. 2:4-4(a). The delay in the service of the final judgment by defendants' attorney might have provided a basis for a thirty-day extension -- although we would also note that the City's attorney was aware of the submission of the proposed final judgment by defendants' attorney on July 18, 2003, and apparently also presented reasons to the trial judge why defendants' proposed order should be modified. Accordingly, the fact that the final

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[4]The timing of the service of the judgment would have relevance to the timeliness of a motion based on R. 4:49-2, since such a motion is triggered by the movant's receipt of the order in question. But, as noted above, the City filed no such motion.

judgment was actually entered on or about July 24, 2003 should have been no surprise to the City, and the submission of the proposed order a week earlier should have alerted the City that its time to appeal would soon be triggered.

In any event, the City's attorney received a copy of the final judgment on September 22, 2003, well within the extension period permitted by R. 2:4-4(a). Notwithstanding, the City delayed in filing its notice of appeal until November 6, 2003, well beyond the maximum seventy-five day period for filing an appeal of a civil judgment permitted by the rules. There can be no extension of the time to appeal beyond the maximum seventy-five day period set forth in R. 2:4-1(a) and R. 2:4-4(a). In re Hill, 241 N.J. Super. 367, 370-71 (App. Div. 1990); Paul v. Ohio Cas. Ins. Co., 216 N.J. Super. 250, 253 (App. Div.), certif. denied, 107 N.J. 656 (1987); Cabrera v. Tronolone, 205 N.J. Super. 268, 271-72 (App. Div. 1985), certif. denied, 103 N.J. 493 (1986).

Because its notice of appeal was not timely filed, the City's appeal is dismissed.