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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1108-15T2

KENNETH NICOLOSI and
DIANE NICOLOSI, his wife,

Plaintiffs-Appellants,

v.

SMITH AND NEPHEW, INC.,

Defendant-Respondent,

and

THE TRIAD GROUP,

Defendant.

Argued December 15, 2016 - Decided February 16, 2017

Before Judges Lihotz, Hoffman and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Burlington County, Docket No.
L-1256-13.

Gary D. Ginsberg argued the cause for
appellants (Ginsberg & O'Connor, P.C.,
attorneys; Adam M. Raditz, on the brief).

Carla Rose Karp (Goodwin Procter, LLP) argued
the cause for respondent (Glenn S. Kerner and
Ms. Karp, on the brief).

PER CURIAM

Plaintiff Kenneth Nicolosi appeals from an October 2, 2015 order denying his motion to reinstate a complaint against defendant Smith & Nephew, Inc.¹ Plaintiff filed this product liability complaint on May 14, 2013, alleging he suffered infections after using medical wipes manufactured by defendant. The parties agreed to a temporary dismissal of the action pending negotiations. When a settlement could not be reached, plaintiff moved to reinstate the matter. Defendant objected, asserting the action was filed beyond the applicable two-year statute of limitations. The trial court agreed, and denied plaintiff's request to restore the action to the trial calendar.

On appeal, plaintiff argues the judge abused his discretion and misapplied the law. Following our review, we affirm in part and reverse and remand in part.

The facts are not disputed. Plaintiff, who suffers from significant medical conditions, used SKIN-PREP Protective Wipes and REMOVE Universal Adhesive Remover Wipes, manufactured by defendant, as a sterile skin preparation between 2007 and 2011. On May 3, 2011, defendant recalled specific lot numbers of medical

¹ The complaint includes plaintiff's wife, Diane Nicolosi, as a named plaintiff. Because her claims are derivative, we have chosen to refer solely to Kenneth Nicolosi as the plaintiff in our opinion.

wipes because they were improperly sterilized. Plaintiff's medical supplier issued a recall notice. The notice instructed customers to "immediately discontinue use and responsibly destroy the affected products," which were manufactured dating back to 2007. The notice also requested completion of a "Recall Response Form," which plaintiff completed on May 9, 2011. On the form, plaintiff affirmed he identified "the recalled products in [his] possession and . . . destroyed them."

On August 1, 2011, defendant issued a second notice, identifying additional product lot numbers of medical wipes recalled, also improperly sterilized.² Plaintiff received the recall notice from his medical supplier, which included instructions to discontinue use and destroy the products. This notice was also accompanied by a "Recall Response Form," which plaintiff did not complete and return.

Plaintiff filed an eleven-count complaint on May 14, 2013, two years and five days following his execution of the May 9, 2011 recall notice.³ In each count of the complaint, plaintiff alleged he used defendant's products "[p]rior to May 2011," and defendant's

² The lot numbers identified in the May 3, 2011 recall notice are not included in the record. However, there is no dispute the batch numbers of similar products were different.

³ The complaint also named as defendants the Triad Group and fictitious parties as manufacturers and distributors.

failure to sterilize the products made them not reasonably fit, suitable, and safe for their intended use, and not of merchantable quality, free of defects in design. Further, the complaint alleged the products breached express and implied warranties, as they were defective. As a consequence, plaintiff suffered numerous infections requiring treatment and hospitalizations.

Service upon defendant was effectuated on June 17, 2013. Defendant did not file responsive pleadings. Instead, the parties entered into a four-month tolling agreement, open to extension, which provided plaintiff would voluntarily dismiss his complaint and release his medical records, and defendant would preserve all defenses. A notice of dismissal of the action, without prejudice, see R. 4:37-1, was filed on July 18, 2013. On November 28, 2013, the court dismissed the action as to all defendants for lack of prosecution. See R. 1:13-7.

Plaintiff gathered his medical records and retained an expert, who issued a report. These documents along with a demand were transmitted to defendant on April 2, 2015. Negotiations were unsuccessful in resolving the dispute.

On July 28, 2015, plaintiff moved to reinstate his complaint. Defendant objected. Defendant argued plaintiff's request was filed significantly beyond the four-month tolling period, and plaintiff did not show extraordinary circumstances caused the

delay. Also, defendant asserted plaintiff's claims were time-barred.

During argument on the motion, plaintiff explained the delay in seeking reinstatement resulted from the non-responsiveness of plaintiff's medical providers. Defendant acknowledged it had no basis to challenge the claimed delay regarding securing plaintiff's medical records. The judge agreed and found plaintiff successfully satisfied the exceptional circumstances standard allowing reinstatement.

Addressing defendant's argument the action could not proceed because the two-year statute of limitations had run on May 9, 2013, plaintiff urged he also used products listed in the August 1, 2011 recall that caused harm. He stated the second recall extends the limitations period and allowed him to present all claims. The judge disagreed. In its October 2, 2015 order, the court declined to reinstate the complaint, concluding the claims were barred by the statute of limitations set forth in N.J.S.A. 2A:14-2. Plaintiff timely filed this appeal.

Our review of a trial court's decision to grant or deny a motion to reinstate litigation required us to determine whether the judge abused his or her discretion. Weber v. Mayan Palace Hotel & Resorts, 397 N.J. Super. 257, 262 (App. Div. 2007). The arguments on appeal do not implicate the judge's finding that

reinstatement would be appropriate, but for the failure to timely file the complaint. We limit review to whether the action was time-barred, which is a legal question, subject to plenary review. Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013).

"A product liability action is defined as 'any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.'" Cornett v. Johnson & Johnson, 211 N.J. 362, 386-87 (2012) (quoting N.J.S.A. 2A:58C-1(b)(3)). Permissible theories of liability include manufacturing defect, defective design, or failure to warn through adequate warnings or instructions. Ibid. (citing N.J.S.A. 2A:58C-2). "The standard for liability is that the product is 'not reasonably fit, suitable or safe for its intended purpose'" Ibid. (quoting N.J.S.A. 2A:58C-2).

Plaintiff first argues his complaint timely asserts claims for injuries resulting from using wipes identified in the August 1, 2011 recall notice, which are not barred. Defendant argues plaintiff was noticed of the problem with the wipes in May; therefore, the time to file commenced on May 9, 2011, and expired before he filed his complaint.

The facts belie defendant's argument. The May 3, 2011 recall notice identified distinctly different batches of defendant's

product than the August 1 recall notice. The latter recall did not merely reiterate products identified in the first recall; instead, it added new batches of the product, manufactured after March 2010. We reject defendant's contention the May 3, 2011 recall put plaintiff on notice all of defendant's products were possibly defective; rather, the notice limited the defective products to the identified batches. In this regard, we agree the August 1, 2011 notice may support a separate cause of action.

The complaint does not state a cause of action specifically linked to products listed in the August 1, 2011 recall. Rather, the complaint repeatedly asserts plaintiff used defendant's products "[p]rior to May 2011." Reviewing plaintiff's factual allegations indulgently, as we must, Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989), we conclude such language could encompass products listed in the August 1, 2011 recall because they were manufactured after March 2010. Plaintiff did not receive notice of the defect in these products until August 1, 2011.

At this stage, we do not evaluate whether plaintiff can prove medical causation sufficient to survive summary judgment. We conclude only the complaint alleges claims arising within two years of the filing date of the complaint.

We add these additional comments on other issues raised on appeal. Plaintiff argues "the statute of limitations does not begin to run until the wrongful action ceases," citing Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999), and suggests:

Once [plaintiff] received the May 9, 2011 letter recalling certain tainted products, the tortious and wrongful action by [defendant] did not cease. Plaintiff continued to unknowingly use the tainted products [manufactured] by [respondent] through the August 3, 2011 recall which included tainted products Clearly, there is a material issue as to whether the tainted products involved in the August 2011 recall were the source of [plaintiff's] infections.

We reject plaintiff's attempt to extend the "continuing tort doctrine" to these facts. The Supreme Court recognized the continuing tort theory for discrimination and harassment claims, which "are often based on continuing violations."

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative [e]ffect of individual acts.

[Green v. Jersey City Bd. of Educ., 177 N.J. 434, 447 (2003) (quoting Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 20 (2002)).]

No authority extends the doctrine to medical torts or personal injury claims. The discovery doctrine, not the continuing tort doctrine, triggers the statute of limitations in personal injury actions. Cornett v. Johnson & Johnson, 414 N.J. Super. 365 (App. Div. 2010) ("New Jersey courts apply a 'discovery rule' The bases of a claim for personal injury are the plaintiff's awareness that he or she sustained an injury, and the understanding that the injury may involve another party's fault.").

As demonstrated above, plaintiff's theory of liability is based on discrete use of specific wipes on certain days. The discovery rule was triggered by the May 3 and August 1, 2011 recall notices. Therefore, any injuries resulting from use of the wipes listed in the May 3, 2011 recall are barred as untimely.

We also reject as lacking merit plaintiff's argument equity should permit the claims to stand because defendant suffered no prejudice. See R. 2:11-3(e)(1)(E). We reinstate the complaint to allow only consideration of claims resulting from wipes referenced in the August 1, 2011 recall notice. We remand the matter for further proceedings related to these claims.

Affirmed in part and reversed and remanded in part.

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


CLERK OF THE APPELLATE DIVISION