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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-4939-14T2

VERONICA WILLIAMS,

Plaintiff-Appellant,

v.

ATLANTICARE REGIONAL MEDICAL CENTER,
JAMES LOWE, M.D., JOSEPH ZERBO, D.O.,
SCOTT URBAN, D.O. and FRANCIS J.
SALVATORE, JR., M.D.,

Defendants,

and

JESSICA COSTABILE, D.O.,

Defendant-Respondent.

Argued March 21, 2017 – Decided May 11, 2017

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-2228-09.

Richard J. Heleniak argued the cause for appellant (Messa & Associates, P.C., attorneys; Mr. Heleniak, on the brief).

Joseph A. DiCroce argued the cause for respondent (Mr. DiCroce, attorney; Janice B. Venables, on the brief).

PER CURIAM

Plaintiff appeals Law Division orders granting summary judgment to defendant Jessica Costabile denying plaintiff's motion for reconsideration of the summary judgment order, and directing that her counsel pay defendant Joseph Zerbo's expert witness cancellation fees. Having considered the record in light of the applicable law, we affirm the orders granting Costabile's motion for summary judgment and denying plaintiff's motion for reconsideration, and reverse the order directing plaintiff's counsel to pay the fees.

I.

On June 19, 2007, plaintiff underwent spinal surgery performed by Dr. Zerbo, an orthopedic surgeon, and Dr. James Lowe, a neurosurgeon, under general anesthesia administered by Dr. Costabile. During the surgery, plaintiff suffered a tear to her pharynx that required subsequent surgical repair and resulted in a failure of the spinal surgery.

On June 17, 2009, plaintiff filed a complaint alleging medical malpractice against Zerbo, Lowe, other physicians, the hospital, and various fictitious defendants.¹ Costabile was not named as a defendant, but plaintiff alleged that fictitiously-named John Doe

¹ The complaint named John Does 1 through 7 and Jane Does 1 through 7 as defendants.

and Jane Doe defendants "intubated [plaintiff] and administered general and tracheal anesthesia," caused injury to plaintiff's pharynx, and "took no steps to treat the injury."

In February 2011, the court granted plaintiff's motion to amend the complaint to add Costabile as a defendant. In March 2011, plaintiff filed an amended complaint alleging Costabile negligently caused injury to plaintiff's pharynx during the intubation of plaintiff and administration of anesthesia.

Costabile subsequently filed a motion for summary judgment asserting that plaintiff's claim was barred by the two-year statute of limitations, N.J.S.A. 2A:14-2, and claiming plaintiff failed to provide an affidavit of merit in accordance with N.J.S.A. 2A:53A-26 to -29. The court rejected plaintiff's contention that her claim was timely because it was asserted in the original complaint against a fictitious defendant in accordance with Rule 4:26-4.

The court determined the claim was barred by the statute of limitations because plaintiff's initial complaint alleged she was injured as a result of the anesthesiologist's negligence, the available hospital records identified Costabile as the anesthesiologist, and plaintiff was not otherwise diligent in attempting to learn Costabile's identity before the limitations period expired. Because the court concluded plaintiff's claim was

time-barred, it did not address Costabile's argument that she was entitled to a dismissal because plaintiff failed to serve an affidavit of merit. The court entered a February 17, 2012 order granting Costabile's summary judgment motion.

Plaintiff moved for reconsideration. The court denied the motion, finding plaintiff failed to demonstrate that the court's summary judgment order was founded either on a palpably incorrect or irrational basis, or that the court failed to consider or appreciate the significance of probative competent evidence. The court further determined the complaint should be dismissed as to Costabile because plaintiff failed to serve an affidavit of merit. On May 11, 2012, the court entered an order denying plaintiff's reconsideration motion and granting Costabile summary judgment based on plaintiff's failure to serve an affidavit of merit.

The trial against the remaining defendants was scheduled for January 22, 2013, but was adjourned by the court until May 20, 2013. Six days before the trial was scheduled, plaintiff's counsel requested an adjournment. The court granted the request and scheduled a preemptory trial date of June 24, 2013. On June 18, 2013, plaintiff's counsel commenced jury selection in a different matter in Camden County and requested an adjournment of the trial in this case. The court denied the request. In response to an emergent application filed by plaintiff, we granted a stay of the

trial until June 26, 2013. The trial court then adjourned the trial to a later date.

In September 2013, the court granted Zerbo's motion for summary judgment based on plaintiff's failure to serve an affidavit of merit. Ten months later, in July 2014, Zerbo filed a motion requesting that plaintiff pay expert witness cancellation fees that were owed to Dr. Scott A. Rushton, M.D., Zerbo's expert witness in the field of orthopaedic surgery. Zerbo asserted that under his agreement with Rushton, he was obligated to pay a \$4000 fee for each of the late cancellations of Rushton's scheduled appearances at the adjourned May 2013 and June 2013 trial dates. Zerbo claimed the trial adjournments were at plaintiff's request and were due to her counsel's actions, and thus she should pay the cancellation fees due Rushton.

The court heard argument on Zerbo's motion and determined that Rushton was entitled to reimbursement from plaintiff's counsel in a sum not to exceed \$4000 for any loss of income resulting from the cancellation of his appearance at the June 2013 trial, which was adjourned solely due to plaintiff's counsel's unavailability. The court entered an October 8, 2014 order directing that Rushton submit a certification detailing any claimed lost income resulting from the cancellation of the June 2013 trial. The court subsequently reviewed a certification from

Rushton, and on December 15, 2014, entered an order directing that plaintiff's counsel pay Rushton's medical practice \$4000 "in reimbursement for the fee paid to [] Rushton."

In 2015, the case proceeded to trial before a jury against Lowe only.² The jury returned a no-cause verdict. Plaintiff appealed.

II.

On appeal, plaintiff makes the following arguments:

POINT I

The Trial Court Erred in Sanctioning Plaintiff's Counsel and Compelling Payment of Defendant Zerbo's Expert Cancellation Fees Because the Adjournment of the June 24, 2013, Trial Listing Was [] for Good Cause and a Just Excuse.

POINT II

The Trial Court Erred in Granting Summary Judgment on Behalf of Dr. Costabile For Failing to File the Complaint Within the Applicable Statute of Limitations When Plaintiff Included Fictitious Parties Within The Complaint and The Court Permitted Plaintiff's Motion to Amend the Complaint Pursuant to [R.] 4:26-4 Upon Discovery of Dr. Costabile's Identity and Role in The Surgery.

We first consider plaintiff's contention the court erred by directing that her counsel pay Zerbo's expert, Rushton, for lost income resulting from the adjournment of the June 2013 trial.

² The claims against the other defendants were dismissed at various times prior to trial.

Plaintiff argues the adjournment of the trial was necessitated by his participation in the Camden County jury trial, and that imposition of a sanction constituted an abuse of discretion.³

The court determined that plaintiff's counsel should pay Rushton because counsel was aware of the June 2013 preemptory trial date in this matter, but began the Camden County trial without advising the court there about the preemptory trial date in this matter. We review a trial court's imposition of a sanction for an abuse of discretion. Cf. Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005).

In pertinent part, Rule 1:2-4(a) provides that "[i]f without just excuse or because of failure to give reasonable attention to the matter" a party requests an adjournment of a trial, the court may order that the party making the request pay the "reasonable expenses" of the "aggrieved party." The record shows plaintiff's counsel was actively engaged in a jury trial in Camden County, made a timely request for an adjournment of the June 2013 trial date in accordance with Rule 4:36-3(b), and his participation in

³ We suppressed Zerbo's brief in this matter as nonconforming and, as such, he has presented no argument in opposition to plaintiff's contentions. In any event, Zerbo's putative brief did not include any substantive arguments but relied solely on the reasoning of the motion court.

the Camden County matter necessitated an adjournment of the commencement of the trial in this case.

To be sure, plaintiff's counsel should have communicated with the Camden County court and the trial court in this case about the potential scheduling conflict between the two matters. The record, however, also shows that plaintiff's counsel had been engaged in settlement negotiations in the Camden County matter, believed it was going to be resolved and would not interfere with the commencement of the trial here, and immediately requested the adjournment in this case when the settlement negotiations failed and jury selection began in Camden. The court was reasonably concerned with plaintiff's counsel lack of communication concerning the potential scheduling conflict, but we are not convinced the record supports a determination that plaintiff's adjournment request was without "just excuse" and was the result of a "failure to give reasonable attention to [this] matter." R. 1:2-4(a). We are therefore constrained to reverse the court's orders directing that plaintiff's counsel reimburse Rushton for any purported loss of income due to the trial adjournment.

We next address plaintiff's argument that the court erred by granting Costabile's motion for summary judgment. In the first instance, we affirm the court's award of summary judgment based on its determination that plaintiff failed to serve an affidavit

of merit as required under N.J.S.A. 2A:53A-26 to -29. The court's finding that plaintiff failed to serve an affidavit of merit from a physician licensed in Costabile's area of practice, anesthesiology, is supported by the record.

Plaintiff appealed the court's December 15, 2014 order granting summary judgment to Costabile based on plaintiff's failure to serve an affidavit of merit, but plaintiff's brief on appeal does not argue that entry of the order constituted error. An issue not briefed on appeal is deemed waived. Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008); Zavodnick v. Leven, 340 N.J. Super. 94, 103 (App. Div. 2001). We are therefore satisfied plaintiff waived her right to challenge the order granting summary judgment based on the failure to serve the affidavit of merit.

We are also convinced the court correctly granted summary judgment on the separate, but equally dispositive, basis that plaintiff's claim against Costabile is barred by the statute of limitations, N.J.S.A. 2A:14-2. Plaintiff contends her complaint against Costabile was timely because Costabile's identity was unknown, and plaintiff therefore properly asserted her claim against a fictitiously-named defendant in accordance with Rule 4:26-4. The court rejected plaintiff's argument, finding she failed to act diligently to discover Costabile's identity prior

to the expiration of the limitations period, and naming a fictitious defendant did not provide refuge from the statute of limitations bar to her claim. We agree.

Rule 4:26-4 provides that "if the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification." The Rule "address[es] the situation in which a plaintiff is aware of a cause of action against a defendant but does not know that defendant's identity." Worthy v. Kennedy Health System, 446 N.J. Super. 71, 88 (App. Div.) (quoting Gallagher v. Burdette-Tomlin Med. Hosp., 318 N.J. Super. 485, 492 (App. Div. 1999), aff'd, 163 N.J. 38 (2000)), certif. denied, 228 N.J. 24 (2016). Rule 4:26-4 "render[s] timely the complaint filed by a diligent plaintiff, who is aware of a cause of action against an identified defendant but does not know the defendant's name," ibid. (quoting Greczyn v. Colgate-Palmolive, 183 N.J. 5, 11 (2005)), because "[w]hen the plaintiff discovers the party's name, 'amendment of the complaint may relate back [to] allow an action otherwise time-barred,'" ibid. (quoting Brown v. Kennedy Mem'l Hosp.-Univ. Med. Ctr., 312 N.J. Super. 579, 587 (App. Div.), certif. denied, 156 N.J. 426, (1998)).

"[I]dentification of a defendant by a fictitious name . . . may be used only if a defendant's true name cannot be ascertained by the exercise of due diligence prior to filing the complaint." Id. at 88-89 (quoting Claypotch v. Heller, Inc., 360 N.J. Super. 472, 479-80 (App. Div. 2003)). A plaintiff must proceed with due diligence in ascertaining the fictitiously identified defendant's true name. Ibid.; Johnston v. Muhlenberg Reg'l Med. Ctr., 326 N.J. Super. 203, 208 (App. Div. 1999).

In Matynska v. Fried, 175 N.J. 51, 53 (2002), the Court determined that the plaintiff did not "cross the due diligence threshold" under Rule 4:26-4 where the physician's name appeared twice in the plaintiff's medical records and even "a cursory look at the telephone book or a call to . . . the hospital" would have yielded the identity of the fictitiously named defendant. The Court concluded that the plaintiff "had an obligation to investigate all potentially responsible parties in a timely manner but did not do so." Ibid.

In all significant respects, the circumstances here are identical to those presented in Matynska. The record shows plaintiff obtained her hospital medical records during the limitations period and they identified Costabile as the anesthesiologist. Moreover, as the motion judge aptly observed, plaintiff could have simply contacted the hospital to determine

the identity of the anesthesiologist, but failed to do so. The record is also otherwise bereft of any evidence showing plaintiff acted diligently to determine the identity of Costabile during the limitations period. See Claypotch, supra, 360 N.J. Super. at 479-80 (holding Rule 4:26-4 permits use of a fictitious name "only if a defendant's true name cannot be ascertained by the exercise of due diligence prior to filing the complaint"). The court correctly concluded plaintiff did not satisfy the "due diligence threshold" of Rule 4:26-4. Matynska, supra, 175 N.J. at 53. Therefore, plaintiff's claim against Costabile is barred by the statute of limitations.

We reject plaintiff's reliance on Viviano v. CBS, Inc., 101 N.J. 538, 556 (1986), where the Court relaxed the requirements of Rule 4:26-4 "[u]nder the singular circumstances of [the] case." The Court in Viviano was satisfied the plaintiff acted with sufficient diligence to obtain the benefit of Rule 4:26-4, but relaxed the application of the Rule solely because the delay in identifying and naming the defendant was due to the "adverse party['s] fail[ure] to comply with the rules of discovery." Ibid. There are no similar circumstances presented here.

Affirmed in part. Reversed 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