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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0942-16T1

MUNTERS CORPORATION, a New York corporation, NICHOLAS DES CHAMPS and REBECCA DES CHAMPS, in their individual capacity and as indemnitors on behalf of MUNTERS CORP.,

Plaintiffs-Appellants,

v.

ENVIRO-SCIENCES (OF DELAWARE) INC., a Delaware corporation,

Defendant-Respondent.

Argued March 20, 2018 – Decided April 19, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1931-16.

Brian J. Molloy argued the cause for appellants (Wilentz, Goldman & Spitzer, PA, and Ronald C. Minkoff (Frankfurt Kurnit Klein & Selz PC) of the New York bar, admitted pro hac vice, attorneys; Brian J. Molly and Ronald C. Minkoff, of counsel and on the brief; Risa M. Chalfin, on the briefs).

Timothy E. Corriston argued the cause for respondent (Connell Foley, LLP, attorneys;

Timothy E. Corriston, of counsel and on the brief; Scott M. Press, on the brief).

PER CURIAM

Plaintiffs Munters Corporation and its indemnitors filed a malpractice action against defendant Enviro-Sciences Inc. Defendant moved to dismiss the complaint because it was barred by the statute of limitations and therefore failed to state a claim. The trial court dismissed plaintiffs' complaint with prejudice. We affirm.

The following facts are taken from the record. From 1983 to 1990, plaintiffs[1] operated a manufacturing facility in Livingston. From 1991 to 1997, plaintiffs retained counsel to assist with the wind-down of its New Jersey operations, including environmental and regulatory matters, and sale of the property. In order to sell the property, plaintiffs had to comply with certain obligations under the New Jersey Industrial Site Recovery Act (ISRA). Plaintiffs allege defendant was hired as plaintiffs' environmental consultant to work in tandem with counsel on ISRA compliance matters.

On December 30, 1996, upon the advice of defendant, plaintiffs executed a negative declaration stating there was no discharge of

[1] Nicholas and Rebecca Des Champs owned Des Champs Laboratories, Inc., a former industrial manufacturer, which merged into Munters Corporation in 2007.

hazardous substances from the property, and on January 9, 1997, defendant submitted the negative declaration to the New Jersey Department of Environmental Protection (DEP) formally requesting the issuance of a No Further Action (NFA) letter. The DEP approved the request and issued an NFA letter on January 22, 1997, closing its case related to ISRA compliance, and the property was subsequently sold.

In 2008, the DEP rescinded the NFA letter after groundwater contamination was discovered originating from the property. On November 10, 2008, the DEP issued a letter stating: "Because the [DEP] has rescinded the January 22, 1997 NFA approval [plaintiffs] no longer ha[ve] the required authorization that allowed the sale of property to occur in 1997." The rescission letter instructed plaintiffs to complete an application for a remediation agreement with the DEP, conduct an investigation of the property to define the source of contamination, submit a preliminary assessment and site investigation report, and pay the appropriate review fees.

After receiving the DEP's rescission letter, plaintiffs were advised by legal counsel regarding a De Minimis Quantity Exception ("DQE"). According to plaintiffs' complaint, if defendant had advised plaintiffs to obtain a DQE rather than the NFA Letter, the DEP would have been barred from pursuing plaintiffs for the

groundwater contamination discovered at a later date. Unlike an NFA letter, a DQE could not be rescinded.

Thus, plaintiffs submitted a retroactive DQE application to the DEP on March 23, 2009. The DEP denied plaintiffs' retroactive DQE application on April 21, 2009, due to the presence of groundwater contamination on the property.

On October 27, 2014, plaintiffs contacted defendant requesting defendant execute a tolling agreement pertaining to plaintiffs' potential malpractice claims against defendant. In a letter, plaintiffs stated: "The time within which [plaintiffs] may bring a claim for professional malpractice and breach of contract against [defendant] under the applicable six-year statute of limitation running from their discovery of the breach (November 10, 2008) may expire on November 10, 2014." Defendant agreed to enter into the limited tolling agreement with plaintiffs, and agreed any claims plaintiffs may have had against defendant that had not expired as of the effective date of the agreement on November 4, 2014, were tolled to October 1, 2015. The tolling period was excluded from the calculation of the statute of limitations for any claim brought after the tolling date. The tolling agreement was not extended after it expired.

On March 17, 2016, plaintiffs filed a complaint against defendant in this matter. Defendant filed its motion to dismiss.

Defendant argued the complaint failed to state a claim upon which relief could be granted because plaintiffs' potential malpractice claim accrued on November 10, 2008. Defendant argued while the discovery rule applied in professional malpractice claims, plaintiffs' complaint was still untimely because it was filed approximately five-and-a-half months after the expiration of the statute of limitations, notwithstanding the benefit of the tolling agreement.

In response, plaintiffs argued the statute of limitations expired on March 18, 2016, six years after the DEP's April 21, 2009 denial of the retroactive DQE, plus the 332 days of the tolling period that were tacked on to apply to claims filed after the tolling date. Plaintiffs also argued the court was required to conduct a Lopez[2] hearing to determine the date upon which its malpractice claim against defendant accrued.

The motion judge entered an order granting defendant's motion to dismiss plaintiffs' complaint with prejudice. In her oral decision, the judge found the cause of action accrued on March 23, 2009, and thus plaintiffs should have filed their complaint by February 18, 2016, pursuant to the tolling agreement. The judge dismissed plaintiff's complaint for failure to state a claim

[2] Lopez v. Swyer, 62 N.J. 267 (1973).

pursuant to Rule 4:6-2(e), because it was filed on March 17, 2016. The judge also determined "plaintiffs have failed to meet their burden of establishing a need for a Lopez [h]earing, as the admissions pled in the plaintiff[s'] complaint provide the [c]ourt with the facts necessary to dispose of their claims." This appeal followed.

We begin by reciting our standard of review. Appellate review of a trial court's ruling on a motion to dismiss is de novo. Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010) (citing Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002)). "A complaint should be dismissed for failure to state a claim pursuant to Rule 4:6-2(e) only if 'the factual allegations are palpably insufficient to support a claim upon which relief can be granted.'" Ibid. (quoting Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)). "This standard requires that 'the pleading be searched in depth and with liberality to determine whether a cause of action can be gleaned even from an obscure statement.'" Ibid. (quoting Seidenberg, 348 N.J. Super. at 250).

Plaintiffs contend because defendant failed to advise of the need to apply for a DQE prior to the sale of the property, they were thereafter barred from obtaining a DQE. Therefore, the date of accrual for the action was April 21, 2009, the date when the

DEP denied plaintiffs' application for a retroactive DQE. Plaintiffs argue the statute of limitations and the additional 332 days pursuant to the tolling agreement, would run from April 21, 2009 and expire March 18, 2016. Thus, plaintiffs claim the March 17, 2016 complaint was timely.

N.J.S.A. 2A:14-1 states: "Every action at law for [professional malpractice] . . . shall be commenced within [six] years next after the cause of any such action shall have accrued." "The traditional rule is that a cause of action accrues on the date when 'the right to institute and maintain a suit', first arises." Russo Farms v. Vineland Bd. of Educ., 144 N.J. 84, 98 (1996) (quoting Rosenau v. City of New Brunswick, 51 N.J. 130, 137 (1968)).

"[P]ursuant to the discovery rule, a professional malpractice claim accrues when: (1) the claimant suffers an injury or damages; and (2) the claimant knows or should know that its injury is attributable to the professional negligent advice." Vision Mortg. Corp. v. Patricia J. Chiapperini, Inc., 156 N.J. 580, 586 (1999) (alteration in original) (quoting Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280, 296 (1995)).

> Thus, when a party is either unaware that he has sustained an injury or, although aware that an injury has occurred, he does not know that it is, or may be, attributable to the fault of another, the cause of action does not

> accrue until the discovery of the injury or facts suggesting the fault of another person.
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> [Tevis v. Tevis, 79 N.J. 422, 432 (1979).]
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> "Fault" in the context of the discovery rule is simply that it is possible -- not provable or even probable -- that a third person's conduct that caused the injury was itself unreasonable or lacking in due care. In other words, knowledge of fault does not mean knowledge of a basis for legal liability or a provable cause of action; knowledge of fault denotes only facts suggesting the possibility of wrongdoing. Thus, knowledge of fault for purposes of the discovery rule has a circumscribed meaning: it requires only the awareness of facts that would alert a reasonable person exercising ordinary diligence that a third party's conduct may have caused or contributed to the cause of the injury and that conduct itself might possibly have been unreasonable or lacking in due care.
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> [Savage v. Old Bridge-Sayreville Med. Grp., P.A., 134 N.J. 241, 248 (1993).]

"Legally-cognizable damages occur when a plaintiff detrimentally relies on . . . the negligent advice . . ." in the context of professional malpractice. Grunwald v. Bronkesh, 131 N.J. 483, 495-96 (1993). "[A]lthough an adverse judgment may increase a plaintiff's damages, it does not constitute an indispensable element to the accrual of a cause of action." Ibid.

Here, the trial court correctly reasoned:

> In accordance with [Rule] 4:6-2(e), and New Jersey precedent, the Court finds that the plaintiff's identified accrual date of April 21st, 2009 is not consistent with the

recognized and designated ways a claim can accrue.

Because the time a cause of action accrues is the date at which the plaintiff both realized that they were injured and "knew or should have known." [This is] [b]asically an objective standard that the injury could have been caused by negligence, sufficient facts to start the statute of limitations running. [Savage, 134 N.J. at 249.]

The Court finds that the latest possible date that the claim could have commenced, the statute of limitations clock is March 23rd, 2009.

As set forth in plaintiff's brief in opposition of this motion, plaintiff states that after receiving the letter from the DEP on November 10th, 2008, rescinding the 1997 NFA letter for the [property], because hazardous materials had supposedly been found in ground water coming from the property, [plaintiff] consulted with new counsel.

This new counsel informed [plaintiff] for the first time about the availability of obtaining a DQE from the DEP, as an alternative method of complying with the ISRA.

Additionally, [plaintiff] was informed that based on [defendant]'s prior report, [plaintiff] would have been entitled to receive a DQE back in 1997[,] and had it been obtained, it would have barred the DEP from attempting to hold plaintiffs liable for the alleged new found contamination.

Thus, as stated in plaintiff's opposition brief, the receipt of the DEP letter on November 10th, 2008, "was the first indication that [plaintiff] might face liability for remediation of the alleged pollution."

And by March 23rd, 2009, [plaintiff] filed an application for a DQE. This is after consulting with new counsel that [plaintiff] learned about the availability of a DQE that was available back in 1997[,] and had they obtained it at that time, the DEP would have been barred from attempting to hold plaintiff liable in 2008.

This is what the DEP was attempting to do by rescinding the NFA letter. Thus, by March 23rd, 2009, plaintiffs knew that one, the NFA letter was revoked and they faced the risk of cleanup if they were unable to obtain a DQE and two, that had Enviro-Sciences attempted to procure a DQE initially, instead of an NFA letter, the entire issue would have been avoided.

Thus, by March 23rd, 2009, plaintiffs were "aware of facts that would alert a reasonable person exercising ordinary diligence that Enviro-Science's conduct may have caused or contributed to the cause of the injury and that the conduct itself might possibly have been unreasonable or lacking in due care." [Savage, 134 N.J. at 248.] . . . .

. . . .

Therefore, based on the date of March 23rd, 2009, the plaintiffs must have filed the complaint against ESI calculated with the additional 332 days provided in the [t]olling [a]greement by February 18th, 2016, in order to . . . avoid violating the statute of limitations.

Since plaintiff's complaint was filed March 17th, 2016, it was not timely and consequently is barred by the expiration of the statute of limitations.

Our review of the record does not lead us to a different conclusion than the motion judge. By filing for a DQE on March 23, 2009, plaintiffs knew or should have known their cause of action had accrued because they discovered defendant's conduct may have caused injury in connection to the wind-down of their business.[3]

Plaintiffs contend "[t]he [t]rial [c]ourt could not have made an informed decision on the accrual date for the statute of limitations, specifically the date of knowledge of fault, without even reviewing the critical March letter or without conducting a

[3] Plaintiffs' argument counsel's failure to advise them of a DQE barred them from obtaining one, and therefore harmed them, has been addressed while this appeal was pending. In R&K Assocs., LLC v. N.J. Dep't of Envtl. Prot., __ N.J. Super. __, __ (App. Div. 2017) (slip op. at 11), we held "there is no language in the text of the statute explicitly prohibiting a former owner of property . . . from pursuing a DQE after it has sold its parcel." We stated:

> It would be inequitable to construe the statutory scheme to deprive former owners of contaminated sites, who can be held liable retrospectively under ISRA for those conditions, of the opportunity to pursue DQEs or other exemptions that may be enjoyed by current owners. If liability under ISRA can extend to a former "owner" then the avenue for an exemption equitably and logically should extend reciprocally to qualified former owners, as well.
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> [Id. at 16-17.]

Lopez hearing to establish a factual record." Plaintiffs argue the motion judge "improperly denied [p]laintiffs' request for a hearing[.]" Lopez, 62 N.J. at 274.

A Lopez hearing is meant to provide an opportunity for the "equitable claims of opposing parties [to] be identified, evaluated and weighed" by the trial court before determining the date upon which a plaintiff became aware of the facts giving rise to the cause of action. Lopez, 62 N.J. at 275. "The burden of proof will rest upon the party claiming the indulgence of the rule." Id. at 276. "The proofs need not evoke a finding that plaintiff knew for a certainty that the factual basis [for defendant's liability] was present." Burd v. N.J. Tel. Co., 76 N.J. 284, 293 (1978).

When the credibility of the plaintiff is a significant factor, "[t]he determination by the judge should ordinarily be made at a preliminary hearing . . . ." Lopez, 62 N.J. 267, 275 (1973). However, "[w]here credibility is not involved, affidavits, with or without depositions, may suffice; it is for the trial judge to decide." Ibid. Where "the record . . . unquestionably establishes [a] plaintiff's awareness of the essential facts, no formal hearing [is] necessary to resolve the discovery rule issue." Lapka v. Porter Hayden Co., 162 N.J. 545, 558 (2000).

Here, plaintiffs' complaint provided the motion judge with the requisite information to determine the issue of plaintiffs' awareness of the essential facts that should have alerted them to the possibility of the claim by March 23, 2009. Indeed, the judge concluded:

> [B]ased upon the . . . facts in the pleadings and Lopez v. Swyer, 62 N.J. 262 (1973), the [c]ourt does not find that a Lopez [h]earing is necessary as the plaintiffs have failed to meet their burden of establishing a need for a Lopez hearing, as the admissions pled in the plaintiffs' complaint provide the [c]ourt with the facts necessary to dispose of their claims.

We agree. Plaintiffs' complaint contained admissions, which the motion judge found established plaintiffs should have been aware the date of accrual was March 23, 2009. A Lopez hearing was not necessary to establish these facts. Furthermore, there is no indication a hearing was required to address issues of credibility as the motion before the judge was to dismiss for failure to state a claim, and plaintiffs' pleadings were afforded all reasonable inferences. Therefore, the motion judge properly determined plaintiffs failed to meet the burden of establishing the need to conduct a Lopez hearing.

Nonetheless, plaintiffs contend a hearing was mandated here pursuant to Palisades at Fort Lee Condo. Assoc., Inc. v. 100 Old Palisade, LLC, 230 N.J. 427 (2017). The plaintiff in Palisades,

commenced a suit regarding defective construction of a condominium. Id. at 434. The Palisades plaintiff was the new owner of the condominium and did not have possession at the time of construction. Id. at 449-50. The defendant argued the statute of limitations had run and barred the plaintiff's construction-related claims. Id. at 434, 455. The Court stated: "Based on the record before us, we cannot [determine the accrual date] because it requires findings of fact to determine when [plaintiff] . . . first knew or . . . should have known of a cause of action against . . . defendant. . . . To answer those questions, the trial court must conduct a Lopez hearing . . . ." Id. at 452.

The Court held as follows:

> In summary, the following principles guide application of the property-tort statute of limitations in construction-defect cases. The date that a structure is deemed substantially complete oftentimes is when a cause of action accrues because some construction defects will be readily apparent on inspection and therefore the plaintiff will have a reasonable basis for filing a claim. But many construction defects will not be obvious immediately. In such instances, a cause of action does not accrue until the plaintiff knows or, through the exercise of reasonable diligence, should know of a cause of action against an identifiable defendant. A plaintiff who is a successor in ownership takes the property with no greater rights than an earlier owner. If the earlier owner knew or should have known of a cause of action against an identifiable defendant, the accrual clock starts then.

> The determination of when a claim accrued ordinarily should be made at a Lopez hearing. At the hearing, the plaintiff will bear the burden of proving that the claim accrued at a time after a project's substantial completion. See Lopez, 62 N.J. at 276. The plaintiff is in the best position to establish when he first knew or reasonably should have known of his cause of action. The court's decision must be based on objective evidence. The court may consider documentary evidence, deposition transcripts, and, in its discretion, take testimony. Last, the court must state its reasons for its findings of facts.
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> [Palisades, 230 N.J. at 454 (citation omitted).]

The facts and circumstances here are dissimilar from Palisades. This case did not involve a latent construction defect that was not readily discoverable by plaintiffs. Moreover, plaintiffs did not inherit the conditions on their property from a prior owner, such that the motion judge's imputation of knowledge of the potential claims against defendant required a fact finding hearing. The judge was able to determine the date upon which the statute of limitations for the commencement of the lawsuit expired based on the parties' pleadings.

Finally, plaintiffs contend the motion judge's decision the statute of limitations commenced on March 23, 2009, was an argument defendant asserted for the first time in its reply brief in support of its motion to dismiss. Plaintiffs argue they were deprived of

due process because it was improper for the motion judge to consider an argument raised in a reply brief without affording them the opportunity to respond. We are not persuaded.

In its reply brief to the motion judge, defendant reiterated the accrual date was the November 10, 2008 rescindment. The purpose of the reply brief was to reply to an argument plaintiffs had advanced regarding the April 2009 denial and reiterate that, based on their pleadings, plaintiffs were aware of the DQE option by March 23, 2009, at the latest. Thus, defendant's reply brief introduced no new facts or issues that plaintiffs had not already raised themselves, and plaintiffs' due process rights were not violated.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION