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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-1648-16T2

JOSEPH HUTCHKO,

Plaintiff-Appellant,

v.

JOHN B. DELBENE,

Defendant-Respondent.

Argued November 27, 2017 – Decided February 16, 2018

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Gloucester County, Docket No.
L-0960-16.

Michael J. Veneziani argued the cause for
appellant (Freedman & Lorry, PC, attorneys;
Michael J. Veneziani, on the brief).

Deborah C. Halpern argued the cause for
respondent (Parker Young & Antinoff, LLC,
attorneys; Deborah C. Halpern, on the brief).

PER CURIAM

Plaintiff Joseph Hutchko appeals from an order dismissing his complaint because it was filed one day beyond the two-year statute of limitations for a personal injury action. See N.J.S.A. 2A:14-

2(a). Because we are convinced the record is bereft of any evidence that plaintiff was induced or tricked into filing his complaint outside of the limitations period, we affirm.

I.

On August 1, 2014, plaintiff was injured in an automobile accident which he alleges in the complaint was caused by defendant John B. Delbene's negligence. On September 9, 2014, plaintiff's counsel sent a letter of representation to defendant's insurance carrier, New Jersey Manufacturers Insurance Company (NJM). In response, NJM requested that counsel provide medical reports and other information related to plaintiff's claim, and advised plaintiff's cooperation was expected if an independent medical examination (IME) became necessary.

On April 6, 2015, NJM sent plaintiff's counsel a letter, again requesting information concerning plaintiff's status and copies of medical bills and records. Plaintiff's counsel did not respond to the request. Almost one year later, in March 2016, NJM sent a letter to plaintiff's counsel requesting the same information and renewing its request for copies of plaintiff's medical bills and reports.

By letter dated May 12, 2016, plaintiff's counsel provided NJM with insurance information, medical bills and reports, as well as other information related to the accident and plaintiff's

injuries. The letter also included a monetary settlement demand. On May 20, 2016, an NJM's claims adjuster told plaintiff's counsel that plaintiff's demand "would not be evaluated without an [IME] due to issues pertaining to the verbal threshold." On the same day, plaintiff's counsel advised NJM he was filing a complaint in Camden County.

Three days later, NJM wrote to Dr. Larry Rosenberg, requesting that he conduct plaintiff's IME. The letter was also sent to plaintiff's counsel. The IME was scheduled for July 20, 2016. NJM requested that Dr. Rosenberg provide NJM with a typed report no later than ten days after the IME.

Dr. Rosenberg notified NJM that the IME needed to be rescheduled. On June 23, 2016, NJM sent correspondence to Dr. Rosenberg and plaintiff's counsel advising the IME had been rescheduled for August 5, 2016. Plaintiff's counsel received the letter, but there were no further communications between plaintiff's counsel and NJM until August 2, 2016, one day after the statute of limitations expired.

On August 2, 2016, a new claims adjuster from NJM called plaintiff's counsel and asked if a complaint had been filed.¹ Later that day, plaintiff's counsel filed a one-count complaint

¹ The record does not include any additional information concerning what was said during the conversation.

alleging defendant's negligence caused the accident and plaintiff's injuries. The following day, NJM cancelled plaintiff's August 5, 2016 IME because a complaint had been filed.

Defendant moved to dismiss the complaint, arguing plaintiff's claim was barred by the statute of limitations. In opposition, plaintiff relied on his counsel's certification, which averred that because NJM did not deny coverage or plaintiff's claim during the limitations period, he was led to believe efforts to resolve the case would continue after the IME. Defendant submitted an affidavit from Sharon O'Brien, a supervisor in NJM's bodily injury department. O'Brien represented NJM's records reflected that on May 20, 2016, plaintiff's counsel said he "would be filing suit in Camden County." She also stated NJM never indicated the matter would be settled, the July 20, 2016 IME was rescheduled at Dr. Rosenberg's request and, following the rescheduling of the IME, there were no further communications with plaintiff's counsel until after the statute of limitations expired.

The court heard oral argument and granted the dismissal in a written opinion and order. The court rejected plaintiff's claim he was entitled to equitable tolling of the statute of limitations. The court found "NJM's conduct was not sufficient to lull plaintiff into a reasonable belief that the complaint did not have to be filed within the . . . two year statute of limitations," and the

rescheduling of the IME beyond the limitations period "without more, was not sufficient to excuse plaintiff from meeting [his] . . . obligation to" timely file suit. The court found no evidence the IME was rescheduled to "trick the plaintiff or . . . lull him into not filing suit."²

On appeal, plaintiff presents the following arguments:

POINT A

THE TRIAL [COURT] ERRED IN HOLDING THAT PLAINTIFF JOSEPH HUTCHKO WAS NOT ENTITLED TO AN EQUITABLE TOLLING OF THE [STATUTE] OF LIMITATIONS SINCE DEFENDANT'S INSURANCE CARRIER LULLED PLAINTIFF INTO A FALSE SENSE OF SECURITY BY CONDUCT SUGGESTING THAT THE CLAIM IN QUESTION COULD BE AMICABLY SETTLED WITHOUT THE NECESSITY OF LITIGATION.

POINT B

THE TRIAL COURT'S RELIANCE ON UNPUBLISHED DECISIONS OF THE APPELLATE DIVISION AS PRINCIPAL SUPPORT FOR GRANTING THE MOTION TO DISMISS VIOLATED R. 1:36-3.

² The court relied upon, cited, and attached a compendium of unreported Appellate Division decisions supporting the dismissal. In doing so, the court erred by failing to comply with the prohibition contained in Rule 1:36-3 against citing unpublished opinions. "[A]s a general matter, unpublished opinions are not to be cited by any court absent certain specified circumstances" set forth in Rule 1:36-3. Badiali v. N.J. Mfrs. Ins. Grp., 429 N.J. Super. 121, 126 n.4 (App. Div. 2012). No special circumstances are extant here. We discern no reason to further address the court's error, however, because we review the court's decision de novo and without reliance on any unpublished decisions.

II.

Although defendant filed a motion to dismiss the complaint for failure to state a claim upon which relief may be granted, see R. 4:6-2(e), and the court entered an order dismissing the complaint, we consider the order as one granting summary judgment because the court considered facts beyond those alleged in the complaint, see R. 4:6-2(e) (providing that a motion to dismiss for failure to state a claim shall be treated as one for summary judgment where "matters outside the pleading are presented to and not excluded by the court"). We therefore review the court's order de novo, applying the same standard as the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). We determine whether the defendant, as the moving party, has demonstrated the absence of genuine issues of material fact, and whether the trial court correctly determined defendant was entitled to judgment as a matter of law, owing no deference to the trial court's legal conclusions. N.J. Dep't of Env'tl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 507 (App. Div. 2015).

It is not disputed the complaint was filed one day after the two-year limitations period applicable to personal injury actions. See N.J.S.A. 2A:14-2(a). Plaintiff argues, however, that the complaint was timely filed because NJM's conduct equitably tolled the statute of limitations. We disagree.

Statutes of limitations "are based on the goals of achieving security and stability in human affairs and ensuring cases are not tried on the basis of stale evidence." Zaccardi v. Becker, 88 N.J. 245, 256 (1982). "Consistent with that purpose, 'where defendants are on notice of the claims, and no significant prejudice results, the policy reasons for upholding a strict statute of limitations recede.'" Price v. N.J. Mfrs. Ins. Co., 182 N.J. 519, 524 (2005) (quoting W.V. Pangborne & Co., Inc. v. N.J. Dep't of Transp., 116 N.J. 543, 563 (1989)). Thus, "[f]lexible applications of procedural statute of limitations may be based on equitable principles, such as the discovery rule, or estoppel." Id. at 524-25 (internal citation omitted).

"[T]he doctrine of equitable tolling of limitations periods has been applied only in narrowly-defined circumstances." R.A.C. v. P.J.S. Jr., 192 N.J. 81, 100 (2007). For example, equitable tolling has been applied where "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Binder v. Price Waterhouse & Co., LLP, 393 N.J. Super. 304, 312 (App. Div. 2007) (quoting Freeman v. State, 347 N.J. Super. 11, 31 (App. Div. 2002)).

"Absent a showing of intentional inducement or trickery by a defendant, the doctrine . . . should be applied sparingly and only in the rare situation where it is demanded by sound legal

principles and in the interest of justice." Id. at 313 (citation omitted). "Equitable tolling 'requires the exercise of reasonable insight and diligence by a person seeking its protection,'" ibid. (quoting Villalobos v. Fava, 342 N.J. Super. 38, 52 (App. Div. 2001)), because even though "it 'affords relief from inflexible, harsh or unfair application of a statute of limitations,' [it] does not excuse claimants from exercising the reasonable insight and diligence required to pursue their claims," ibid. (alteration in original) (quoting Freeman, 347 N.J. Super. at 31).

In Price, 182 N.J. at 525-26, the Court held that the carrier, NJM, could not rely on the statute of limitations to bar the plaintiff's uninsured motorist claim, after it received early notice from plaintiff of the claim, and thereafter sought and received from plaintiff various information necessary to evaluate plaintiff's claim over the course of several years. The Court concluded that "the record amply supports the trial court's finding that NJM's conduct lulled plaintiff and his counsel into believing that the [UM] claim had been properly filed. Plaintiff reasonably relied on NJM's conduct in failing to file a complaint or to request arbitration within the statute of limitations period." Id. at 527.

NJM's conduct here does not fall within the narrowly-defined circumstances permitting equitable tolling of the limitations

period. To the contrary, NJM diligently requested information concerning plaintiff's alleged injuries and medical records in September 2014 and advised plaintiff an IME might be required to evaluate his claim. It was not until May 2016, however, that NJM was first provided with the requested information and records. NJM thereafter immediately scheduled the IME, which was then rescheduled based solely on Dr. Rosenberg's request.

During the limited communications between NJM and plaintiff's counsel, NJM stated only that it needed the requested information to "evaluate" plaintiff's claim. NJM and plaintiff's counsel never engaged in settlement discussions, NJM never said plaintiff should not file a complaint, and NJM made no commitment the matter would be settled without the need for filing a timely complaint. Plaintiff's counsel does not dispute NJM's assertion that on May 20, 2016, he advised NJM he intended to file a complaint in Camden County. Thus, NJM had reason to believe plaintiff would file a complaint; plaintiff's counsel told NJM so.

We find no evidence NJM engaged in trickery by rescheduling the IME. To the contrary, the IME was rescheduled solely at Dr. Rosenberg's request. There is no evidence the IME was rescheduled to take advantage of the looming expiration of the limitations period.

In plaintiff's counsel's opposition to the dismissal motion, he claims only that it was NJM's failure to deny plaintiff's "claim or disclaim coverage during the limitations period . . . [that] led him to believe that efforts to resolve the matter before engaging in litigation would continue after [p]laintiff's IME." In his certification, however, plaintiff's counsel acknowledges that on May 20, 2016, the NJM claims adjuster advised him that the settlement demand "would not be evaluated without an [IME] due to issues pertaining to the verbal threshold." Thus, NJM did advise plaintiff's counsel during the limitations period of its position concerning plaintiff's claim.³

Plaintiff's counsel knew on May 20, 2016, NJM would not make a decision on the claim until after the IME and, on the same day, he told the claims adjuster suit would be filed in Camden County. Thereafter, the only communications between plaintiff's counsel and NJM prior to the expiration of the limitations period concerned

³ We observe that any purported failure of NJM to make a final decision on plaintiff's claim within the limitations period was the result of the long-delayed delivery of plaintiff's medical records and insurance information. As noted, NJM first requested the records and information in September 2014, but plaintiff did not provide them until May 2016. NJM then immediately scheduled the IME, which it advised at the outset might be required to evaluate plaintiff's claim. Cf. Price, 182 N.J. at 527 (finding equitable tolling where carrier had all of the requested and necessary medical information but failed to deny plaintiff's claim or coverage during the limitations period).

the scheduling of the IME. We find nothing in those communications or any action by NJM, however, that could have reasonably lulled or induced plaintiff into believing he was relieved of his burden of filing a timely complaint. See Binder, 393 N.J. Super. at 312.

In any event, the mere fact that settlement discussions might have followed the expiration of the limitations period does not support a finding of equitable tolling. "A claim must be commenced by filing a complaint and is not commenced by writing letters or negotiating with one's adversary." Mortara v. Cigna Prop. & Cas. Ins. Co., 356 N.J. Super. 1, 3-4 (App. Div. 2001), aff'd o.b., 174 N.J. 566 (2002). It was plaintiff's burden to file his complaint within the limitations period. Cruz-Diaz v. Hendricks, 409 N.J. Super. 268, 279 (App. Div. 2009). Plaintiff simply failed to do so here.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION