SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1857-16T2

JOSE PEREZ & MYRIAM PEREZ,
his wife,

Plaintiffs-Respondents,

v.

WARREN A. CHIODO, DPM,
THE UNIVERSITY HOSPITAL OF
MEDICINE & DENTISTRY OF
NEW JERSEY,

Defendants-Appellants.

Submitted January 25, 2018 – Decided February 12, 2018

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6022-16.

Gubir S. Grewal, Attorney General, attorney for appellants (Melissa H. Raksa, Assistant Attorney General, of counsel; Bryan E. Lucas, Deputy Attorney General, on the briefs).

Emolo & Collini, attorneys for respondents (John C. Emolo, on the brief).

PER CURIAM

Defendants Warren A. Chiodo, DPM, and University Hospital appeal from a December 2, 2016 Law Division order granting plaintiffs Jose and Myriam Perez's motion for leave to file a late notice of tort claim pursuant to N.J.S.A. 59:8-9. We reverse and remand for a Lopez[1] hearing on all issues related to the motion.

On January 24, 2015, plaintiff Jose Perez (Perez) was on duty as a police officer when he slipped and fell on ice and sustained an injury to his left ankle. He was referred to Dr. Chiodo, who was a podiatrist employed by University Hospital, a public healthcare facility of the State of New Jersey. Dr. Chiodo diagnosed Perez with a left ankle fracture and, on February 2, 2015, performed surgery on the ankle. According to Perez's certification, he thereafter experienced pain in the ankle, and he had to use crutches and a walker boot to ambulate. Perez claimed that Dr. Chiodo assured him that these conditions were normal post-operative complications of the surgery.

Perez certified that after his last appointment with Dr. Chiodo on June 23, 2015, he "began looking for another physician as [his] ankle was not getting any better and [he] was still incapable of putting any weight on [it] and [he] was still on crutches and wearing a [walker] boot." He consulted another

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

physician on July 22, 2015, who recommended that Perez undergo a second surgical procedure to repair his left ankle. However, Perez alleged that this doctor "never suggested or intimated that the reason that [he] needed another surgical procedure was due to anything that Dr. Chiodo had done during the first surgery." Perez did not supply a certification from the second doctor corroborating these hearsay statements.

On August 3, 2015, the second physician performed revision surgery on Perez's ankle. Perez alleged that he was thereafter confined to his home, except when he went out for physical therapy. Perez developed an infection and, on November 16, 2015, the second doctor performed another surgery to remove the screws in Perez's ankle. Perez claimed that he was now using a walker, a cane, and a boot to get around, but could still not leave the home to consult with an attorney, although he continued to go out for physical therapy and doctor's appointments.

Sometime in February 2016, Perez met with his attorney at the attorney's office. According to the certifications submitted by Perez and his attorney, they discussed whether Perez might be able to institute a "third[-]party action against the owner of the property where he fell." After several months, the attorney determined that "no third[-]party action was viable." Neither of the certifications specifically addresses whether they also

discussed Perez's ongoing medical complaints during their conversations.

Perez certified that sometime in July 2016, he "began to wonder why [he] needed a second surgery if the first surgery was done correctly." Perez asserted he then asked his attorney to send his X-rays to a podiatric surgeon for review. "On or about August 30, 2016,"[2] that surgeon advised Perez's attorney "that it was his opinion that Dr. Chiodo did deviate from acceptable standards of podiatric surgery." According to Perez and his attorney, "[t]his was the first time that [Perez] became aware of the fact that there may be a viable cause of action for podiatric malpractice against Dr. Chiodo."

On September 20, 2016, Perez's attorney filed a notice of claim upon Dr. Chiodo and University Hospital. He thereafter filed a motion for leave to file a late notice of claim pursuant to N.J.S.A. 59:8-9. Despite the many factual issues raised in Perez's and his attorney's certifications concerning the date Perez's malpractice claim accrued, the trial judge did not conduct an evidentiary hearing or oral argument. Instead, the judge simply issued an order on December 2, 2016, granting plaintiffs' motion

[2] Neither of the certifications are clear as to when Perez's attorney received his expert's report. Both certifications state that this occurred "[o]n or about August 30, 2016[.]"

and writing at the bottom of the order that the date of accrual of plaintiffs' cause of action was August 30, 2016.

After defendants filed their notice of appeal, the judge issued a brief written decision pursuant to Rule 2:5-1(b). While acknowledging that the parties vigorously disputed when plaintiffs' cause of action accrued, he nevertheless found on the sparse record before him that "it was not possible for Perez to know he had a cause of action" until he received the expert's report on August 30, 2016. Therefore, the September 20, 2016 notice of claim was timely. This appeal followed.

On appeal, defendants argue that the judge mistakenly exercised his discretion by granting plaintiffs' motion to file a late notice of claim. We agree.

Under the Tort Claims Act, N.J.S.A. 59:1-1 to -12.3, a notice of claim must be filed within ninety days after the accrual of a cause of action. N.J.S.A. 59:8-8. A cause of action is generally considered to have accrued on the date of the injury. Beauchamp v. Amedio, 164 N.J. 111, 117 (2000). If, however, the date of the injury cannot be determined, courts will use the discovery rule to determine when the cause of action accrued. Ibid. It is well-established that the discovery rule applies to claims brought under the Act. McDade v. Siazon, 208 N.J. 463, 474-75 (2011); Beauchamp, 164 N.J. at 117. The discovery rule is an equitable

tool created by courts to toll a limitations period by postponing the accrual of a cause of action. Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 273 (App. Div. 1997).

Under the discovery rule, a cause of action accrues when "the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another." Caravaggio v. D'Agostini, 166 N.J. 237, 246 (2001). Thus, the accrual date, and the resultant computation of the time limit, begins when a plaintiff knows or should know of the essential facts to advance a cause of action. Baird v. Am. Med. Optics, 155 N.J. 54, 68 (1998) (noting that the time limit begins to run when the injured party has actual or constructive knowledge of the material "facts indicating that [he or] she has been injured through the fault of another, not when a lawyer advises [him or] her that the facts give rise to a legal cause of action"). A plaintiff does not need to know the legal effect or "specific basis for legal liability" for a claim to accrue once the material facts of the case are known. Caravaggio, 166 N.J. at 246.

When a plaintiff seeks to invoke the discovery rule, a preliminary hearing is often required to determine its applicability. Lopez, 62 N.J. at 275. An evidentiary hearing is especially critical in a case where, as here, credibility is at issue, ibid., or where the material facts regarding the date of

discovery are in dispute. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 336 n.6 (2010).

Here, Perez's credibility was clearly at issue and the material facts concerning when he knew or should have known that he had a cause of action were in sharp dispute. Perez alleged he had no idea he had a cause of action until "on or about August 30, 2016" when his attorney received the expert report. However, he also stated that "it became apparent to [him] that [he] was not getting any better" on July 23, 2015, and that he felt he needed "another physician" at that time. Perez also consulted with his attorney in person sometime in February 2016, but implied that they did not discuss his continued poor physical condition.

These conflicting facts obviously raised factual issues concerning the discovery rule that could only be determined through an evidentiary hearing and the crucible of cross-examination. Therefore, we reverse and remand for a Lopez hearing. In remanding this matter, we do not suggest a preferred result, but only that the trial court should conduct a hearing to develop the facts and record upon which to base a reasoned decision on the issue of the accrual of plaintiffs' cause of action against defendants.

After the trial court resolves the issue on remand of when plaintiffs' claim accrued, its next and separate task will be "to determine whether a notice of claim was filed within ninety days."

Beauchamp, 164 N.J. at 118. If the court finds that the claim was untimely, it must next "decide whether extraordinary circumstances exist justifying a late notice." Id. at 118-19. Because the facts surrounding these issues were also contested and, therefore, cannot be addressed on the basis of the parties' certifications, the evidentiary hearing should also encompass these issues.

Reversed and remanded. We do not retain jurisdiction.