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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-4042-15T2

C.P.B.,¹

Plaintiff-Appellant,

v.

DAVID TORCHIN and SHAPIRO,
CROLAND, REISER, APFEL &
DI IORIO, LLP,

Defendants-Respondents.

Argued December 12, 2017 - Decided January 12, 2018

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No.
L-7596-15.

C.P.B., appellant, argued the cause pro se.

Paul V. Esposito (Clausen Miller, PC) of the
Illinois bar, admitted pro hac vice, argued
the cause for respondents (Clausen Miller, PC,
attorneys; Paul V. Esposito and Matthew T.
Leis, on the brief).

PER CURIAM

¹ We refer to plaintiff by his initials to protect his privacy.

Plaintiff C.P.B.² appeals from an April 8, 2016 Law Division order dismissing his legal malpractice complaint with prejudice for failure to provide an affidavit of merit (AOM) in accordance with the Affidavit of Merit Statute, N.J.S.A. 2A:53A-27 (AMS). We affirm.

Plaintiff's legal malpractice complaint alleged that defendants David Torchin and Shapiro, Croland, Reiser, Apfel & Di Iorio, LLP, improperly counseled him during an investigation by the Division of Youth and Family Services (Division), now known as the Division of Child Protection and Permanency, related to a pending family court matter. According to plaintiff, because he was facing criminal charges pertaining to a gun offense, defendants made an agreement with the Division that any gun related questions were off-limits due to the criminal matter. However, plaintiff claimed that defendants later allowed him to give statements to the Division regarding the gun. In his legal malpractice complaint, plaintiff set forth two causes of action: (1) "legal malpractice – specialist duty of care;" and (2) "legal malpractice – general duty of care."

² Plaintiff is self-represented in this matter. However, we note that plaintiff is an attorney licensed to practice law in New York and New Jersey since 1994.

Defendants filed an answer and asserted the lack of an AOM as an affirmative defense. After receiving defendants' answer, plaintiff asked defendants for a thirty-day extension of time to file an AOM. Defendants agreed and prepared a stipulation extending the time for plaintiff to file an AOM to February 5, 2016. On February 2, 2016, plaintiff requested another extension of time to file an AOM. The next day, defendants advised they would not consent to a second extension of time for plaintiff to file an AOM.

On February 29, 2016, defendants filed a motion to dismiss plaintiff's complaint for failure to provide an AOM.³ In opposition to the motion, plaintiff claimed that an AOM was not necessary based upon the common knowledge exception. Plaintiff also argued that the court's failure to conduct a Ferreira⁴ conference required an extension of time for the filing of an AOM. Plaintiff also alleged that there were extraordinary circumstances justifying an extension of time to file the AOM.

The motion judge found the common knowledge exception to the AMS inapplicable to plaintiff's case. The judge concluded that

³ The maximum statutory time period for compliance with the AMS, with all allowable extensions, expired on February 29, 2016. As of the date of defendants' motion, plaintiff had not filed an AOM.

⁴ Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003).

plaintiff's allegations related to defendants' "strategy and legal impressions" concerning a Division investigation and that the issues related to the Division's inquiry were "complex and not within the common knowledge of a lay person." The judge determined that expert testimony "would be required to elucidate the complex legal issues for [the] jury."

The judge also rejected plaintiff's argument that the court's failure to conduct a Ferriera conference warranted an extension of time to file an AOM. The judge found plaintiff was aware of the obligation to file an AOM because plaintiff asked defendants for extensions of time to file the document. Further, the judge noted that plaintiff filed a Case Information Statement (CIS) acknowledging the necessity of an AOM if plaintiff was pursuing a legal malpractice case. Box 13 of the CIS filed by plaintiff noted the following: "IS THIS A PROFESSIONAL MALPRACTICE CASE? IF YOU HAVE CHECKED 'YES' SEE N.J.S.A. 2A:53A-27 AND APPLICABLE CASE LAW REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT." Based on the filed CIS and the requested extensions of time to file an AOM, the judge found that plaintiff was aware of his obligation to file an AOM.

The judge also rejected plaintiff's extraordinary circumstances argument, finding that he failed to make the requisite showing to warrant a belated Ferriera conference or an

extension of the AOM deadline. While the judge was sympathetic to plaintiff's dealing with the death of a cousin and the illness of his mother-in-law, she reasoned that plaintiff had sufficient time between December 24, 2015, when plaintiff first requested an extension of time to file an AOM, and February 29, 2016, when the 120-day statutory time period to file an AOM expired.

The judge granted defendants' motion and dismissed plaintiff's complaint with prejudice. The judge included her statement of reasons in a rider appended to the order granting defendants' motion.

On appeal, plaintiff raises the following arguments:

Point I

IS SIMPLE NEGLIGENCE (COMMON-KNOWLEDGE) ALLEGED IN THE FACTS AS PLED IN REGARD TO COUNSEL IN A CIVIL PROCEEDING PERMITTING CLIENT TO ANSWER QUESTIONS ABOUT A SHOTGUN WHILE A CRIMINAL CHARGE IS PENDING REGARDING THE SAME SUBJECT SHOTGUN?

Point II

DID THE LOWER COURT MISAPPREHEND THE FACTS AS ALLEGED IN THE COMPLAINT AND ERR IN HOLDING THAT ON NO READING OF THE PLEADINGS COULD A CLAIM OF SIMPLE NEGLIGENCE BE MADE OUT, EVEN IF IN THE CONTEXT OF LEGAL MALPRACTICE?

Point III

IF THE LOWER COURT ERRED IN FAILING, REFUSING AND DECLINING TO FIND ALLEGATIONS OF SIMPLE NEGLIGENCE IN THE COMPLAINT, DID THE LOWER COURT ERR IN HOLDING AN EXPERT AFFIDAVIT WAS

REQUIRED EVEN FOR PLAINTIFF TO PROVE SIMPLE NEGLIGENCE.

Point IV

DID THE LOWER COURT ERR IN FAILING TO CALL A FERREIRA HEARING YET NONETHELESS HOLDING THAT AN EXPERT AFFIDAVIT WAS REQUIRED OF PRO SE PLAINTIFF?

Point V

DID THE LOWER COURT ERR IN FAILING TO FIND EXTRAORDINARY CIRCUMSTANCES SUFFICIENT TO WARRANT EITHER EXTENDING TIME FOR PLAINTIFF TO OBTAIN AN AFFIDAVIT OF MERIT OR ALTERNATIVELY DISMISSING THE COMPLAINT WITHOUT PREJUDICE?

Failure to comply with the AMS constitutes a failure to state a cause of action. N.J.S.A. 2A:53A-29. A trial court's decision on a motion to dismiss for failure to state a claim is reviewed de novo. Smith v. Datla, 451 N.J. Super. 82, 88 (App. Div. 2017).

Plaintiff argues that the motion judge erred in dismissing his complaint because the allegations fall within the common knowledge exception to the AMS. Plaintiff asserts that allowing him to be questioned by the Division about a gun "in the context of criminal charges, including a Graves Act violation involving the shotgun, [was] clearly negligent" on the part of defendants. Plaintiff similarly asserts that because defendants had an agreement with the Division precluding questions concerning the gun, it is common knowledge that violating such an agreement is

negligence. Plaintiff further contends that defendants were unprepared for the court proceeding involving the Division, and that lack of preparation is simple negligence under the AMS's common knowledge exception. Despite these arguments, plaintiff admits that an expert would be "helpful" in proving his negligence and damages claims, but argues that expert testimony is not required.

The AMS provides:

In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

[N.J.S.A. 2A:53A-27.]

The AMS "clearly applies to attorney legal malpractice." Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 228 (1998). Failure to comply with the AMS constitutes a failure to state a cause of action, subjecting the plaintiff to dismissal of the complaint.

N.J.S.A. 2A:53A-29. "[A] dismissal under the statute based on a violation of the affidavit requirement would be without prejudice only if there are extraordinary circumstances. Absent extraordinary circumstances, a failure to comply with the statute . . . would be with prejudice." Cornblatt, 153 N.J. at 247; see also Tischler v. Watts, 177 N.J. 243, 245-46 (2003).

A plaintiff may forego an AOM where the alleged professional error is so patently negligent that it falls within the common knowledge of a juror. See Hubbard v. Reed, 168 N.J. 387, 396 (2001). "In a common knowledge case, whether a plaintiff's claim meets the threshold of merit can be determined on the face of the complaint. Because defendant's careless acts are quite obvious, a plaintiff need not present expert testimony at trial to establish the standard of care." Palanque v. Lambert-Woolley, 168 N.J. 398, 406 (2001).

However, the common knowledge exception to the AMS is narrowly construed and confined to cases of obvious and egregious negligence. See Hubbard, 168 N.J. at 397. Plaintiffs who elect not to submit an affidavit based upon reliance on the common knowledge exception do so at their own peril. Ibid. ("[T]he wise course of action in all malpractice cases would be for plaintiffs to provide affidavits even when they do not intend to rely on expert testimony at trial Although we understand that in

some cases plaintiffs may choose not to expend monies on an expert who will not testify at trial, . . . [a] timely filed affidavit would prevent the risk of a later dismissal."); see also Brizak v. Needle, 239 N.J. Super. 415, 432 (App. Div. 1990) (cautioning that a plaintiff "who litigates a legal malpractice claim without the opinion testimony of a legal expert unnecessarily exposes [himself] to a serious risk of dismissal.")

Plaintiff's negligence claims are not so obvious to avoid the AOM requirement. We agree with the motion judge that litigation strategy and decisions related to the representation of a client involve the exercise of legal judgment and specialized knowledge. When a claim would require the fact finder to "evaluate an attorney's legal judgment," expert testimony is required. Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 13 (App. Div. 2001), abrogated in part on other grounds by Segal v. Lynch, 211 N.J. 230 (2012).

Next, plaintiff argues that even if his claims do not fall within the common knowledge exception, he is entitled to relief based on the court's failure to schedule and conduct a Ferreira conference. Plaintiff also claims that extraordinary circumstances, including illness and death in his family, require reinstatement of his complaint and a remand to the court to conduct a Ferreira conference.

In Ferreira, the Court held that the AMS requires trial courts conduct a case management conference in professional malpractice cases within ninety days of service of an answer. Ferreira, 178 N.J. at 154–55. At the conference, the trial court shall:

address all discovery issues, including whether an affidavit of merit has been served on defendant. If an affidavit has been served, defendant will be required to advise the court whether he has any objections to the adequacy of the affidavit. If there is any deficiency in the affidavit, plaintiff will have to the end of the 120-day time period to conform the affidavit to the statutory requirements. If no affidavit has been served, the court will remind the parties of their obligations under the statute and case law.

[Id. at 155 (emphasis added).]

Recently, the Court revisited the issue of a trial court's failure to conduct a Ferreira conference. See A.T. v. M. Cohen, M.D., ___ N.J. ___ (2017). In the A.T. case, the plaintiffs belatedly submitted an AOM in opposition to the defendant's summary judgment motion. Based upon the submission of an AOM and the plaintiffs' attorney's explanation in miscalculating the due date for filing the AOM, the Court found extraordinary circumstances sufficient to warrant acceptance of the untimely AOM. A.T., slip op. at 15-16. Under the particular and distinctive facts in A.T., plaintiffs' complaint was reinstated and the matter remanded to the trial court with instructions to accept the untimely AOM and

consider the plaintiffs' case on the merits. Ibid. As the Court in A.T. wrote:

[a]lthough the failure to conduct a Ferreira conference alone may not demonstrate extraordinary circumstances, a confluence of factors persuades us to recognize this case as sufficiently extraordinary to allow the untimely affidavit to be accepted and to require that the matter proceed on its merits.

[Slip op. at 15-16.]

Unlike the plaintiffs in A.T., plaintiff was not confused as to the need to file an AOM before February 29, 2016. Plaintiff requested and obtained a thirty-day extension of time to file an AOM. Plaintiff knew that the AOM, with the extension granted by defendants, was due on February 6, 2016. Several days before the thirty-day extension period expired, plaintiff requested a second extension of time to file an AOM. Although defendants were unable to consent to a second extension, plaintiff still had time to obtain an AOM before the 120-day time period expired.⁵ Further, unlike the plaintiffs in A.T., plaintiff did not obtain and submit an AOM in opposition to defendants' motion to dismiss his complaint with prejudice.

⁵ Plaintiff requested the second extension of time to file the AOM on February 2, 2016. On February 3, 2016, defendants advised that they could not consent to an additional extension period. Plaintiff still had time between February 3, 2016 and February 29, 2016 to file a timely AOM.

It is clear that plaintiff was aware of his responsibility to file an AOM such that a Ferreira conference to advise him of that obligation was unnecessary. Plaintiff candidly admitted to the motion judge, and to this court, that he looked into hiring an attorney to prepare an AOM, but declined to retain a legal expert based on financial considerations. The following exchange took place before the motion judge:

THE COURT: But, you were aware that an affidavit of merit may be required, and you were aware from discussions with [defense] counsel, that they were not waiving it?

C.P.B.: Yes, Judge.

Plaintiff further confirmed his awareness of the AOM requirement to the motion judge:

THE COURT: . . . You knew you had to get an affidavit of merit. You knew you needed an extension. You got that. It's not as if the court intervention was necessary, because you had no clue of what was going on. You've even stipulated that to me, which I appreciate. So—

C.P.B.: Yes, Judge.


We reject plaintiff's argument that his mother-in-law's illness, the death of his cousin, and the pendency of his criminal case constitute extraordinary circumstances warranting an extension of time to file an AOM. The "criterion for determining extraordinary circumstances [is] a fact-sensitive [case-by-case]

analysis." Tischler, 177 N.J. at 246 (second alteration in original) (citation omitted). Inadvertence such as "carelessness, lack of circumspection, or lack of diligence" does not constitute extraordinary circumstances. Palanque, 168 N.J. at 405. Nor does "ignorance of the law or failure to seek legal advice." Hyman Zamft & Manard, L.L.C. v. Cornell, 309 N.J. Super. 586, 593 (App. Div. 1998).

Plaintiff claims that personal circumstances prevented him from procuring a timely AOM. However, plaintiff told the motion judge that he considered obtaining an AOM, but decided against it for financial reasons as well as his conclusion that the common knowledge exception applied. Thus, we reject plaintiff's suggestion that extraordinary circumstances precluded his obtaining an AOM. Plaintiff conveyed his true reason for failing to obtain an AOM to the motion judge and cannot argue otherwise before this court.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION