SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4220-15T4

LINDA FRANCESE and
ROCCO R. GIORDANO,

Plaintiffs-Appellants/
Cross-Respondents,

v.

NARRAGANSETT BAY INSURANCE COMPANY, SICA CONSTRUCTION, INC., and SELECTIVE INSURANCE COMPANY OF AMERICA,

Defendants,

and

CONOVER BEYER ASSOCIATES, INC. and MARYANN McMAHON,

Defendants-Respondents/
Cross-Appellants.

Submitted April 10, 2018 – Decided May 1, 2018

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3167-13.

Stuart P. Schlem, attorney for appellants/cross-respondents.

Douglas B. Hanna, attorney for respondents/cross-appellants.

PER CURIAM

Plaintiffs Linda Francese and Rocco R. Giordano appeal from a May 13, 2016 order dismissing their complaint against defendants Conover Beyer Associates, Inc. (CBA) and CBA employee Mary Ann McMahon[1] for failure to file an Affidavit of Merit (AOM) in accordance with the Affidavit of Merit Statute (AMS), N.J.S.A. 2A:53A-27. Defendants cross-appeal from a February 5, 2016 order denying their motion for summary judgment. We reverse the order dismissing plaintiffs' complaint and affirm the order denying defendants' motion.

Plaintiffs are owners of a home located in Brick, New Jersey. The house, built in or around 2010, is a three-story modular home elevated by timber pilings. McMahon was plaintiffs' neighbor and a member of the same boat club as plaintiffs.

Plaintiffs obtained homeowner's insurance and flood insurance through McMahon and CBA. After the home was constructed, plaintiffs allegedly discussed with McMahon their intention to insulate and sheetrock the walls enclosing the ground level of the

[1] The only remaining defendants in this case are CBA and McMahon.

home to create additional storage and recreational space. McMahon purportedly represented that the ground level of plaintiffs' home and its contents would be covered under the flood insurance policy. Plaintiffs claim McMahon made this oral representation before work on the ground level commenced, and they decided to renovate the home only after McMahon assured them that the enclosed area would be covered under their flood insurance policy.

In January 2011, plaintiffs insulated and sheetrocked the ground level of their home. In August 2011, Hurricane Irene struck, causing damage to plaintiffs' personal property on the ground level of the home. Plaintiffs allege they contacted McMahon regarding the damage, and McMahon represented there was contents coverage for the ground level of the home. However, because plaintiffs' losses from the storm were less than the amount of the deductible under the flood insurance policy, plaintiffs elected not to file a claim.

In February 2012, plaintiffs received a pamphlet from the Federal Emergency Management Agency (FEMA) advising they could obtain contents coverage for their home. Shortly after receiving the FEMA information, plaintiffs sent an email to McMahon seeking confirmation of contents coverage under their flood insurance policy. According to plaintiffs, McMahon advised there was contents coverage, including the ground floor.

In October 2012, plaintiffs' home suffered damage due to Hurricane Sandy, including flood damage to personal property on the ground level. Plaintiffs claim they sent a text message to McMahon shortly after the storm regarding their damages. McMahon responded that plaintiffs had $100,000 in contents coverage, including contents on the ground level. Following McMahon's advice, plaintiffs obtained a dumpster, took photographs of the damages, and made a list of the damaged property.

About a week later, after speaking with another agent at CBA, plaintiffs learned they did not have contents coverage for personal property on the ground level of their home. That agent told plaintiffs the ground level of their home was "uninsurable."

Two weeks after Hurricane Sandy, McMahon sent an email to Selective Insurance Company of America (Selective), plaintiffs' flood insurance carrier, setting forth a history of plaintiffs' insurance policies. McMahon wrote she previously submitted an "unprocessed" flood insurance application to Selective requesting contents coverage for the building, including the ground level. When Selective issued the flood insurance policy for plaintiff's home, the policy did not include contents coverage. The policy was renewed annually, without contents coverage, from the date the home was constructed. McMahon's email to Selective asked "[w]e're wondering what went wrong."

During her deposition, McMahon testified she first learned there was no contents coverage under the flood insurance policy when plaintiffs filed a claim after Hurricane Sandy. Prior to that, McMahon assumed such coverage was issued as requested in plaintiffs' application. When asked whether CBA made a mistake regarding the unprocessed application, McMahon responded: "I guess so."

In October 2013, plaintiffs filed a complaint against defendants, alleging breach of contract and related causes of action for damage to their home after Hurricane Sandy. After some procedural delays irrelevant to this appeal, defendants filed an answer on October 23, 2014.

On May 28, 2015, defendants moved for summary judgment, arguing ground floor contents coverage was never available to plaintiffs because no insurance company provided such coverage. Defendants further argued that plaintiffs had an obligation to read the policy to understand the scope of the coverage.

During the motion hearing, the judge explored whether plaintiffs' cause of action against defendants was based on professional negligence, requiring an AOM, or misrepresentation. Plaintiffs' counsel responded the claim was based "upon the representations of the agent that they were covered," but, even if the complaint included a professional negligence claim, "it

still doesn't require an expert." Plaintiffs' counsel explained that "the whole purpose of an expert is when a juror can't understand the issue," and "whether or not . . . an agent tells you you have coverage and you don't have coverage, I don't think requires anything more than being alive and understanding the English language."

In response to plaintiffs' arguments, defendants claimed the matter alleged professional negligence and an AOM was therefore required. The judge questioned defendants' argument, reasoning that if defendants were arguing plaintiffs had an obligation to read the policy, then "how come we need an expert? Because if you're telling me we need an expert . . . that means that the average citizen can't understand the policy." Defense counsel immediately abandoned the AOM argument, responding: "Then we don't need an expert. Forget about that. We'll go with they had an obligation to read the three policies they received each year before the loss."

In his oral decision denying defendants' motion, the judge concluded he had to "hear what the testimony is at the time of trial," and did not "think it [was] one of these situations that's so black and white that it requires and compels a court to grant summary judgment." The judge explained that the case involved "one of those issues where the facts as they come to light in the

course of trial, will dictate how the court makes its rulings as to what ultimately the jury will be able to determine."

Nearly one year later, on the eve of trial, defendants moved to dismiss plaintiffs' claims based on the failure to provide an AOM. During argument on the motion, plaintiffs' counsel explained that an AOM was prepared in 2014, but never filed. Plaintiffs' counsel represented to the court that he could file the AOM immediately, if the court deemed it necessary.

After reviewing the parties' written submissions and argument, the judge granted defendants' motion and dismissed plaintiffs' complaint. In his oral opinion, the judge concluded "the action against Conover [Beyer Associates, Inc.], Mary Ann McMahon is one of professional negligence," and because there was no AOM, plaintiffs could not "sustain [their] burden of proof in regard[] to any deviation from the standard of care."

I.

On appeal, plaintiffs contend the judge erred in dismissing their complaint for failure to file an AOM because an AOM was not required. Plaintiffs also contend that an AOM was served on defense counsel, although plaintiffs only discovered such service after filing their notice of appeal.

A motion to dismiss pursuant to R. 4:6-2(e) may be granted "only if, accepting all well-pleaded allegations in the complaint

as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." Smerling v. Harrah's Entm't Inc., 389 N.J. Super. 181, 186 (App. Div. 2006). We review a trial court's decision to dismiss a complaint de novo. Smith v. Datla, 451 N.J. Super. 82, 88 (App. Div. 2017).

Failure to comply with the AMS constitutes a failure to state a cause of action. N.J.S.A. 2A:53A-29.

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 includes insurance producers within the definition of "licensed person." N.J.S.A. 2A:53A-26(o).

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).

The common knowledge exception to the AMS is confined to cases of obvious and egregious negligence. See Hubbard, 168 N.J. at 397 (declining to require expert testimony where a dentist pulled the wrong tooth); Palanque, 168 N.J. at 407 (declining to require expert testimony where a doctor misread a laboratory report); Bender v. Walgreen E. Co., 399 N.J. Super. 584, 591-92 (App. Div. 2008) (declining to require expert testimony where a pharmacist provided a drug different from the one prescribed); Popwell v. Law Offices of Broome and Horn, 363 N.J. Super. 404, 410 (App. Div. 2002) (declining to require expert testimony where an attorney failed to timely file an application for trial de novo).

Plaintiffs who elect not to submit an AOM based upon the common knowledge exception do so at their own peril. Hubbard, 168 N.J. at 397 ("[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"). "By not producing an affidavit of merit, [a] plaintiff may be seen to have placed all his eggs in the ordinary negligence basket," and may be precluded from pursuing a professional negligence claim at trial. Murphy v. New Rd. Const., 378 N.J. Super. 238, 243 (App. Div. 2005).

Plaintiffs argue that their claims against defendants are premised on misrepresentation, not professional negligence. Plaintiffs contend that even if their claims against defendants were based on professional negligence, the common knowledge exception applies and an AOM is not required. According to plaintiffs, their claim is based on the representation by McMahon that there was flood insurance coverage for damage to the personal property on the ground level of their home. We agree that a jury is capable of deciding whether McMahon did, or did not, make such a representation, and no expert is required to assist a jury in resolving that issue.[2]

[2] We note the statements by plaintiffs' counsel to the trial court that his clients' claims do not require an AOM. Because the record before the trial court is incomplete regarding service of an AOM

II.

On cross-appeal, defendants contend the judge erred in denying their motion for summary judgment based on plaintiffs' misrepresentation claim. Defendants argue that plaintiffs failed to prove reasonable or justifiable reliance on defendants' "ephemeral comments" to prevail on a misrepresentation claim.

"In an appeal involving the grant or denial of a motion for summary judgment, [appellate courts] 'employ the same standard [of review] that governs the trial court.'" Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012) (second alteration in original) (quoting Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010)). The court must "determine if there is a genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law." Ibid. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

In arguing that the judge erred in denying their motion for summary judgment, defendants contend that plaintiffs' reliance on defendants' representations, if made, were neither reasonable nor justified. Defendants fail to cite any case law holding that

---

on defendants, we decline to preclude plaintiffs from pursuing a professional negligence claim at trial. On remand, the trial court may consider whether plaintiffs served an AOM or whether plaintiffs are limited to arguing misrepresentation/common knowledge.

reliance on the representation of an insurance agent as to coverage available under an insurance policy is de facto unreasonable and unjustified. We agree with the motion judge's denial of summary judgment based on the genuine issue of material fact whether or not McMahon made representations to plaintiffs regarding contents coverage for the ground level of their home.

Reversed as to dismissal of plaintiffs' complaint. Affirmed as to denial of defendants' motion for summary judgment. We do not retain jurisdiction.