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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0172-21**

**MICHAEL A. SUTTON
and BARBARA SUTTON,**

Plaintiffs-Respondents,

v.

KEVIN G. BABILONIA,

Defendant-Appellant.

Argued April 27, 2022 – Decided May 12, 2022

Before Judges Hoffman, Geiger and Susswein.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-8821-20.

David J. Dering argued the cause for appellant (Leary, Bride, Mergner & Bongiovanni, attorneys; David J. Dering, of counsel and on the brief).

Respondents have not filed a brief.

PER CURIAM

By leave granted, defendant appeals from the Law Division order denying the summary judgment dismissal of plaintiffs'¹ complaint and a later order denying reconsideration. Defendant contends the motion court erred in ruling the Second Omnibus COVID-19 Order extended plaintiffs' statute of limitations by fifty-six days, and by finding, on reconsideration, that plaintiffs "substantially complied" with the two-year statute of limitations. We reverse.

I.

According to plaintiffs' complaint, on November 21, 2018, plaintiff was travelling on Route 78 West in Millburn when he sustained injuries in a car crash between his vehicle and a vehicle driven by defendant Kevin Babilonia. Plaintiffs alleged the accident was caused by defendant operating his vehicle in "a careless, negligent manner." In addition, the complaint alleged that plaintiff sustained additional injuries when defendant "exited his motor vehicle and then physically assaulted [p]laintiff for no justifiable reason." Plaintiffs' complaint sought compensatory and punitive damages.

Plaintiff consulted with an attorney regarding his claim six days before the statute of limitations expired. According to the certification of the attorney,

¹ In this opinion, we refer to Michael A. Sutton and Barbara Sutton collectively as plaintiffs, and Michael A. Sutton individually as plaintiff. Barbara Sutton sues per quod.

he explained to plaintiff that the statute of limitations was about to run in just six days, requiring plaintiffs to act with haste. On November 17, 2020, four days before the statute of limitations was set to expire, plaintiffs hired the attorney to represent them. On November 18, 2020, the attorney sent plaintiffs an email requesting information he needed to properly file the complaint, including the specifics of plaintiffs' claim, the date and location of the accident, and related information.

On the afternoon of November 19, 2020, plaintiffs dropped off a check and other paperwork to the attorney to cover filing and service fees. That same day, the attorney drafted a complaint and sent it to plaintiffs for review. On Friday, November 20, 2020, the attorney sent plaintiffs the final draft of the complaint for plaintiffs' review. Later that afternoon, the attorney attempted to file the complaint electronically, along with a case information statement, and a filing letter. The attorney used his account in the "eCourts" system for electronic filing and his "JACS" account for electronic payment of filing fees.

According to the attorney, he "encountered a number of problems" getting the eCourts system to accept his filing documents. The attorney shut down his computer multiple times, exited and re-entered the eCourts system, and rebooted his computer while attempting to get the eCourts system to accept his filing documents. Following

several attempts, the attorney believed he successfully filed plaintiffs' complaint in the eCourts system. The attorney then waited to receive a docket number. When he did not receive a docket number after an unusually long time, the attorney called the "help desk" at eCourts. Each time, the eCourts representative informed the attorney that the system did not list the case, but that the representative would "check this out and get back to [him.]" The attorney claims these representations caused him to delay immediate action. The eCourts system did not accept plaintiffs' complaint; as a result, plaintiffs' complaint was filed more than a month after the statute of limitations expired.

The attorney finally succeeded in filing plaintiffs' complaint on December 23, 2020. Defendant filed an answer in February 2021, and then moved to dismiss the complaint as time-barred.

Initially, the motion judge noted that the two-year statute of limitations ran on November 21, 2020, and that plaintiffs' complaint was not filed until December 23, 2020. Notwithstanding the late filing, the judge concluded that the bar of the statute of limitations did not apply because the Second Omnibus Order "exclude[d] the period of March 16, 2020 through May 10, 2020, so that's [fifty-six] days." By adding fifty-six days beyond November 21, 2020, the judge determined the complaint was timely filed.

On July 23, 2021, the motion judge denied defendant's motion for reconsideration, reiterating his reasoning regarding the fifty-six-day extension. In addition, the judge provided an alternative basis for denying defendant's motion, finding that plaintiffs substantially complied with the statute of limitation based upon the unsuccessful efforts of their attorney and the problems he encountered with electronic filing on eCourts. The judge announced this alternative basis for his ruling without making any specific findings regarding application of the doctrine of substantial compliance.

Defendant successfully moved for leave to appeal. On appeal, defendant argues that the plain language of the Supreme Court's Second Omnibus Order did not serve to add fifty-six days to all statutes of limitation for all actions. Defendant further argues that the record does not support the application of the doctrine of substantial compliance to excuse the late filing in this case. As a result, defendant urges us to reverse

II.

A.

This court reviews a trial court's grant or denial of a motion for summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Christian Mission John 3:16 v. 63 Passaic City, 243 N.J. 175, 184 (2020); This

court applies the same standard as the trial court, considering "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

A motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Ibid. "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 450, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)); see also Brill, 142 N.J. at 540.

B.

On April 24, 2020, our Supreme Court issued the Second Omnibus Order to address the impact of the COVID-19 pandemic on our court system. The order provides, in relevant part:

In the computation of time periods under the Rules of Court and under any statute of limitations for matters in

all courts, for purposes of filing deadlines, except as otherwise provided in this order, the period from March 16 through May 10, 2020 shall be deemed the same as a legal holiday.

Rule 1:3-1 provides:

In computing any period of time fixed by rule or court order . . . [the] last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor legal holiday. In computing a period of time less than 7 days, Saturday, Sunday and legal holidays shall be excluded.

The motion court denied defendant's motion for summary judgment because it interpreted the Second Omnibus Order to add fifty-six days to plaintiffs' two-year statute of limitations. We find no support for the motion court's interpretation of the Second Omnibus Order.

Rule 1:3-1 makes clear that where the statute of limitations expires on a legal holiday, the party may act on the next day that is not a Saturday, Sunday, or legal holiday. The Second Omnibus Order converted every day, from March 16 to May 10, 2020, into a legal holiday. For example, if a plaintiff's statute of limitations ran on April 7, 2020, a plaintiff could satisfy the statute of limitations by filing a complaint on May 11, 2020. In this case, however, plaintiffs' statute of limitations ran on November 22, 2020, well beyond the March 16 to May 10,

2020 period. The Second Omnibus Order did not extend the statute of limitations for a fifty-six-day period as to plaintiff's claims. Accordingly, the motion court incorrectly found plaintiffs timely filed their complaint pursuant to the Second Omnibus Order.

C.

"Courts invoke the doctrine of substantial compliance to 'avoid the technical defeats of valid claims.'" Negron v. Llarena, 156 N.J. 296, 305 (1998) (quoting Zamel v. Port of New York Auth., 56 N.J. 1, 6 (1970)). Quoting from our opinion in Bernstein v. Board of Trustees of Teachers Pension & Annuity Fund, 151 N.J. Super. 71, 76-77 (App. Div. 1977), Negron set out the elements of substantial compliance as follows:

- (1) the lack of prejudice to the defending party;
- (2) a series of steps taken to comply with the statute involved;
- (3) a general compliance with the purpose of the statute;
- (4) a reasonable notice of petitioner's claim;
- and (5) a reasonable explanation why there was not a strict compliance with the statute.

[Negron, 156 N.J. at 305.]

In Est. of Vida ex rel. Kesciova v. City of Garfield, 330 N.J. Super. 225, 230 (App. Div. 2000), we applied Negron, allowing a wrongful death action to proceed even though plaintiff filed her amended complaint after the statute of limitations expired. We found defendant knew of plaintiff's claim twelve days

before the expiration of the statute of limitations. Ibid. We further found defendant received all necessary information within the limitations period and plaintiff took immediate action to notify defendant of its claim. Ibid. Under these circumstances, we "hesitate[d] to bar an action based on a technical defect" and applied the doctrine of substantial compliance. Id. at 231.

Unlike Est. of Vida, in this case, plaintiffs cannot satisfy all five requirements to support application of the doctrine of substantial compliance. While it appears that plaintiffs can satisfy the first three Negron requirements, the record contains no evidence that defendant received, within the statutory period, "reasonable notice of [plaintiffs'] claim," Negron, 156 N.J. at 305, or even notice of plaintiffs' intention to make a claim. Nor does the record contain any evidence that defendant's insurance carrier ever received any notice of the pendency of any suit, or an intention to make a claim, within the statutory period. In both Negron and Kesciova, the defendant learned of the plaintiff's intention to make a claim within the statutory period. The record lacks any evidence that would satisfy the fourth Negron factor.

The record also lacks sufficient credible evidence to satisfy the fifth Negron factor. It appears undisputed that electronic filing of Essex County matters through the eCourts system became mandatory in 2017. According to

the eCourts header notation on the complaint in this matter, plaintiffs' complaint was not filed until December 23, 2020. In opposition to defendant's summary judgment motion, plaintiffs' attorney submitted a certification wherein he recounted that plaintiffs retained him approximately six days prior to the expiration of the statute of limitations, that he attempted to file a complaint via eCourts on November 20, 2020, and initially believed that he had succeeded in doing so. The attorney then attempted to check on the status of the complaint on an unspecified date thereafter, when he did not receive a docket number. This led to a call to the eCourts Help Desk on an unspecified date, when he claims he spoke with an unidentified person, and then waited for an unspecified period of time, before finally achieving the successful eCourts filing on December 20, 2020. No evidence was presented to the motion court regarding any further specifics, such as the reasons for not appreciating the lack of confirmation of filing on November 20th, or the reasons for the delay in following up regarding the filing after he contacted the eCourts Help Desk.

In appropriate cases, the doctrine of substantial compliance can be utilized to excuse a plaintiff's late filing, provided the plaintiff can satisfy the elements required for application of the doctrine. Because plaintiffs failed to satisfy the fourth and fifth required elements for the motion court to apply the doctrine in

this case, and because the motion court misinterpreted the Second Omnibus Order, we are constrained to reverse and remand for the entry of an order dismissing plaintiffs' complaint, with prejudice.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION