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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0145-21

Estate of IRENE AVAGNANO,
deceased, by and through FRANK
AVAGNANO, Administrator ad
Prosequendum,

Plaintiff-Appellant,

v.

ATRIUM POST ACUTE CARE
AT WAYNEVIEW, 2020 ROUTE
23 OPERATING COMPANY LLC,
d/b/a ATRIUM POST ACUTE
CARE OF WAYNEVIEW, KBWB
OPERATIONS – ATRIUM, LLC,
KBWB OPERATIONS, LLC,
WAYNEVIEW LP, RICE
MANAGEMENT, INC., and PULSE
MEDICAL TRANSPORTATION,

Defendant-Respondents.

Argued February 14, 2023 – Decided May 15, 2023

Before Judges Susswein and Fisher.

On appeal from the Superior Court of New Jersey, Law
Division, Passaic County, Docket No. L-2473-20.

Mark W. Davis argued the cause for appellant (Davis & Brusca, LLC, attorneys; Mark W. Davis and Michael A. Brusca, on the briefs).

Ryan A. Notarangelo argued the cause for respondents Atrium Post Acute Care at Wayneview and 2020 Route 23 Operating Company LLC (Dughi, Hewit & Domalewski PC, attorneys; Ryan A. Notarangelo, on the brief).

Robert T. Gunning argued the cause for respondent Pulse Medical Transportation (Morrison Mahoney, LLP, attorneys; Robert T. Gunning on the brief).

PER CURIAM

In this personal injury action, plaintiff, the Estate of Irene Avagnano, appeals from Law Division orders granting summary judgment dismissal in favor of defendants, Atrium Post Acute Care at Wayneview ("Atrium") and Pulse Medical Transportation ("Pulse"). Plaintiff alleged negligence, gross negligence, and violations of the Nursing Home Responsibilities and Rights of Residents Act, N.J.S.A. 30:13-1 to -19, in connection with a fall that occurred in May 2018. An earlier complaint was dismissed because it was filed in Avagnano's name after her death, rendering it a nullity. Avagnano's Estate filed a second action—the subject of this appeal—in August 2020. The trial court, relying on our decision in Repko v. Our Lady of Lourdes Med. Ctr., Inc., 464 N.J. Super. 570 (App. Div. 2020), determined that the Estate's complaint was

time-barred under the two-year statute of limitations. Acknowledging that the circumstances in Repko are substantially similar to the present matter, plaintiff asks us to hold that Repko was wrongly decided. We decline to do so and affirm the dismissal of plaintiff's complaint with prejudice.

I.

On May 11, 2018, Irene Avagnano—a resident of Atrium's nursing home—fell out of her wheelchair while being transported to a doctor appointment by Pulse. She suffered cervical vertebra fractures.

On August 2, 2018, Avagnano died at the age of ninety-one from causes unrelated to the fall. Her counsel, who was retained prior to her death, filed suit in her name on January 17, 2019, not knowing she had died four months earlier.

On April 29, 2020, Frank Avagnano, decedent's son, was appointed administrator ad prosequendum. Frank¹ did not advise the attorney who filed suit of the ad prosequendum appointment until August 18, 2020. The next day, the second complaint was filed, asserting identical claims as in the first complaint but in the name of the Estate.

¹ Because the decedent and her son share the same surname, we refer to him by his first name. We mean no disrespect in doing so.

In August 2020, Pulse filed a motion to dismiss the first complaint on the grounds that a complaint cannot be brought by a deceased person, citing Repko. On January 6, 2021, Judge Thomas Brogan dismissed the complaint without prejudice. Pulse later filed a motion to dismiss the first complaint with prejudice, which Judge Brogan granted on June 14, 2021. The dismissal of the initial complaint is not before us in this appeal.

On January 14, 2021, Pulse filed a motion in lieu of answer to dismiss the second complaint pursuant to the two-year statute of limitations. Atrium filed an answer and moved for summary judgment on the same grounds.

The Estate opposed defendants' motions, arguing that the statute of limitations was tolled until the date of Avagnano's death because she lacked capacity to understand her legal rights. Plaintiff produced medical records indicating that Avagnano suffered from auditory hallucinations and impaired cognition. Plaintiff did not, however, submit an expert report regarding her mental competency at the relevant times. Plaintiff requested the opportunity to present additional proofs and argued that the record was not sufficiently developed for the court to make a ruling as to Avagnano's mental capacity. Plaintiff also raised the theories of substantial compliance and equitable tolling to excuse the failure to comply with the statute of limitations.

On April 21, 2021, Judge Bruno Mongiardo granted defendants' motions and dismissed the second complaint with prejudice. He determined that the second complaint could not relate back to the initial complaint to meet the statute of limitations because the initial complaint was a legal nullity. He also rejected plaintiff's mental incapacity tolling argument, concluding that the records presented to the court "fall short of establishing that decedent suffered from a condition of mental derangement that actually prevented her from understanding her legal rights for initiating legal actions."

Judge Mongiardo also rejected plaintiff's substantial compliance theory, reasoning that the initial complaint provided insufficient notice because it contained only broad generalities. Lastly, the judge rejected plaintiff's equitable tolling argument, concluding that there was no wrongdoing on the part of defendants that would have induced plaintiff into missing the deadline. Plaintiff moved for reconsideration, which Judge Mongiardo denied on August 11, 2021.

Plaintiff raises the following contentions for our consideration:

POINT I

THE TRIAL COURT ERRED IN DISMISSING THE
CASE BASED ON THE STATUTE OF
LIMITATIONS.

A. REPKO WAS WRONGLY DECIDED,
CONFLICTS WITH BINDING PRECEDENT

FROM THE HIGHEST COURT IN NEW JERSEY HOLDING THAT COURTS SHOULD SUBORDINATE MATTERS OF FORM WHICH DO NOT AFFECT THE MERITS, AND THE [SECOND] FILING SHOULD RELATE BACK TO THE ORIGINAL COMPLAINT WHICH WAS CLEARLY FILED WITHIN THE STATUTE OF LIMITATIONS.

B. THE TRIAL COURT SHOULD HAVE APPLIED EQUITABLE DEFENSES TO THE STATUTE OF LIMITATIONS.

i. THE DEFENDANTS ADVOCATED FOR, AND THE TRIAL COURT IMPROPERLY UTILIZED, A MECHANICAL APPLICATION OF THE STATUTE OF LIMITATIONS, WHICH IS INCONSISTENT WITH THE FACTS, NEW JERSEY LAW, AND PRINCIPLES OF EQUITY AND JUSTICE.

ii. THE COURT SHOULD APPLY THE DOCTRINE OF SUBSTANTIAL COMPLIANCE.

iii. EQUITABLE TOLLING SHOULD BE APPLIED DUE TO THE FACTS AND THE IMPACT OF THE COVID-19 PANDEMIC.

iv. THE DEFENDANT[S] SHOULD BE ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS AS AN AFFIRMATIVE DEFENSE.

C. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT

DESPITE THE FACT THAT UNRESOLVED QUESTIONS OF FACT AS TO THE MENTAL COMPETENCE OF IRENE AVAGNANO EXISTED IN THE RECORD.

i. SUMMARY DISMISSAL CANNOT BE GRANTED WHEN PREDICATED UPON FACTS WHICH ARE DISPUTED.

ii. SUBSTANTIAL EVIDENCE OF MENTAL INCOMPETENCE EXISTS IN THE RECORD, GIVING RISE TO THE QUESTION OF TOLLING UNDER N.J.S.A. 2A:14-21.

iii. THE EXISTENCE OF A POWER OF ATTORNEY AND THEIR ATTEMPT TO FILE THE COMPLAINT DOES NOT LIFT THE STATUTORY TOLLING FROM LACK OF CAPACITY.

iv. THE COMPLAINT WAS TIMELY FILED IF TOLLING APPLIES PURSUANT TO N.J.S.A. 2A:14-21.

POINT II

THE COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING AND EXPANSION OF THE RECORD ON THE ISSUE OF MENTAL CAPACITY.

Plaintiff raises the following additional points in its reply brief:

POINT I

THE STATUTE OF LIMITATIONS ANALYSIS SHOULD UTILIZE THE FILING DATE OF THE FIRST ACTION.

A. DEFENDANTS' CONTINUED RELIANCE ON REPKO AND ATTEMPTS TO DISTINGUISH CAMMARATA LACK MERIT.

B. DEFENDANTS HAVE NO ANSWER FOR THE TRUTH, WHICH IS, THAT THEY RECEIVED TIMELY NOTICE AND A FULL AND FAIR OPPORTUNITY TO DEFEND THE CLAIM.

POINT II

THE DEFENDANTS['] ARGUMENTS LACK MERIT AND ARE BASED ON A DISTORTION OF THE RECORD.

A. EQUITABLE PRINCIPLES WERE RAISED BELOW AND SHOULD BE UTILIZED BY THE COURT.

B. THE RECORD BELOW CONTAINED MYRIAD ISSUES OF FACT AS TO PLAINTIFF'S MENTAL COMPETENCY AND THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

POINT III

BARRON WAS WRONGLY DECIDED AND IGNORED THE PLAIN LANGUAGE OF THE SUPREME COURT'S FOURTH OMNIBUS ORDER.

II.

We review the dismissal of a complaint as barred by the statute of limitations de novo. Barron v. Gersten, 472 N.J. Super. 572, 576 (App. Div. 2022) (quoting Smith v. Datla, 451 N.J. Super. 82, 88 (App. Div. 2017)). We likewise review a trial court's decision on a motion for summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

Although we review this matter with a fresh set of eyes, we agree with Judge Mongiardo's application of the legal principles we recognized in Repko. The gravamen of plaintiff's argument on appeal is that Repko was wrongly decided and that the filing of the second action should relate back to the first for purposes of complying with the statute of limitations. We disagree and reiterate that "[b]ecause plaintiff's death prevented her from suing in her own behalf, the complaint filed in her name by her counsel was a nullity." Repko, 464 N.J. Super. at 575. Given that the complaint filed after decedent's death "was ineffective 'to set [the] judicial machinery in motion,' there was nothing for the estate's complaint to 'relate back' to." Id. at 576 (quoting Eder Bros. v. Wine Merchs. of Conn., Inc., 880 A.2d 138, 143 (Conn. 2005)). Simply stated, we held that "[t]he 'relation-back' rule cannot cure the failure to file a valid complaint in the first instance." Ibid.

Plaintiff's reliance on Cammarata v. Pub. Serv. Coordinated Transp., 124 N.J.L. 38 (E. & A. 1940), is misplaced, as that case is readily distinguished from Repko. In Cammarata, the relevant statute required that the intestacy action be brought within two years in the name of an administrator ad prosequendum. Id. at 39. The complaint was brought in the name of the administrator ad prosequendum within the statute of limitations, but his appointment had not been perfected until after the statute of limitations had run. Ibid. The Court of Errors and Appeals held that because the administrator ad prosequendum was "a mere trustee to bring and conduct the action," the error was curable by admitting the letters of administration, which were offered as evidence. Id. at 40–41 (quoting Loughney v. Thomas, 117 N.J.L. 169, 173 (E. & A. 1936)). The Court concluded,

the neglect of the plaintiff or his attorneys to take out letters of administration ad prosequendum before beginning suit in the name of such administrator was a technical error; that defendant was not harmed thereby,—and indeed seems to have defended on the merits until the trial—and that under the circumstances the error was curable by the issue of the letters offered in evidence and rejected.

[Id. at 41.]

The Court added "it was not even necessary to amend the record: all that was required was to recognize nunc pro tunc the party entitled to bring and maintain

the action and in whose name the record then read and always had read." Id. at 40.

In both Repko and the matter before us, in sharp contrast, the action was not brought in the name of an executor or administrator who had yet to be formally appointed. Rather, it was brought in the name of a dead person, rendering it a nullity at its purported inception. As we stressed in Repko, "[b]ecause the original complaint, as a nullity never existed, . . . an amended complaint cannot relate back to something that never existed, nor can a nonexistent complaint be corrected." Ibid. (omission in original) (emphasis added) (quoting Davenport v. Lee, 72 S.W.3d 85, 94 (Ark. 2002)). Nothing in Cammarata undermines the rationale or persuasive logic of Repko.

III.

We likewise reject plaintiff's argument that the second complaint was timely filed based on tolling attributable to decedent's incompetence. For one thing, any question regarding decedent's mental incapacity is unavailing and irrelevant, as tolling on that basis could only delay the statute of limitations until

August 2, 2020—two years after her death.² The second complaint was filed on August 18, 2020, after the expiration of any such extended deadline.³ Furthermore, as plaintiff candidly acknowledges, its COVID-related tolling argument fails under the legal principles recognized in Barron, 472 N.J. Super. at 576–80. We reject the argument in plaintiff's reply brief that Barron, like Repko, was wrongly decided.

IV.

We next address plaintiff's contention that the doctrine of substantial compliance applies. That doctrine "allows for the flexible application of a statute in appropriate circumstances." Negron v. Llarena, 156 N.J. 296, 304 (1998). "Courts invoke the doctrine of substantial compliance to avoid technical defeats of valid claims." Id. at 305 (internal quotation marks omitted) (quoting Cornblatt v. Barow, 153 N.J. 218, 239 (1998)). To prove substantial compliance, a defaulting party must demonstrate:

- (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

² Plaintiff essentially abandoned that contention at oral argument before us, given that the second complaint was filed too late even if we were to accept the mental competency tolling argument.

³ That circumstances renders moot plaintiff's request for an opportunity to present additional proofs concerning decedent's mental competency.

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.

[Ibid. (alteration in original) (quoting Bernstein v. Bd. of Trs. of Tchs.' Pension & Annuity Fund, 151 N.J. Super. 71, 76–77 (App. Div. 1977)).]

The present circumstances bear no relation to the circumstances extant in Negron. In that case, the plaintiff filed a wrongful death complaint in federal court that was later dismissed for lack of diversity jurisdiction. Id. at 306. The plaintiff refiled the complaint in New Jersey court soon after the federal complaint was dismissed. Id. at 299. Our Supreme Court found that there was a reasonable explanation for why there was not strict compliance because the plaintiff's complaint brought in federal court made a colorable claim of complete diversity at the time of filing. Id. at 306–07.

In the matter before us, the initial complaint was a legal nullity. See Repko, 464 N.J. Super. at 576–77. There was no "colorable claim" as in Negron. See 156 N.J. at 306. But even were we to accept for the sake of argument that the substantial compliance doctrine can extend the statute of limitations even when the initial complaint is a nullity, plaintiff in this instance has failed to establish all five substantial compliance factors required by Negron. Plaintiff is unable to show, for example, that steps were taken to comply with the statute.

Most significantly, plaintiff has not provided a reasonable explanation for why there was not strict compliance with the two-year statute of limitations. See id. at 305.

V.

Finally, plaintiff argues that equitable tolling should be applied due to defendant's late assertion of the statute of limitations defense and the impact of the COVID-19 pandemic. In Barron, we held:

A statute of limitations may be equitably tolled under very limited circumstances: "(1) [if] the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his [or her] rights, or (3) if the plaintiff has timely asserted his [or her] rights mistakenly in the wrong forum."

[472 N.J. Super. at 577 (alterations in original) (quoting F.H.U. v. A.C.U., 427 N.J. Super. 354, 379 (App. Div. 2012)).]

We further explained that "[a]bsent a showing of intentional inducement or trickery by a defendant, [equitable tolling] . . . should be applied sparingly and only in the rare situation where it is demanded by sound legal principles and in the interest of justice." Ibid. (second alteration and omission in original) (quoting Binder v. Price Waterhouse & Co., L.L.P., 393 N.J. Super. 304, 313 (App. Div. 2007)). "[E]quitable tolling requires plaintiffs to 'diligently pursue

their claims' because although 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. (alterations in original) (quoting Binder, 393 N.J. Super. at 313).

In Repko, we specifically considered whether equitable tolling applies when counsel files a complaint in the name of a deceased individual. 464 N.J. Super. at 578. We concluded that there was "no basis for its application," as the "actions [of counsel and the executor] do not bespeak the diligence the doctrine of equitable tolling demands." Ibid. We emphasized in Repko that "counsel had no contact with his client in at least ten months leading up to the filing of the complaint . . . , which she obviously was not available to authorize" and the "executor delayed sending a death certificate and [l]etters [t]estamentary to counsel for five months after being informed of the suit." Ibid.

In the present matter, the trial court made substantially similar observations regarding the conduct of counsel and the administrator. Judge Mongiardo commented:

The fact of the matter is that a mistake was made in the filing of the initial complaint, a filing which would have been timely. This mistake was the product of a lack of communication between the power of attorney and the law firm retained to prosecute potential claims of the decedent.

There very well may not have been any communication between the two for approximately seven months from the date of the decedent's death. Once the death was learned by the law firm, approximately [seventeen⁴] months passed before a complaint on behalf of the estate was filed.


We add it was not until August 18, 2020 that Frank advised the Estate's counsel he had received letters of administration, though they had been granted on April 29, 2020.

Judge Mongiardo carefully considered the equitable tolling analysis in Repko and concluded that "the actions of the power of attorney and the associate handling this file cannot bespeak the diligence the doctrine of equitable tolling demands." We concur with his fact-sensitive analysis and conclusion.

To the extent we have not addressed them, any remaining arguments raised by plaintiff lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION

⁴ The judge made a finding that the Estate's counsel learned of Avagnano's death from a letter dated March 19, 2019, of which counsel acknowledged receipt. Plaintiff's attorneys maintain they did not actually learn of Avagnano's passing until June 2019. Judge Mongiardo's seventeen-month calculation uses the March date. The three-month discrepancy is irrelevant to the resolution of this appeal.