SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0793-21

ANA A. DELOAZ,

Plaintiff-Appellant,

v.

SCOTT A. GOLER, D.P.M. and PRIME HEALTHCARE SERVICES - ST. MARY'S PASSAIC, LLC d/b/a ST. MARY'S GENERAL HOSPITAL,

Defendants-Respondents.

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Argued March 14, 2023 – Decided August 16, 2023

Before Judges Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-1636-20.

Ronald C. Hunt argued the cause for appellant (Hunt, Hamlin & Ridley, attorneys; Ronald C. Hunt, of counsel and on the briefs).

William J. Buckley argued the cause for respondent Scott A. Goler, D.P.M. (Schenck Price Smith & King,

LLP, attorneys; William J. Buckley, of counsel and on the briefs; Catherine Popso O'Hern, on the briefs).

Richard J. Mirra argued the cause for respondent Prime Healthcare Services – St. Mary's Passaic, LLC d/b/a St. Mary's General Hospital (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Richard J. Mirra, of counsel and on the brief).

PER CURIAM

In this medical-negligence case, plaintiff Ana A. Deloaz appeals from orders granting the motions of defendants Scott A. Goler, D.P.M., and Prime Healthcare Services-St. Mary's Passaic, LLC d/b/a St. Mary's General Hospital to dismiss the complaint based on the statute of limitations.[1] Plaintiff also appeals from orders denying her cross-motion to reinstate a prior complaint in a different matter and her subsequent reconsideration motion. Because the motion judge erred in granting defendants' motions to dismiss, we reverse those orders and the aspect of the reconsideration order denying reconsideration of those orders. We affirm the denial of plaintiff's cross-motion to reinstate and the related aspect of the reconsideration order.

[1] In its answer, Prime Healthcare Services-St. Mary's Passaic, LLC d/b/a St. Mary's General Hospital (the Hospital) stated it had been improperly pled as St. Mary's General Hospital. Plaintiff, the Hospital, and the motion judge use alternate spellings of defendant Goler's name. We use Goler's spelling. The record contains alternate spellings of plaintiff's name. We use the spelling used by the motion judge.

I.

On June 26, 2019, plaintiff filed a medical-negligence complaint against defendants based on a June 27, 2017 surgery defendant Goler had performed at the Hospital on the fifth toe of plaintiff's right foot after diagnosing her with "hammertoe." Plaintiff alleged she had "followed up" with Goler on or about July 24, 2018, "presenting a complaint of a floppy toe of [the same toe], which was presented for many months." According to plaintiff, "after reoccurring difficulty in [the] fifth right toe, she was scheduled to discuss future surgery" on or about July 31, 2018. Plaintiff asserted Goler, as an employee of the Hospital, had breached the applicable standard of care by "failing to provide a proper medical treatment and conduct proper medical testing and monitoring of [plaintiff's] condition." Plaintiff also alleged the Hospital's breach of its duty of care to her included "the failure to assess whether the applicable standard of medical care was being performed prior to the performance of the surgical procedure [and] the failure to monitor [plaintiff] before and after the surgical procedure."

After providing notice and giving plaintiff an opportunity to act, the trial court dismissed the 2019 complaint without prejudice on January 10, 2020, for lack of prosecution under Rules "1:13-7 or 4:43-2." On October 14, 2020, Goler

moved to dismiss the 2019 complaint with prejudice pursuant to Rule 1:13-7. The Hospital cross-moved for the same relief. On January 21, 2021, the court granted the motions and dismissed the 2019 complaint with prejudice, stating the motions had been "unopposed."[2]

On June 2, 2020, plaintiff filed another medical-negligence complaint against defendants, making the same allegations she had asserted in the 2019 complaint. On July 22, 2020, the Hospital moved to dismiss the 2020 complaint with prejudice, arguing the two-year statute of limitations for plaintiff's medical-negligence claim had expired. In support of that motion, the Hospital submitted copies of the 2019 complaint and the order dismissing that complaint with prejudice. The following day, the Hospital filed an answer to the 2020 complaint and demanded plaintiff produce an affidavit of merit.[3] On August 26,

[2] In Estate of Semprevivo v. Lahham, we held "the text of [Rule 1:13-7] is clear and unambiguous. 'Dismissals under the rule are "without prejudice."'" 468 N.J. Super. 1, 15-16 (App. Div. 2021) (quoting Ghandi v. Cespedes, 390 N.J. Super. 193, 196 (App. Div. 2007)). Plaintiff did not appeal from the order dismissing the 2019 complaint with prejudice.

[3] The Hospital later moved to dismiss the direct claims against it pursuant to N.J.S.A. 23A:53A-29 based on plaintiff's failure to provide an affidavit of merit. The court granted that motion on August 4, 2021. Plaintiff did not appeal from that order.

2020, Goler moved to dismiss the 2020 complaint on statute-of-limitations grounds.

On September 29, 2020, plaintiff opposed defendants' motions and cross-moved to reinstate the 2019 complaint. When plaintiff filed the cross-motion, the 2019 complaint had been dismissed without prejudice; defendants had not yet filed the October 2019 motions to dismiss the 2019 complaint with prejudice. In support of plaintiff's cross-motion, plaintiff's counsel submitted a certification, stating he had been "deeply involved" in the trial of another case when the court dismissed the 2019 complaint and had "elected to re-file the exact complaint that was administratively dismissed given the fact that the statute of limitations had not yet expired . . . as [plaintiff] only discovered and had reasons to believe that her injuries were attributable to [defendants'] conduct on or about July 31, 2018." He attached to his certification: Goler's July 24, 2018 office notes; the July 31, 2018 office notes of Dr. Henry Slomowitz, D.P.M., who worked in Goler's medical group; and the July 31, 2018 and August 7, 2018 office notes of Dr. Claudio Gomez, D.P.M., from whom plaintiff had sought a second opinion regarding her toe.

In his July 24, 2018 office notes, Goler stated plaintiff had "present[ed] for follow-up complaint of a 'floppy' toe of the 5th digit right foot- present for

many months. [Plaintiff] complains that the toe is sometimes painful and gets caught with putting on clothing." He also stated they had had a "[d]iscussion of surgical correction of the 'floppy' 5th toe right foot in consultation with Dr. Slomowitz . . . [and] of a possible procedure to include a bone graft to maintain the length of the toe."

In his July 31, 2018 progress notes, Slomowitz stated "[a]s a result of the [2017] surgery the patient has a floppy toe. . . . She . . . recently had a second opinion which suggested a bone graft with K wire to maintain length of toe." According to Slomowitz, he recommended "a syndactyly of the fourth and fifth toes . . . [but plaintiff] does not want to have this procedure." Slomowitz noted the bone-graft procedure recommended in the second opinion was a "good choice," but he did not "believe that there is enough bone for the graft to be successful."

In his July 31, 2018 notes, Gomez wrote plaintiff had complained she "had surgery on both of [her] feet, but [her] last surgery did not go as [she] wanted, [her] right little toe is crooked and hurts when [she] walk[s] or put[s on] shoes." According to Gomez, x-rays indicated "most of the proximal phalanx bone [was] removed from previous surgery." Gomez noted he had "[a]dvised [plaintiff] to return to her podiatric doctor since [she] related she was offered a salvage

surgery with either syntactically or bone graft." In his August 7, 2018 notes, Gomez wrote plaintiff had "present[ed] today after going to her podiatrist for a follow up on a painful deviated right 5th digit after having surgery for what [she] describe[d] 'it was a corn only that I wanted taken care of'" and that she had told him "her former doctor told her 'there is nothing I can do for you now.'"

Defendants disputed plaintiff's assertion that she had not discovered her injury was attributable to defendants' malpractice until July 31, 2018. In support of their argument, Goler submitted his August 23, 2017 and May 24, 2018 office notes. In his August 23, 2017 notes, Goler wrote plaintiff had complained "that her 5th toe right foot is floppy" and they had discussed "surgical correction of the 'floppy' 5th toe right foot. [Plaintiff] will be scheduled for a 'syndactaly' procedure to tact the toe down." He noted a follow-up appointment in four weeks. In his May 24, 2018 notes, Goler stated plaintiff had "present[ed] for complaint of difficulty with the 5th toe right foot- [plaintiff] state[d] the 5th toe sometimes gets stuck in the up position," they had discussed "surgical correction of the 'floppy' 5th toe," and she would "be scheduled for a . . . 'syndactaly' procedure to tact the toe down." Based on those notes, Goler asserted "plaintiff 'discovered' or should have 'discovered' her possible cause of action sometime between August 23, 2017, and May 24, 2018." During argument, Goler's

counsel relied on the August 23, 2017 and May 24, 2018 office notes in support of his argument that "from a discovery rule standpoint," plaintiff had known or should have known she had a malpractice claim against Goler more than two years before she filed the 2020 complaint.

After hearing argument, the motion judge issued three orders on August 4, 2021, granting defendants' motions to dismiss the complaint with prejudice based on the expiration of the statute of limitations and denying plaintiff's cross-motion. The judge attached to each order the same two-page statement of reasons, reciting the standard of review for a Rule 4:6-2(e) motion. In granting defendants' motions, the judge held:

> Here, [p]laintiff's cause of action accrued on . . . June 27, 2017, when she underwent surgery with Dr. Goler at [the] Hospital. The underlying complaint in this matter was filed on June 2, 2020, nearly three years later. This [c]ourt finds . . . [p]laintiff had actual or constructive notice of the accrual of her cause of action because she filed her first complaint[], which is identical to the underlying action, on June 26, 2019, a day before the [s]tatute of [l]imitations was set to expire.

In denying plaintiff's cross-motion to reinstate the 2019 complaint, the judge held "the motion was untimely filed as more than ninety (90) days passed since [the dismissal o]rder of January 21, 2021." The judge also found plaintiff had "failed to show exceptional circumstances and demonstrate due diligence in the

handling of the 2019 complaint" and, having never served defendants with the 2019 complaint, had "voluntarily slept on her rights."

Plaintiff moved for reconsideration of all three orders. After hearing argument, the judge denied the motion in an October 4, 2021 order and opinion. In denying plaintiff's motion, the judge relied on information contained in the doctors' office notes submitted in opposition to and support of defendants' motions, the 2019 complaint and the dismissal notice and orders regarding that complaint, and a certification plaintiff had submitted in opposition to the Hospital's affidavit-of-merit motion. In her certification, plaintiff testified Dr. Gomez had advised her during the July 31, 2018 appointment that "there was no bone in [her] right small toe" and "the surgery [she had] had with Dr. Goler for [her] toe was the result of its current condition." According to plaintiff, she "started to cry hysterically because [she] didn't know how bad [her] toe injury was until that very day."

Addressing defendants' motions to dismiss, the judge found "[n]o facts in the record demonstrate any evidence or circumstances to show that [p]laintiff is entitled to the benefit of the discovery rule" and that "[p]laintiff knew or had reason to know that she had a potential cause of action against [d]efendants before seeking a second opinion." Addressing plaintiff's cross-motion, the judge

found plaintiff had not "proffer[ed] sufficient evidence to show that her untimely filing of a motion to reinstate is excusable when attributed to an honest mistake, accident, or any cause not incompatible with proper diligence" and had "failed to show exceptional circumstances by failing to demonstrate due diligence in handling the 2019 [c]omplaint."

On appeal, plaintiff argues the judge erred in failing to apply the correct standard under Rule 4:6-2(e) given that the judge considered matters outside the pleading, to apply the correct legal standard for a motion to reinstate a complaint pursuant to Rule 1:13-7(a), and to grant plaintiff's motion for reconsideration. Because we agree the judge failed to apply the correct standard in deciding defendants' motions to dismiss, we reverse the orders granting those motions and the portion of the reconsideration-motion order denying reconsideration of those orders.

II.

We review de novo a dismissal of a complaint on statute-of-limitations grounds, applying the same standard under Rule 4:6-2(e) that governed the motion judge. Barron v. Gersten, 472 N.J. Super. 572, 576 (App. Div.), certif. denied, 252 N.J. 429 (2022); see also Wreden v. Township of Lafayette, 436

N.J. Super. 117, 124-25 (App. Div. 2014). A review of that standard demonstrates the judge's dismissal of the complaint was procedurally improper.

"When reviewing a motion to dismiss under Rule 4:6-2(e), we assume that the allegations in the pleadings are true and afford the pleader all reasonable inferences." Sparroween, LLC v. Township of West Caldwell, 452 N.J. Super. 329, 339 (App. Div. 2017). "The essential test is 'whether a cause of action is "suggested" by the facts.'" Sashihara v. Nobel Learning Cmtys., Inc., 461 N.J. Super. 195, 200 (App. Div. 2019) (quoting Printing Mart-Morristown v. Sharp Elecs., 116 N.J. 739, 746 (1989)). Thus, a motion to dismiss a complaint under Rule 4:6-2(e) "must be based on the pleadings themselves." Roa v. Roa, 200 N.J. 555, 562 (2010).

"In evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015) (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005)). If a judge deciding a Rule 4:6-2(e) motion is presented with and does not exclude "matters outside the pleading," the motion must "be treated as one for summary judgment and disposed of as provided by [Rule] 4:46, and all parties shall be given . . . a reasonable opportunity to present

all material pertinent to such a motion." R. 4:6-2; see also Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019) ("If the court considers evidence beyond the pleadings in a Rule 4:6-2(e) motion, that motion becomes a motion for summary judgment, and the court applies the standard of Rule 4:46.").

Deciding a summary-judgment motion, a judge must "determine whether '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.'" Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (quoting R. 4:46-2(c)). "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. 449, 472 (2020) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). "The slightest doubt as to an issue of material fact must be reserved for the factfinder, and precludes a grant of judgment as a matter of law." Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399 (App. Div. 2015). Furthermore, "[a]ny issues of credibility must be left to the finder of fact." Ibid.

Generally, summary judgment is premature when the opposing party has not yet had an opportunity to conduct discovery and develop facts on which it intends to base its claims. Friedman, 242 N.J. at 472; see also Hyman v. Rosenbaum Yeshiva of N.J., 474 N.J. Super. 561, 573 (App. Div. 2023) ("Generally, summary judgment is inappropriate prior to the completion of discovery." (quoting Wellington v. Est. of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003))). "A party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete." Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007).

The motion judge was presented with but failed to exclude "matters outside the pleading." R. 4:6-2. Goler submitted his office notes in support of his motion, and his attorney relied on those notes during argument. Although the judge did not reference the notes in his statement of reasons regarding the motions to dismiss, he also did not expressly exclude them, and he specifically referenced them in his reconsideration-motion opinion, making it clear he had considered them. Thus, he should have treated the dismissal motions as summary-judgment motions.

Treating them as summary-judgment motions, the judge should have denied the motions. The motions were premature. Discovery had not even begun and could have – especially depositions of plaintiff, Goler, Slomowitz, and Gomez – revealed critical information about what plaintiff was told about her condition and its cause. Moreover, viewing the facts in a light most favorable to plaintiff as the non-moving party, a genuine issue of fact existed as to when plaintiff knew or should have known Goler's negligence had caused her injury and, thus, when she knew or should have known she had the basis for an actionable claim.

Medical-negligence actions are governed by a two-year statute of limitations. N.J.S.A. 2A:14-2. A cause of action for medical negligence generally accrues on the date of the alleged negligent act or omission. Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005). However, the discovery rule delays accrual of a cause of action "until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he [or she] may have a basis for an actionable claim." R.L. v. Voytac, 199 N.J. 285, 299 (2009) (quoting Lopez v. Swyer, 62 N.J. 267, 272 (1973)). "[I]n determining [if] it is appropriate to apply the discovery rule[, t]he crucial inquiry is 'whether the facts presented would

alert a reasonable person exercising ordinary diligence that he or she was injured due to the fault of another.'" Szczuvelek, 182 N.J. at 281 (quoting Martinez v. Cooper Hosp., 163 N.J. 45, 52 (2000)); see also Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 191 (2012) (whether plaintiff was alerted that injury was caused by another person is "[a]t the heart of every discovery rule case"); Baird v. Am. Med. Optics, 155 N.J. 54, 66 (1998) ("Critical . . . is the injured party's awareness of the injury and the fault of another.").

"In many cases, knowledge of fault is acquired simultaneously with knowledge of injury." Martinez, 163 N.J. at 53. But "where the relationship between [a] plaintiff's injury and [a] defendant's fault is not self-evident, it must be shown that a reasonable person, in [the] plaintiff's circumstances, would have been aware of such fault in order to bar [the plaintiff] from invoking the discovery rule." Kendall, 209 N.J. at 192. As the Court explained in Martinez, the discovery rule encompasses two types of plaintiffs: (1) "those who do not know that they have been injured"; and (2) "those who know they have suffered an injury but do not know that it is attributable to the fault of another." 163 N.J. at 53.

Generally, discovery-rule issues "will not be resolved on affidavits or depositions since demeanor may be an important factor where credibility is

significant." Lopez, 62 N.J. at 275. If credibility is involved, a trial court should conduct an evidentiary hearing outside the presence of the jury. Ibid.; see also The Palisades at Fort Lee Condo. Ass'n v. 100 Old Palisade, LLC, 230 N.J. 427, 452 (2017) (remanding case for trial court to conduct a Lopez hearing to examine evidence presented and "in its discretion, take testimony from relevant witnesses").

In granting defendants' motions to dismiss, the judge erred by misapplying the discovery rule. He assumed and held plaintiff's cause of action accrued on June 27, 2017, when she underwent surgery. The record is devoid of evidence she knew or should have known that day she had a "floppy toe" condition, most of the bone in her toe had been removed, or Goler had been negligent in his treatment of her and thereby caused the condition. In denying plaintiff's reconsideration motion, the judge appeared to apply the discovery rule, concluding plaintiff "knew or had reason to know that she had a potential cause of action against [d]efendants before seeking a second opinion." In reaching that conclusion, the judge referenced plaintiff's appointments with Goler regarding her "floppy toe" condition. Those appointments may demonstrate knowledge of the condition but alone are not enough to establish plaintiff knew or should have known Goler's negligence caused the condition.

The judge procedurally erred in not treating the dismissal motions as summary-judgment motions. He erred substantively in his misapplication of the discovery rule. Accordingly, we reverse the August 4, 2021 orders granting defendants' motions to dismiss based on statute-of-limitations grounds and the portion of the reconsideration order denying reconsideration of those orders.

"We review the denial of a motion to reinstate a complaint dismissed for lack of prosecution for abuse of discretion." Est. of Semprevivo, 468 N.J. Super. at 11. A trial judge abuses his or her discretion "when a decision is made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." Kornbleuth v. Westover, 241 N.J. 289, 302 (2020) (quoting Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015)).

Subsection (a) of Rule 1:13-7 sets forth "the standards and procedures for reinstatement, permitting a plaintiff whose complaint has been dismissed to file a motion to reinstate the complaint." Est. of Semprevivo, 468 N.J. Super. at 11. A plaintiff may seek reinstatement of a complaint by consent order or motion. A reinstatement motion may be filed after the plaintiff has served the complaint. R. 1:13-7(a) ("If the defendant has been properly served but declines to execute a consent order, plaintiff shall move on good cause shown for vacation of the

dismissal. In multi-defendant actions in which at least one defendant has been properly served, . . . a motion for reinstatement shall be required" if a consent order is not submitted within sixty days of the dismissal order) (emphasis added). A motion judge will "ordinarily routinely and freely grant[] [reinstatement] when plaintiff has cured the problem that led to the dismissal even if the application is made many months later." Ghandi, 390 N.J. Super. at 196 (quoting Rivera v. Atl. Coast Rehab. & Health Care Ctr., 321 N.J. Super. 340, 346 (App. Div. 1999)).

Plaintiff did not move to reinstate the 2019 complaint in the 2019 case. Instead, plaintiff cross-moved to reinstate the 2019 complaint in the 2020 case in response to motions filed in the 2020 case. Nothing in Rule 1:37-7 permits a plaintiff to move in one case to reinstate a complaint filed in another case. Even if we were to ignore that procedural anomaly, plaintiff admittedly did not serve defendants with the 2019 complaint and, thus, did not meet the requirement for a reinstatement motion under Rule 1:13-7 or "cure[d] the problem that lead to the dismissal." Ghandi, 390 N.J. Super. at 196 (quoting Rivera, 321 N.J. Super. at 346). Service of the 2020 complaint is not the equivalent of service of the 2019 complaint for purposes of a reinstatement motion under Rule 1:13-7. For those reasons, and for those reasons alone, we affirm the denial of plaintiff's

cross-motion to reinstate the 2019 complaint. See Brown v. Brown, 470 N.J. Super. 457, 463 (App. Div. 2022) (noting "we review orders and not opinions").

Reversed as to the dismissal orders and related aspects of the reconsideration order; affirmed as to the reinstatement order and related aspects of the reconsideration order; and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.