SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1561-22

JAMES DUFFY,

Plaintiff-Respondent,

v.

GENESIS HEALTHCARE, INC., 625 STATE HIGHWAY OPERATIONS, LLC, d/b/a MADISON CENTER,

Defendants-Respondents,

and

BENJAMIN LESSIG,

Defendant-Appellant.

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Argued April 18, 2023 – Decided May 31, 2023

Before Judges Messano, Gummer and Perez-Friscia.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2201-21.

Matthew E. Blackman argued the cause for appellant (Ruprecht Hart Ricciardulli & Sherman, LLP, attorneys; Michael R. Ricciardulli, of counsel; Matthew E. Blackman, on the brief).

Richard A. Gantner argued the cause for respondent James Duffy (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys; Richard A. Gantner, of counsel and on the brief).

PER CURIAM

On leave granted, defendant Benjamin D. Lessig, D.O., appeals from the Law Division's September 15 and December 20, 2022 orders, denying his summary judgment motion, which he based on the statute of limitations (SOL) for medical malpractice claims, and subsequent reconsideration motion. Plaintiff James Duffy, relying on the fictitious party, Rule 4:26-4, and the relation back, Rule 4:9-3, named Dr. Lessig as a defendant in an amended complaint after the expiration of the SOL. Following our review of the parties' arguments, the record and applicable law, we reverse.

This matter arises from the medical treatment and care Duffy received at co-defendant 625 State Highway Operations, LLC, d/b/a Madison Center (Madison), a rehabilitation facility. We limit our recitation of the facts and procedural history to the relevant issues presented on appeal.

Duffy was admitted to Madison after a surgical repair to his right femur. He received care at Madison on December 11 and 12, 2019. Upon admission, Yelena Zhdanova, R.N., noted in the medical records that an intake review and order had been completed. The note, dated December 11, 2019, at 22:52, states, "[a]dmission orders reviewed and confirmed by Dr. Lessig."

On the day after admission, at approximately 5:15 a.m., Duffy had an unwitnessed fall. Duffy was heard calling from his room and was determined to have refractured his femur. After the fall Victoria Morin, R.N., completed a note dated December 12, 2019, at 10:47 a.m., which states, "[c]hange reported to Primary Care Clinician: Dr. Lesig 12/12/2019[,] 5:20 AM." Morin incorrectly spelled "Dr. Lessig" in the note as "Dr. Lesig." In an "event summary report," Nurse M. Romulo identified "Dr. Lesig" as plaintiff's physician and stated, "Dr. Lesig and [Duffy's wife] were made aware of incident . . . ." Duffy was transferred to Bayonne Medical Center later that day.

A note in the records states, "[c]opy of chart mailed to [plaintiff's counsel] on 12/16/20." The medical records consisted of 143 pages. On June 24, 2021, Duffy filed a complaint, alleging medical negligence, punitive damages, violations of the Omnibus Budget Reconciliation Act (OBRA), 42 C.F.R. § 483.1-483.480, and violations of the Nursing Residents' Bill of Rights Act

(NRBRA), N.J.S.A. 30:13-1 to -19.[1] Duffy named as defendants Genesis Healthcare, Inc., Madison, Zhdanova, Morin, Mir Maqbool Ahmad, M.D., Lily Larbi, L.P.N., Roseann Prieto, R.N., Jane and John Doe, and ABC Corporations.[2] According to plaintiff's counsel, the medical records referenced Dr. Ahmad approximately sixty-five times and identified him as the attending physician. In the initial complaint, Duffy described Dr. Ahmad as a "physician who was employed by [d]efendant Madison." Duffy named as fictitious party defendants "Jane and John Doe 1-10," who were "personnel employed by [d]efendant Genesis and/or defendant Madison at all times relevant to this matter," and who "were responsible for providing medical care to [p]laintiff while he was a patient of . . . Madison and . . . Genesis."

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[1] The NRBRA provides a patient has "the right to a safe and decent living environment . . . including the right to expect and receive appropriate assessment . . . consistent with sound nursing and medical practices." N.J.S.A. 30:13-5(j) (emphasis added). The causes of action permitted under NRBRA are set forth in N.J.S.A. 30:13-8. We take notice of the medical malpractice causes of action pleaded, as the nature of the claims is relevant to the due diligence required, as addressed later in this opinion.

[2] Yelena Zhdanova, R.N., Lily Larbi, L.P.N, Roseann Prieto, R.N., and Mir Maqbool Ahmad, M.D., were named in the initial complaint as defendants, but not named in the amended complaint.

Duffy did not name Dr. Lessig in the initial complaint. The SOL for medical negligence in connection with Duffy's fall expired on December 12, 2021, more than five months after the filing of the initial complaint.

Duffy served Dr. Ahmad with the initial complaint on July 8, 2021. In answers to interrogatories, dated April 19, 2022, Dr. Ahmad identified himself as an independent contractor serving as Medical Director with Physician Services at Madison. Dr. Ahmad also stated, "[w]hen the patient was admitted on December 11, 2019, admitting orders were reviewed and confirmed by Dr. Benjamin Lessig (the on-call physician)," and "when the patient fell on the morning of December 12, 2019, Dr. Lessig was contacted." The interrogatories provided essentially the same information regarding Dr. Lessig that was contained in the medical records. After receiving the answers to interrogatories, Duffy moved to amend the complaint on April 27, 2022, to add Dr. Lessig as a defendant, and the motion judge granted the motion. Plaintiff's amended complaint, naming Dr. Lessig as a defendant for the first time, was filed on July 8, 2022, over eleven months after the filing of the complaint, and seven months after the SOL expired.

After service of the amended complaint, Dr. Lessig moved for summary judgment. In support of the motion, Dr. Lessig certified he had first learned of

the litigation in May of 2022, when he received a copy of the summons and complaint in his staff "mailbox" at a different medical facility, Jersey Shore Care Center in Eatontown. Dr. Lessig certified he "was unaware that Mr. Duffy had filed any lawsuit or claims against anyone."

After hearing argument on the motion, the motion judge, in an oral decision, denied summary judgment. The judge found Duffy "met all the elements under Rule 4:9-3 for his amended complaint against [defendant] to relate back to the date of the original complaint," and "plaintiff did not fail to exercise due diligence in omitting [defendant] from the original complaint." The judge observed Dr. Lessig was named three times in the medical records (twice misspelled as Lesig), and only minimal discovery had occurred. Further, the judge found Duffy had satisfied the relation back rule because "Dr. Lessig should have been aware that he was a proper defendant since his employer and co-worker are named as defendants and Dr. Lessig was involved in Duffy's care and knew or should have known that Mr. Duffy was contemplating suit."

Dr. Lessig moved for reconsideration, certifying, "[m]y duties as an attending and Medical Director between December 2020 and February 2022 did not include participation in litigation on behalf of Madison Center," and "I was not routinely advised of the service of any lawsuits against Madison Center."

At the time of Duffy's stay at Madison, Dr. Lessig was not an attending physician or the Medical Director. The judge, after hearing arguments, found Duffy had "a right to some discovery to make a determination as to whether or not Dr. Lessig should have known based upon the policies and procedures of his practice, based upon what his co-employee knew, based upon all of those arguments what he knew or should have known." The judge again noted Dr. Lessig's name was misspelled twice as Lesig and observed the "chart was difficult to read."

Before us, Dr. Lessig argues we should reverse the orders denying his motions because: Duffy did not amend the complaint before the expiration of the SOL; reliance on the fictitious party rule is misplaced as Dr. Lessig was discoverable with due diligence; and the relation back rule is inapplicable as Dr. Lessig had no notice of the action.

We review a motion judge's grant or denial of a motion for summary judgment de novo. Branch v. Cream-O-Land, 244 N.J. 567, 582 (2021). We apply the same standard as the motion judge and consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder 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). "We therefore must first determine whether, giving the non-moving party the benefit of all reasonable inferences, the movant has demonstrated that there are no genuine issues of material fact." Walker v. Choudhary, 425 N.J. Super. 135, 142 (App. Div. 2012). A dispute of material fact is "genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

"'If there is no genuine issue of material fact,' then we must 'decide whether the trial court correctly interpreted the law.'" Richter v. Oakland Bd. of Educ., 459 N.J. Super. 400, 412 (App. Div. 2019) (quoting DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013)). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995) (citing State v. Brown, 118 N.J. 595, 604 (1990)). Thus, "[w]e accord no deference to the

trial judge's legal conclusions." Richter, 459 N.J. Super. at 412 (citing Nicholas v. Mynster, 213 N.J. 463, 478 (2013)).

If the non-moving party "points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment." Brill, 142 N.J. at 529. "[B]are conclusions in the pleadings without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (citing U.S. Pipe & Foundry Co. v. Am. Arb. Assoc., 67 N.J. Super. 384, 399-400 (App. Div. 1961)). "Competent opposition" to a motion for summary judgment "requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (citation omitted).

A medical malpractice action alleging personal injuries due to wrongful conduct or neglect of a person must be "commenced within two years . . . after the cause of . . . action shall have accrued." N.J.S.A. 2A:14-2(a). The "cause of action generally accrues on the date that the alleged act or omission occurred." Baird v. Am. Med. Optics, 155 N.J. 54, 65 (1998) (citing Bauer v. Bowen, 63 N.J. Super. 225, 230 (App. Div. 1960)). Here, the cause of action accrued on

December 12, 2019, the day of the fall. The SOL, therefore, expired on December 12, 2021.

Although acknowledging he filed the amended complaint after the SOL expired, Duffy argues the judge correctly denied summary judgment because amendment is permissive under the fictitious party and relation back rules. Duffy maintains the amendment was proper under the fictitious party rule because the original complaint named fictitious John Doe parties, and Dr. Lessig was not readily discoverable with due diligence upon inspection of the 143 pages of medical records. Duffy maintains the exercise of due diligence did not disclose Dr. Lessig as a potentially culpable defendant because Dr. Ahmad is named in the records as the attending physician, Dr. Ahmad is more frequently referenced in the records, and Dr. Lessig's name is misspelled twice in the record. Duffy maintains Dr. Lessig was discoverable only after the SOL expired upon receipt of Dr. Ahmad's answers to interrogatories, which, according to Duffy, first named Dr. Lessig as the on-call physician.

Regarding the relation back rule, Duffy argues the amended complaint naming Dr. Lessig satisfies all conditions of the rule. The argument is premised on the assumption Dr. Lessig should have become aware of the litigation when Madison was served with the complaint, and Dr. Lessig should have known but

for misidentification he would have been named as a defendant. We are unpersuaded by Duffy's arguments.

Fictitious party practice in New Jersey is governed by Rule 4:26-4. The Court has construed the Rule "to permit a plaintiff who institutes a timely action against a fictitious defendant to amend the complaint after the expiration of the statute of limitations to identify the true defendant," which amended pleading will "relate[] back to the time of filing of the original complaint, thereby permitting the plaintiff to maintain an action that, but for the fictitious-party practice, would be time-barred." Viviano v. CBS, Inc., 101 N.J. 538, 548 (1986). "The fictitious defendant rule was promulgated to address the situation in which a plaintiff is aware of a cause of action against a defendant but does not know that defendant's identity." Gallagher v. Burdette-Tomlin Med. Hosp., 318 N.J. Super. 485, 492 (App. Div. 1999), aff'd, 163 N.J. 38 (2000). Rule 4:26-4 "render[s] timely the complaint filed by a diligent plaintiff, who is aware of a cause of action against an identified defendant but does not know the defendant's name." Greczyn v. Colgate-Palmolive, 183 N.J. 5, 11 (2005) (citing Gallagher, 318 N.J. Super. at 492).

To avail themselves of the Rule, plaintiffs must 1) not know the identity of the fictitious defendant; 2) describe the defendant with sufficient detail to

allow identification; 3) act diligently in identifying the defendant; and 4) when amending the complaint demonstrate how the defendant's identity was learned. See ibid.; see also Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 119-22 (1973). The benefit of the Rule is reserved for plaintiffs who have exercised "due diligence in ascertaining the fictitiously identified defendant's true name and amending the complaint to correctly identify that defendant." Claypotch v. Heller, Inc., 360 N.J. Super. 472, 480 (App. Div. 2003).

"[C]ase law has emphasized the need for plaintiffs and their counsel to act with due diligence in attempting to identify and sue responsible parties within the statute of limitations period." Baez v. Paulo, 453 N.J. Super. 422, 438 (App. Div. 2018). To rely on a fictitious pleading, a plaintiff must demonstrate "due diligence in endeavoring to identify the responsible defendants before filing the original complaint" and "in taking prompt steps to substitute the defendant's true name, after becoming aware of that defendant's identity." Id. at 439 (citing Claypotch, 360 N.J. Super. at 479-80). "In determining whether a plaintiff has acted with due diligence in substituting the true name of a fictitiously identified defendant, a crucial factor is whether the defendant has been prejudiced by the delay in its identification as a potentially liable party and service of the amended complaint." Claypotch, 360 N.J. Super. at 480 (citing Farrell, 62 N.J. at 122-

23). The Rule "may be used only if defendant's true name cannot be ascertained by the exercise of due diligence prior to the filing of the complaint." Id. at 479-80 (citing Mears v. Sandoz Pharms. Inc., 300 N.J. Super. 622, 631-33 (App. Div. 1997)).

Fictitious party names in a complaint will typically suspend the running of the statute of limitations where the plaintiff is not aware of the true identity of the defendant. Mears, 300 N.J. Super. at 628 (citing Viviano, 101 N.J. at 547). However, "[t]he rule will not protect a plaintiff who had ample time to discover the unknown defendant's identity before the running of the statute of limitations." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 4:26-4 (2023) (citing Matynska v. Fried, 175 N.J. 51, 53 (2002)).

A plaintiff in a medical negligence action cannot employ the fictitious party rule after expiration of the statute of limitations when a doctor's name was readily discoverable in available medical records. The Court in Matynska affirmed the trial court's denial of an amended complaint adding a new doctor under the fictitious party rule as due diligence was not satisfied when "the doctor's name appeared twice in [the plaintiff's] hospital records as a physician having participated in her care." 175 N.J. at 51. The Court found the plaintiff "had an obligation to investigate all potentially responsible parties in a timely

manner but did not do so." Ibid. "The fictitious pleading rule is not an appropriate device to avoid naming known parties in a timely fashion." Baez, 453 N.J. Super. at 444.

Duffy's counsel received copies of Duffy's medical records on December 16, 2020. Included in the 143 pages were medical records from Bayshore Medical Center, where Duffy's original femur surgery was performed. From the records, Duffy discovered and named Dr. Ahmad, Zhdanova, Morin, Larbi, and Prieto as defendants. Dr. Lessig is named a total of three times in the medical records with his name misspelled as "Lesig" twice. The first medical note states, "[a]dmission orders reviewed and confirmed by Dr. Lessig." We observe Duffy's complaint sets forth violations of the OBRA and the NRBRA, each intended to protect nursing home residents' rights to adequate safety assessments and care. Notably, contemporaneous notes regarding the intake assessment of Duffy as a fall risk are proximate to the note naming Dr. Lessig as the admitting doctor. The proximity of the risk assessment note and Dr. Lessig's name as the admitting physician provided further nexus for discovering Dr. Lessig's role in Duffy's care. Duffy fails to explain why the first medical note was insufficient notice of Dr. Lessig's role in approving the admission orders, especially considering the note was written by Zhdanova, who Duffy named as a defendant

in the initial complaint. We conclude Duffy did not reasonably review and ascertain from the medical records provided a potentially liable party, Dr. Lessig, the admitting physician.

Duffy argues Dr. Lessig was undiscoverable with due diligence due to the misspellings of Dr. Lessig's last name by one letter (Lesig), and because Dr. Lessig was incorrectly named as the primary care physician in the change note after the fall. The second note indicates, "[c]hange reported to the primary care clinician: Dr. Lesig 12/12/2019 — [o]rders obtained include: transfer to BMC ER for evaluation." Although the second note misspells "Dr. Lesig" and misnames Dr. Lessig as the primary care physician, it also indicates Dr. Lessig ordered Duffy's transfer. The exercise of due diligence would have yielded Dr. Lessig's role as Duffy's admitting and on call doctor. Duffy's argument that he named only Dr. Ahmad, and not Dr. Lessig, because Dr. Ahmad was named as the attending physician sixty-five times in the record is unavailing. The exercise of due diligence is not dependent upon the frequency with which a doctor is named in medical records.

Through the exercise of due diligence, Duffy should have and could have discovered from the medical records provided in December of 2020 that Dr. Lessig was a potentially liable party before the SOL expired on December 12,

2021. For these reasons, we conclude Duffy cannot rely on the fictitious party rule, Rule 4:26-4, to amend the complaint to name Dr. Lessig.

Turning to Rule 4:9-3, Duffy maintains the relation back rule provides an independent basis to permit the filing of the amended complaint under the principle of fundamental fairness. Duffy contends in this regard that denying him the ability to amend the complaint to add Dr. Lessig, would be fundamentally unfair because "by reasonable due diligence [he] was unable to identify Dr. Lessig before preparation of the [c]omplaint due to defendant's inaccurate records . . . [and] [t]he amended complaint did not change any of the allegations but updated the alleged responsible parties."

When a plaintiff adds a new party after the SOL has run, they must establish: "(1) the claim asserted in the amended complaint arose" from the same conduct, transaction, or occurrence alleged in the original complaint; (2) the new defendant had notice of the potential complaint prior to the expiration of the statute of limitations so as not to be prejudiced in maintaining a defense; and (3) the new defendant knew or should have known that, but for the misidentification, "the action would have been brought against him or her." Viviano, 101 N.J. at 553; Smelkinson v. Ethel & Mac Corp., 178 N.J.

Super. 465, 471 (App. Div. 1981). When a defendant is added as a new party, and is not a correction of a misnomer:

> [I]n order for the amendment to relate back, the plaintiff must show that the new defendant had "such notice (albeit informal) of the action prior to the running of the statute of limitations that he would not be prejudiced in maintaining his defense on the merits and knew or should have known that but for an error of identification, the action would have been brought against him."
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> [Otchy v. City of Elizabeth Bd. of Educ., 325 N.J. Super. 98, 105 (App. Div. 1999) (citing Pressler, Current N.J. Court Rules, cmt. 2 on R. 4:9-3 (2000)); see also Walker, 425 N.J. Super. at 143.]

Absent such proof, when a complaint is filed out of time, and the defendant had "no prior notice of plaintiff's cause of action, [the complaint] cannot relate back to the date of filing of the original complaint" against an already named defendant. Giannakopoulos v. Mid State Mall, 438 N.J. Super. 595, 610 (App. Div. 2014). In determining whether the relation back rule should apply, "[t]he good faith and reasonableness of plaintiff['s] conduct must be measured against a claim of prejudice to defendants." Aruta v. Keller, 134 N.J. Super. 522, 529-30 (App. Div. 1975) (citing Farrell, 62 N.J. at 122); see also Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 458 (1998) (recognizing the Rule permits plaintiffs "to correct pleading errors or to respond

affirmatively to [their] acquisition of new information") (quoting Wimmer v. Coombs, 198 N.J. Super. 184, 189 (App. Div. 1985)).

If the newly-added defendant knew of the complaint prior to the expiration of the SOL and suffered no prejudice, then "the remaining aspect of Rule 4:9-3 to be considered is whether a defendant must have known or should have known within the statute of limitations period that but for the plaintiff's mistake in not naming her as a defendant, the action would have been brought against her personally." Walker, 425 N.J. Super. at 143 (citation omitted). A hearing was warranted in Walker to resolve the defendant doctor's contradictory assertions as to when she learned of the litigation, and whether the relation back rule was satisfied. Id. at 147-48.

Here, the first prong of Rule 4:9-3 is met as it is undisputed the claims arose from the same occurrence. As to the second prong, Dr. Lessig certified he did not know of the lawsuit or any claims until Duffy served the complaint after the expiration of the SOL. Further, Dr. Lessig certified he had no reason to believe a claim would be brought against him. The motion judge imputed knowledge to Dr. Lessig based on his employment at co-defendant Madison, nothing more. The record does not support any finding Dr. Lessig had personal knowledge of the claim.

Duffy bears the burden of demonstrating he fulfilled the requirements of Rule 4:9-3. See Viviano, 101 N.J. at 552. Duffy has not demonstrated Dr. Lessig received informal notice of any lawsuit or claim. Additionally, Dr. Lessig's employment with Madison did not put him on constructive notice of Duffy's claim. Cf. Ciaudelli v. City of Atl. City, 268 N.J. Super. 439, 443-45 (1993) (finding a late-added defendant had constructive notice only due to the peculiar procedural history of the case and the defendant's previous active participation in the litigation). An assumption of notice is not proof of notice required for Duffy to meet his burden under Rule 4:9-3. The prejudice to Dr. Lessig in maintaining a defense after the SOL has run has also not been overcome. See Mears, 300 N.J. Super. at 631 ("There cannot be any doubt that a defendant suffers some prejudice merely by the fact that it is exposed to potential liability for a lawsuit after the statute of limitations has run."). Lastly, as to the third prong, Duffy has not demonstrated Dr. Lessig knew a claim would be brought against him "but for a mistake concerning [his] identity." See Otchy, 325 N.J. Super. at 105. For these reasons, we conclude Duffy cannot rely on the relation back rule, Rule 4:9-3, to add Dr. Lessig as a defendant.

We reverse the order denying Dr. Lessig's motion for summary judgment and remand the matter to the trial court to enter an order dismissing plaintiff's complaint as to Dr. Lessig with prejudice.

Reversed and remanded.