SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1959-22

ELENA LAZA, individually and as Administratrix ad Prosequendum of the Estate of HERMAN ERB,

Plaintiff-Respondent,

v.

HMH HOSPITALS CORPORATION, d/b/a PALISADES MEDICAL CENTER, HMH RESIDENTIAL CARE, d/b/a THE HARBORAGE, 800 RIVER ROAD OPERATING COMPANY, LLC, d/b/a CARE ONE AT NEW MILFORD, d/b/a WOODCREST HEALTHCARE CENTER, UROLOGIC SPECIALTIES, P.A., and JOHN KERNS, M.D.,

Defendants,

and

MICHAEL NAZMY, M.D.,

Defendant-Appellant.

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Argued September 27, 2023 – Decided October 23, 2023

Before Judges Rose and Perez Friscia.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-0168-21.

Michael R. Ricciardulli argued the cause for appellant (Ruprecht Hart Ricciardulli & Sherman, LLP, attorneys; Michael R. Ricciardulli, of counsel and on the briefs; Patricia E. Voorhis, on the briefs).

Lance D. Brown argued the cause for respondent (Lance Brown and Associates, LLC, attorneys; Lance D. Brown, of counsel and on the brief; Nicholas F. Savio, on the brief).

PER CURIAM

On leave granted, defendant Michael Nazmy, M.D. appeals from the January 26, 2023 Law Division order, which denied his motion to dismiss plaintiff Elena Laza's complaint, on behalf of herself and the Estate of Herman Erb, pursuant to the statutes of limitations.[1] Plaintiff, relying on the discovery rule, fictitious party rule, R. 4:26-4, and relation back rule, R. 4:9-3, named defendant in an amended complaint after the expiration of the statutes of

[1] All references to plaintiff pertain to Elena Laza, individually and as the administratrix of the estate.

limitations. Following our review of the parties' arguments, the record, and applicable law, we reverse.

This medical malpractice matter arises from Erb's same-day surgery performed at HMH Hospitals Corporation d/b/a Palisades Medical Center, Inc. (PMC). We limit our recitation of the facts and procedural history to the relevant issues presented on appeal.

I.

On January 16, 2019, Erb was admitted to PMC for a suprapubic catheter insertion procedure. John Kerns, M.D., a urologist, was the attending surgeon for the surgery. Defendant, also a urologist, examined Erb upon admission to PMC and was the assistant provider at the surgery. Immediately after the procedure, Erb developed abdominal pain and diarrhea from surgery complications. It was determined Erb suffered a bowel injury during the surgery, which required next-day reparative surgery, including a small bowel resection and replacement of the suprapubic catheter insertion. Erb was then transferred to Palisades General Care, Inc. d/b/a The Harborage (Harborage) but was later readmitted to PMC for sepsis.

On February 24, 2020, Erb was transferred to 800 River Road Operating Company, LLC d/b/a Care One at New Milford d/b/a Woodcrest Healthcare

Center (Care One) where his condition worsened. Approximately three weeks later, Erb passed away.

In September 2020, plaintiff's attorney requested the following PMC medical records: an "[a]bstract of . . . Erb's admission to your facility on 01/16/19 and 01/17/19" and the "[o]perative [r]eport from the [s]ame [d]ay [s]urgical [a]dmission to your facility on 01/16/19." Relevantly, because plaintiff did not request the complete medical record, PMC produced only fifty-six pages responsive to the request, which did not include the perioperative report and other records.

On January 13, 2021, plaintiff filed an eighteen-count medical malpractice complaint against: PMC; Harborage; Care One; Urological Specialties, P.A.; Dr. Kern; and fictitious parties John Does and ABC Corporations.[2] It is undisputed plaintiff named John Doe defendants in the timely-filed complaint. Plaintiff moved for leave to file a second amended complaint, which was granted.

On October 5, 2022, plaintiff filed a second amended complaint which alleged Wrongful Death Act, N.J.S.A. 2A:31-1 to -6, Survivorship Act, N.J.S.A.

[2] Plaintiff's first motion to amend the complaint to correct the titles of co-defendants Harborage and Care One, was granted.

2A:15-3, and tort claims against defendant. Defendant was served with the complaint on November 28, 2022, over twenty-two months after the two-year statutes of limitations expired.

The motion judge denied defendant's ensuing motion to dismiss the complaint with prejudice in lieu of filing an answer. The judge found although defendant "was listed in a perioperative nursing report and in the operating room records," defendant's "omission from the operative report [was] enough to satisfy the discovery rule and toll [p]laintiff's claims." The judge also found dispositive that defendant's name was wrongly excluded, pursuant to N.J.A.C. 13:35-6.5(b)(l)(ix) and N.J.A.C. 13:35-6.5(b)(3)(ii), because it "was required to be included in the operative report" and that plaintiff reasonably "relied on the operative report."

II.

We review de novo a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 4:6-2(e). Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). "A reviewing court must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237

N.J. 91, 107 (2019)). Courts should search the complaint thoroughly "and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). In this early stage of litigation, we are not concerned with a pleading party's ability to prove its allegations. Printing Mart, 116 N.J. at 746.

"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) (internal quotation marks omitted) (quoting Printing Mart, 116 N.J. at 746). But "if the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Dimitrakopoulos, 237 N.J. at 107. "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. of Manalapan, 140 N.J. 366, 378 (1995). Thus, "[w]e accord no deference to the trial judge's legal conclusions." Richter v. Oakland Bd. of Educ., 459 N.J. Super. 400, 412 (App. Div. 2019) (citing Nicholas v. Mynster, 213 N.J. 463, 478 (2013)). We also review "a trial court's decision to dismiss a complaint as barred by a statute of

limitations" de novo. Barron v. Gersten, 472 N.J. Super. 572, 576-77 (App. Div. 2022).

There are three different statutes of limitations applicable to plaintiff's claims. The wrongful death claim is governed by the two-year statute of limitations under N.J.S.A. 2A:31-3. See, e.g., Presslaff v. Robins, 168 N.J. Super. 543, 546 (App. Div. 1979) (explaining the limitations period for wrongful death claims). The survivorship cause of action is governed by the two-year statute of limitations set forth in N.J.S.A. 2A:15-3. See, e.g., Warren v. Muenzen, 448 N.J. Super. 52, 64-69 (App. Div. 2016) (explaining the accrual date for, and running of, the limitations period for survivorship actions). 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). As the statutes of limitations are each for two years and the cause of action accrued on January 16, 2019, the limitations periods therefore expired on January 16, 2021.

Defendant argues the judge erred in denying his motion because: the discovery rule does not apply as defendant was known or discoverable with due

diligence; plaintiff should not be permitted to amend the complaint to add claims against defendant as a fictitious party under Rule 4:26-4; and the amended complaint cannot be found to relate back to the date of the original pleading pursuant to Rule 4:9-3. We note plaintiff argues defendant did not raise the relation back argument before the motion judge; however, defendant cites the arguments raised in his reply brief to refute plaintiff's claim pertaining to the relation back rule that defendant "knew of the suit as a partner of Urologic Specialties."

A. Discovery Rule

Our Court has long recognized the application of the discovery rule to "prevent the sometimes harsh result of a mechanical application of the statute of limitations." Martinez v. Cooper Hosp.-Univ. Med. Ctr., 163 N.J. 45, 52 (2000) (citing Vispisiano v. Ashland Chem. Co., 107 N.J. 416, 426 (1987)). The common law discovery rule is a rule of equity. See Fernandi v. Strully, 35 N.J. 434, 449-50 (1961); see also Lopez v. Sawyer, 62 N.J. 267, 273-74 (1973). A plaintiff that seeks to invoke the application of the discovery rule bears the burden of showing "that a reasonable person in her [or his] circumstances would not have been aware, within the prescribed statutory period, that she [or he] had been injured by [the] defendant[']s" conduct. Kendall v. Hoffman-La Roche,

Inc., 209 N.J. 173, 197-98 (2012). The discovery rule "provides that in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez, 62 N.J. at 272. "The issue that must be determined by the trial judge is whether the party requesting relief is equitably entitled to the benefit of the discovery rule." Heyert v. Taddese, 431 N.J. Super. 388, 435-36 (App. Div. 2013) (citing Lopez, 62 N.J. at 275).

"[L]egal and medical certainty are not required for a claim to accrue." Kendall, 209 N.J. at 193. "The standard is basically an objective one—whether plaintiff 'knew or should have known' of sufficient facts to start the statute of limitations running." Ben Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 134 (2017) (quoting Caravaggio v. D'Agostini, 166 N.J. 237, 246 (2001)).

We observe that generally the discovery rule may not be invoked by a plaintiff in a wrongful death cause of action because N.J.S.A. 2A:13-3 requires the filing of a cause of action within two years of a decedent's death. See Presslaff, 168 N.J. Super. at 546 (holding the discovery rule does not apply to Wrongful Death Act claims). Our Supreme Court in Lafage v. Jani declined to specifically address whether the discovery rule was applicable to wrongful death

claims. 166 N.J. 412, 434 (2001). The Court held that the Wrongful Death Act is codified under our common law, thus "the statute of limitations contained in N.J.S.A. 2A:31-3 is procedural and therefore indisputably subject to equitable principles." Ibid.

We are unpersuaded by plaintiff's argument that N.J.A.C. 13:35-6.5(b)(l)(ix) and N.J.A.C. 13:35-6.5(b)(3)(ii) required PMC to list defendant as a surgeon in the operative report, and that a failure to comport with the provisions tolled the statutes of limitations. Plaintiff's purported reliance on the regulations requiring the operative report to name all responsible parties is not persuasive. N.J.A.C. 13:35- 6.5(b)(l)(ix) requires health care professionals to ensure that "treatment records shall reflect: . . . [t]he identity of the treatment provider if the service is rendered in a setting in which more than one provider practices." (Emphasis added). The surgeon, Dr. Kerns, was correctly identified as the provider, and notably distinguishable here is that defendant, an assistant provider, was listed as such in the perioperative report. Further, defendant's name was otherwise discoverable in the record.

Pursuant to N.J.A.C. 13:35-6.5(b)(3)(ii), "[a]n entry in the patient record shall be made by the physician contemporaneously with the medical service and shall contain the date of service, date of entry, and full printed name of the

treatment provider." The code further provides, "The physician shall finalize or 'sign' the entry by means of a confidential personal code ('CPC') and include date of the 'signing.'" Ibid. Similarly, we do not discern defendant failed to comply with the code provision as, again, Dr. Kerns was the surgeon for Erb's same-day surgery and defendant was demarked as the assistant surgeon. It has not been demonstrated that defendant failed to make a required entry. Defendant is noted in the admission record for his examination of plaintiff. The records do not violate either provider provision. Additionally, we note plaintiff has not provided support for the proposition that a failure to comply with the code's provisions serves to toll the statutes of limitations.

We conclude defendant's name and role during the surgery was readily discoverable through the exercise of ordinary diligence prior to the expiration of the statutes of limitations. Had plaintiff sought Erb's complete medical records from PMC in the September 29, 2020 records request, and not a limited production, she would have received the perioperative report identifying defendant. The report clearly named under "role" John F. Kerns as the "provider" and defendant as the "assistant provider" for the same-day surgery. The report indicated the procedure date, "01/16/2019," with the surgery start time of "9:55" and stop time of "10:56" next to the listed providers and named

three other staff members, including the anesthesiologist. The medical records also provided plaintiff notice that defendant examined Erb, as memorialized in the pre-surgery admissions history, at "9:43" shortly before the surgery. Plaintiff needed only to search defendant's name to determine he was a urologist and partnered with Dr. Kerns. With ordinary diligence, defendant was discoverable.

Plaintiff's argument that the discovery rule applies because in the "first requested medical records from [PMC] in September 2020, the perioperative report was not included in the response," which prevented her from timely discovering defendant's involvement, is unavailing. The discovery rule only delays the 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 may have a basis for an actionable claim." R.L. v. Voytac, 199 N.J. 285, 299 (2009) (quoting Lopez, 62 N.J. at 272). Plaintiff, with the exercise of reasonable diligence, could have discovered defendant from the same-day surgery medical records. Reliance on the partial record requested does not toll the statutes of limitations.

B. Fictitious Party Practice

Rule 4:26-4 governs fictitious party practice in New Jersey. 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). 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." Claypotch, 360 N.J. Super. at 479-80. The 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)).

Here, plaintiff cannot employ the fictitious party rule as defendant's name was identifiable in the available medical records prior to the expiration of the statute of limitations. See Matynska, 175 N.J. at 51 (finding where a "doctor's name appeared twice in [the plaintiff's] hospital records as a physician having

participated in her care" precluded the plaintiff's use of the fictitious party rule because the plaintiff "had an obligation to investigate all potentially responsible parties in a timely manner but did not do so"). Plaintiff has failed to establish an inability to identify defendant and that the requisite due diligence was taken. The fictitious party rule "is not an appropriate device to avoid naming known parties in a timely fashion." Baez, 453 N.J. Super. at 444.

Due diligence required a review of the available records to discern the doctors who participated in Erb's care for the same-day medical procedure. Plaintiff's argument that defendant was only was discoverable through the undertaking of discovery is misplaced. Again, additional discovery was not necessary to ascertain defendant's identity from the medical records as the perioperative report provided the names of the medical staff involved and the surgical procedure stop and end times.

C. Relation Back Rule

The relation back rule provides an independent basis to permit the filing of an amended complaint under the principle of fundamental fairness. R. 4:9-3. A plaintiff adding a new party after the expiration of a statute of limitations 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 (emphasis added); Smelkinson v. Ethel & Mac Corp., 178 N.J. Super. 465, 471 (App. Div. 1981).

When a defendant is added as a new party under the relation back rule, it is the plaintiff's burden to demonstrate "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 . . . [an] action would be have been brought against him." Otchy v. City of Elizabeth Bd. of Educ., 325 N.J. Super. 98, 105 (App. Div. 1999) (quoting Pressler, Current N.J. Court Rules, cmt. 2 on R. 4:9-3 (2000)). 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); Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 458 (1998).

The first prong of Rule 4:9-3 is met as it is undisputed the claims against defendant arose from the same occurrence. As to the second prong, plaintiff's argument that defendant "should have had knowledge of the pending lawsuit" because he was partners with Dr. Kerns at Urologic Specialties is unavailing. Defendant and Dr. Kerns's partnership at Urological Specialties alone does not impute knowledge to defendant. Indeed, defendant's partnership in a medical group does not provide constructive notice of plaintiff's claims. 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).

We note plaintiff globally argued defendant had notice from the time of his deposition and that discovery was necessary to "confirm[] he participated" in the procedure, but that he protracted discovery by adjourning his deposition multiple times. It is undisputed the deposition was noticed well after the statutes of limitations had expired. There is no credible evidence demonstrating defendant had knowledge of the lawsuit or any claims prior to plaintiff's noticed deposition on April 1, 2022, over fourteen months after the limitations period expired. Plaintiff's argument that defendant knew about the lawsuit is unsupported by the record. See Viviano, 101 N.J. at 552. Speculation about

knowledge is insufficient. Plaintiff's argument that defendant has no "peculiar or unusual prejudice" is also unsupported. As plaintiff has failed to satisfy defendant's notice under prong two, we need not further address prejudice under prong three.

We reverse the order denying defendant's motion to dismiss and remand the matter to the trial court to enter an order dismissing plaintiff's complaint as to defendant with prejudice.

Reversed and remanded. We do not retain jurisdiction.