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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2448-21
A-2646-21

MAHMOUD ELSAYED,

Plaintiff-Appellant,

and

JANNAT ELSAYED, a minor
by her Guardian ad litem, DALIA
SAMIR AHMED MAHMOUD,

Plaintiff,

v.

AMAL SHOUBA, STONE
TRANSPORT, LLC, and
LIBERTY MUTUAL
INSURANCE COMPANY,

Defendants-Respondents.

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AMAL SHOUBA,

Plaintiff-Appellant,

v.

LIBERTY MUTUAL INSURANCE,
and STONE TRANSPORT, LLC,

Defendants-Respondents.

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Argued October 17, 2023 – Decided November 1, 2023

Before Judges Whipple, Enright and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-2682-20 and L-4975-19.

Eric J. Plantier argued the cause for appellant Mahmoud Elsayed in Docket No. A-2448-21 and appellant Amal Shouba in Docket No. A-2646-21 (Brandon J. Broderick, LLC, attorneys; Eric J. Plantier, on the briefs).

Renée C. Rivas argued the cause for respondent Stone Transport, LLC (Law Offices of James H. Rohlfing, attorneys; Renée C. Rivas, on the briefs).

PER CURIAM

In these back-to-back appeals, which were consolidated for the purpose of writing one opinion, plaintiffs Mahmoud Elsayed and his mother, Amal Shouba, challenge the March 19, 2021 order granting summary judgment to defendant Stone Transport, LLC (Stone).[1] They also appeal from the June 10, 2021 order

[1] Because plaintiff Jannat Elsayed, Mahmoud Elsayed's minor daughter, is not involved in this appeal, we do not address any arguments raised on her behalf

denying reconsideration of the March 19 order. We affirm, substantially for the reasons expressed by Judge Michael N. Beukas in his comprehensive oral opinions.

I.

We glean the facts from the motion record. On July 14, 2017, Elsayed and his daughter, Jannat,[2] were passengers in a motor vehicle driven by Shouba when a tractor-trailer struck their vehicle. Plaintiffs were unable to identify the hit-and-run driver or owner of the tractor-trailer when the accident occurred. However, Elsayed took a photograph of the tractor-trailer's Tennessee license plate as it drove away. Later that day, Elsayed provided a recorded statement about the accident to defendant Liberty Mutual Insurance Company (Liberty Mutual), his insurance carrier. When giving the statement, he also gave the insurance representative the license plate number from the tractor-trailer.

Elsayed and Shouba retained the same law firm in anticipation of commencing a personal injury action for injuries they and Jannat suffered as a result of the accident. On April 12, 2019, approximately three months before

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before the trial court.

[2] Because Mahmoud Elsayed and his daughter share the same surname, we refer to Jannat by her first name. We intend no disrespect in doing so.

the statute of limitations (SOL) was set to expire,[3] Elsayed underwent an examination under oath, accompanied by counsel. That day—after Elsayed testified he previously gave his attorney a photo of the Tennessee license plate from the tractor-trailer—Elsayed's counsel emailed the Tennessee Department of Revenue (TDR) the license plate number from the tractor-trailer, requesting its assistance in identifying the owner or driver of the tortfeasor vehicle. The TDR promptly acknowledged receipt of this request.

In June 2019, Elsayed's counsel telephoned Liberty Mutual to ask if the carrier was able to identify the tractor-trailer's owner or operator. An insurance representative confirmed the carrier was unable to do so. Around this same time, Shouba retained a different law firm to represent her interests in this matter.

On July 3, 2019, Shouba's newly retained counsel filed a complaint in Bergen County against Liberty Mutual and fictitious defendants "John Doe 1-10" and "ACB Corporations 1-10." Nine days later, Elsayed and Jannat, through her guardian ad litem, filed suit in Essex County against the same defendants, and also named Shouba as a defendant. In their respective complaints, plaintiffs

[3] Pursuant to N.J.S.A. 2A:14-2(a),"every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this State shall be commenced within two years next after the cause of any such action shall have accrued."

alleged the fictitious defendants "were the owner[s] and operators of a motor vehicle" that collided with Shouba's vehicle on the date of the accident, causing plaintiffs to suffer serious and permanent injuries. Plaintiffs also asserted claims for uninsured motorist benefits against Liberty Mutual. Thereafter, plaintiffs' cases were consolidated under one docket number in Bergen County.

On January 16, 2020, Elsayed's counsel submitted a formal "Vehicle Information Request" to the TDR. The TDR responded on January 23, 2020, indicating the license plate number was affiliated with BSE Trailer Leasing, LLC (BSE).[4] Although Elsayed's counsel subsequently informed Judge Beukas that he only received TDR's response "on or about March 31, 2020," counsel supplied no documentation to the judge to support this representation.

In May 2020, Elsayed appeared for a deposition. He testified again that he took a photograph of the tractor-trailer's license plate at the time of the accident. He also stated he provided a photo of the license plate to his attorney.

On May 8, 2020, Elsayed's counsel served a subpoena on BSE, requesting, in part, that BSE provide "[t]he name and address of [the] driver, and/or the name and address of the company who leased [its] truck with Tennessee tag number U618491 . . . on the date of July 14, 2017." Twelve days later, BSE

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[4] BSE also is mistakenly referenced in the record as "BSC."

wrote to Elsayed's attorney, advising the trailer bearing that license plate number was leased to Stone. BSE also included Stone's full business name and New York address on the second page of its communication. Elsayed's counsel later represented to Judge Beukas that he was unsure if he received this second page when BSE sent it. Moreover, Elsayed's attorney informed the court he reviewed the Federal Motor Carrier Safety Administration's Safety and Fitness Electronic Records (SAFER) database to locate Stone's address. He also stated that in August 2020, he spoke with a BSE representative who provided him with Stone's address.

Plaintiffs subsequently moved for leave to amend their complaints to name Stone as a defendant. On August 28, 2020, Judge Beukas granted their applications; four days later, plaintiffs filed their amended complaints to include Stone as a defendant.

Stone answered the amended complaints in September and October 2020, and promptly moved to dismiss the complaints. Stone argued it had no notice of either action before the SOL expired. On notice to the parties, Judge Beukas

converted Stone's dismissal motion to a motion for summary judgment, pursuant to Rule 4:6-2(e).[5]

On March 19, 2021, Judge Beukas heard argument on the summary judgment motion and recited the factual and procedural history of the consolidated matter for the record. At the conclusion of argument, the judge orally granted Stone's summary judgment motion, entered a conforming order, and dismissed plaintiffs' complaints with prejudice.

Before awarding Stone summary judgment, the judge advised the parties that although Shouba's "submission[s] did not include a certification of counsel, in contravention of Rule 1:6-6,"[6] and she did not "file a response to . . .

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[5] Rule 4:6-2(e) provides,

> [i]f, on a motion to dismiss based on defense (e), [failure to state a claim upon which relief can be granted,] matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion.

[6] Rule 1:6-6 states, in part, "[i]f a motion is based on facts not appearing of record or not judicially noticeable, the court may hear it on affidavits made on

defendant's statement of material facts pursuant to Rule 4:46-2,"[7] the judge "relax[ed] the Rules of [Court] . . . to consider all material facts in evidence."

Next, the judge explained,

> a plaintiff relying on a fictitious pleading must demonstrate two phases of due diligence in order to gain the tolling benefits of . . . Rule [4:26-4][8]. . . .
>
> First, [a] plaintiff must exercise due diligence in endeavoring to identify the responsible defendants before filing the original complaint naming John Doe parties. . . .
>
> Second, a plaintiff must act with due diligence in taking prompt steps to substitute the defendant's true name after becoming aware of that defendant's identity.

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personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify."

[7] Pursuant to Rule 4:46-2(b), "[a] party opposing [a] motion [for summary judgment] shall file a responding statement either admitting or disputing each of the facts in the movant's statement." (Emphasis added).

[8] Rule 4:26-4 provides, in part,

> [i]n any action, . . . if the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification. Plaintiff shall on motion, prior to judgment, amend the complaint to state defendant's true name, such motion to be accompanied by an affidavit stating the manner in which that information was obtained.

The judge also stated:

> It is undisputed based upon the established record provided . . . and the admissions to . . . defendant's . . . statement of undisputed material facts that . . . plaintiffs were in receipt of . . . defendant's driver's license plate through the photograph taken by one of the plaintiffs on the date of the accident and . . . plaintiffs and their counsel knew or should have known the truck owner's and/or driver's identity through the exercise of due diligence.
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> There is no indication that after . . . defendant left the scene of the accident that [it] in any other way significantly contributed to the delay in adjudicating this case. Instead, this court finds . . . plaintiffs did not exercise due diligence . . . to identify . . . [Stone] until well after the expiration of the [SOL].
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> The established record before this court supports this inevitable conclusion. There was no response provided to the undisputed statement of material facts by . . . Shouba. Those [statements] are deemed admitted pursuant to Rule 4:46-2.
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> The argument advanced before this court that Shouba relied on the sole efforts of legal counsel for Elsayed to investigate and identify [Stone] and that the [summary judgment] motion should be denied . . . accordingly is wholly without merit and unsupported by any rule or common law in the State of New Jersey. Respective legal counsel and their clients are charged independently with the responsibility of conducting their own and independent investigations.
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> With respect to . . . Elsayed['s action], certain responses to the statement of undisputed facts were admitted. Notably, Elsayed admitted . . . that on May

12[], 2020, nearly three years after the date of the accident, . . . [he] appeared for an oral deposition and produced a photograph of the license plate of the tractor[-]trailer that struck the vehicle in which he was a passenger.

[He] testified that he took the photograph on the date of the accident. On July 14[], 2017, the date of this accident, . . . Elsayed[] gave a recorded statement to Liberty Mutual . . . wherein he clearly state[d] that the license plate number of the truck that struck the vehicle was a Tennessee State plate bearing the characters U-6-1-8-4-9-1.

On April 12[], 2019, approximately three months prior to the filing of [Elsayed's] initial complaint and prior to the [SOL] expiring, . . . Elsayed, submitted to an examination under oath wherein his counsel was present. . . . Elsayed testified to having already provided his attorney with a photograph of the [tractor-trailer] involved in this accident that showed the license plate of the subject [vehicle].

. . . Shouba, is the mother of . . . Elsayed, and they live together. Elsayed took the subject photograph of the [tractor-trailer] while in the presence of . . . Shouba, the operator of the vehicle, at the scene of the accident. All . . . these facts as presented to the court [were] admitted by the respective plaintiffs.

Likewise, the facts are undisputed that respective legal counsel for . . . plaintiffs had direct knowledge of the testimony and proof of the license plate and photograph long before the expiration of the applicable [SOL].

More importantly, . . . opposition to [Stone's summary judgment] motion . . . attached

[e]xhibit[s] . . . which appear to be online submissions to the [TDR] by a representative of . . . [Elsayed's] law firm. These emails were generated on April 12[], 2019.

. . . .

In addition, no [formal] written request was made to the [TDR,] as was attempted by [Elsayed's] counsel [until] January 16[], 2020, [which] yielded . . . the identity of the vehicle on January 23[], 2020, just a few days after the written request.

It is apparent that . . . plaintiff[s] could have and should have issued this written request following the date of the accident on July 14[], 2017, or any day after that point up to April of 2019, or even in the weeks preceding the [SOL] expiration date.

Stated simply, this was never done or accomplished. . . . [I]rrespective of the emails generated on April 12[] of 2019, there was no follow up whatsoever by . . . plaintiff[s] or [their] legal counsel subsequent to the issuance of the April 12[],[] 2019 email and prior to the expiration of the [SOL] date.

The issuance of one email with no follow up in the months preceding the [expiration of the SOL] does not give rise to an adequate showing of due diligence in this regard. . . .

. . . .

It is irrefutable that the parties and their counsel were . . . privy to the statements made by Elsayed to Liberty Mutual . . . on July 14[], 2017, and also under oath on April 12[], 2019, prior to the expiration of the applicable [SOL].

> The opposition papers [from plaintiffs] are silent with respect to any due diligence undertaken prior to April 12[], 2019, and thereafter, up to the expiration of the [SOL]. Thus, . . . plaintiffs have not met their burden [in establishing] . . . they should be protected from the implications of the applicable [SOL] through invocation of Rule 4:26-4.
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> The court now turns its attention to the subject of prejudice to [Stone]. There is implicit prejudice to [Stone] caused by [its] late substitution into the case and [it] . . . had a justifiable expectation to not be sued after the two-year [SOL] period expired.

Based on these findings and a further discussion of "[t]he fictitious pleading rule," the judge determined "plaintiffs failed to show . . . they exercised due diligence in endeavoring to identify the responsible defendant before filing the original complaint naming fictitious parties" and they "did not act with due diligence in taking prompt steps to substitute [Stone's] true name after becoming aware of that defendant's identity."

Plaintiffs moved for reconsideration of the March 19 order. On June 10, 2021, during argument on their motions, plaintiffs newly contended the SOL should not run on Jannat's claims until two years after she reached majority in 2036. Shouba's counsel also claimed he acted reasonably in refraining from initiating an investigation into Stone's identity, given Elsayed's unsuccessful efforts to identify Stone prior to the expiration of the SOL.

Judge Beukas agreed with plaintiffs that he should reconsider the March 19 order regarding Jannat's claims, considering she was a minor. The judge explained "that in the interest of justice," Jannat should "not be punished for the missteps of both legal counsel and [her] guardian ad litem," despite their election to file suit on her behalf in July 2019, and their failure to identify Stone as a defendant until over a year later.

Turning to Shouba's and Elsayed's respective requests to reconsider the March 19 award of summary judgment against them, as well as the dismissal of their claims, Judge Beukas found they "failed to demonstrate that . . . the court . . . expressed its decision based upon a palpably incorrect or irrational basis, or . . . the court . . . did not consider or failed to appreciate the significance of probative, competent evidence with respect to" their claims. Additionally, the judge reiterated the findings he made before entering the March 19 order, including his finding plaintiffs failed to demonstrate they "acted with the required due diligence." Accordingly, he concluded there were no "genuine issues of material fact presented by the respective plaintiffs . . . which would preclude the entry of summary judgment in favor of . . . Stone." Thus, Judge

Beukas entered an order on June 10, 2021, granting Jannat's motion for reconsideration and denying Elsayed's and Shouba's reconsideration motions.[9]

II.

On appeal, plaintiffs contend they "properly utilized the fictitious pleading rule and the trial court erred in granting summary judgment" to Stone. Plaintiffs also argue they "exercised due diligence in determining the identity of . . . Stone" and "moved to amend [their] complaint[s] in a timely manner" after identifying Stone as a defendant. We disagree.

"We review a grant of summary judgment de novo, applying the same standard as the trial court." Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 549 (2022) (quoting Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019)); see also Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

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[9] The March 19 and June 10, 2021 orders became final upon entry of a March 18, 2022 order granting summary judgment to Liberty Mutual and dismissing plaintiffs' remaining claims.

"[A]n issue 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." Bhagat, 217 N.J. at 38 (quoting R. 4:46-2(c)). "If there is no genuine issue of material fact, we must then 'decide whether the trial court correctly interpreted the law.'" DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)).

A party does not create a genuine issue of fact simply by offering a sworn statement. Carroll v. N.J. Transit, 366 N.J. Super. 380, 388 (App. Div. 2004). Also, "'conclusory and self-serving assertions' in certifications without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009) (quoting Puder v. Buechel, 183 N.J. 428, 440 (2005)). "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Hoffman, 404 N.J. Super. at 426).

We also recognize a trial court's decision to grant a motion for

reconsideration should be upheld on appeal unless the decision was an abuse of discretion. Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

Reconsideration is appropriate in two circumstances: (1) when the court's decision is "based upon a palpably incorrect or irrational basis," or (2) when "it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 393, 401 (Ch. Div. 1990)). A motion for reconsideration is not "a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Cap. Fin. Co. of Del. Valley v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008) (citing Cummings, 295 N.J. Super. at 384).

It also is well settled that a personal injury action must commence within two years after the cause of action 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). The two-year SOL is "designed 'to protect defendants from unexpected enforcement of stale claims by plaintiffs who fail to use reasonable diligence in prosecuting their claims.'" Cumberland Cnty. Bd. of Chosen Freeholders v. Vitetta Grp., P.C., 431 N.J. Super. 596, 604 (App. Div. 2013) (quoting LaFage v. Jani, 166 N.J. 412, 423 (2001)). However, SOLs "will not be applied when they would unnecessarily sacrifice individual justice under the circumstances." Zaccardi v. Becker, 88 N.J. 245, 259 (1982).

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 [SOL] 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). Stated differently, 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. Ibid. 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 [SOL] 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. "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 v. Votator Div. of Chemetron Corp., 62 N.J. 111, 122-23 (1973)). 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)). Thus, Rule 4:26-4 "will not protect a plaintiff who had ample time to discover the unknown defendant's identity before the running of the [SOL]." 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)).

Governed by these standards, and convinced the judge's factual findings are amply supported by the record, we perceive no basis to disturb either challenged order. Accordingly, we affirm the March 19, and June 10, 2021 orders for the reasons expressed by Judge Beukas in his well-reasoned, thoughtful oral opinions.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION