SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3918-21

MORONA S. CONSTRUCTION, LLC,

Plaintiff-Appellant,

v.

THE DIAMOND AGENCY, LLC, THE DIAMOND GROUP, LAMBRUS CIUIA, and TRAVELERS INDEMNITY COMPANY,

Defendants-Respondents.

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Argued May 9, 2023 – Decided July 14, 2023

Before Judges Messano, Gilson and Perez Friscia.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Union County, Docket No. L-1913-21.

Joseph L. Garrubbo argued the cause for appellant (Garrubbo & Capece, PC, attorneys; Joseph L. Garrubbo, on the brief).

Seth D. Griep argued the cause for respondents The Diamond Agency, LLC, The Diamond Group, and Lambrus Ciuia (Kaufman Dolowich & Voluck, LLP, attorneys; Seth D. Griep and Paulina E. Lengel, of counsel and on the brief).

David J. Dering argued the cause for respondent Travelers Indemnity Company (Leary, Bride, Mergner & Bongiovanni, attorneys; David J. Dering, of counsel and on the brief).

PER CURIAM

We granted plaintiff Morona S. Construction, LLC leave to appeal from the Law Division's May 2, 2022 orders that granted the motion filed by defendants, The Diamond Agency LLC (Diamond), The Diamond Group,[1] and Lambrus Ciuia, to dismiss the complaint because plaintiff did not file an affidavit of merit (AOM) pursuant to the Affidavit of Merit Statute (AMS), N.J.S.A. 2A:53A-26 to -29, and denied plaintiff's cross-motion to file an amended complaint.

Plaintiff's complaint alleged that for several years it had procured liability and workers' compensation insurance through Ciuia, who "was employed by Diamond and . . . believed to have been a licensed insurance agent." It further alleged that Diamond "was . . . a licensed insurance agency or brokerage firm

[1] The record reflects Diamond Group LLC filed a certificate of amendment in 2018 changing its name to Diamond Agency, LLC.

authorized to do business in the State of New Jersey." Plaintiff asserted that Ciuia would "renew policy coverages" as they expired and produce certificates of insurance demonstrating the coverages were in place with defendant Travelers Indemnity Company (Travelers).

On September 24, 2020, two of plaintiff's employees were injured while working on a construction project. When plaintiff sought coverage from Travelers in defense of its employees' workers' compensation petitions, Travelers denied the request, claiming the last policy issued to plaintiff expired in April 2019.

Plaintiff's complaint sought declaratory judgment against Travelers compelling defense of the workers' compensation petitions, and it also alleged Diamond and Ciuia were negligent in failing to procure the appropriate insurance. In a separate count, plaintiff sought punitive damages and counsel fees if the certificates of insurance "were not authentic" and had been "knowingly false and . . . maliciously issued for the purpose of causing" plaintiff damage. Travelers' answer asserted a counterclaim alleging plaintiff "did not remit the required deposit premium for the policy renewal, and as such, the . . . policy expired by its own terms on April 22, 2019."

Defendants' answer asserted the AMS as an affirmative defense, and they subsequently moved to dismiss the complaint based on plaintiff's failure to serve an AOM. Plaintiff filed opposition and a cross-motion seeking to strike defendants' answer for alleged discovery violations and to amend the complaint. Plaintiff's cross-motion was supported by documents demonstrating that Ciuia's insurance producer's license expired in February 2018 and was not renewed, and Ciuia's failure to appear in response to the Banking Commissioner's order to show cause resulted in revocation of his license in 2021. Plaintiff asserted that Diamond did not have its own license and contended that under the circumstances, plaintiff was not required to furnish an AOM.

The proposed amended complaint was identical to the initial complaint except it included an additional count for breach of contract, alleging defendants "undertook to properly bind coverage" and "failed to place the policies of insurance as required." In support of the motion to amend, noting only "minor discovery ha[d] taken place" and no trial date had been set, plaintiff averred that the failure to include a breach of contract count in the initial complaint was inadvertent. Defendant opposed plaintiff's motion to amend, calling it an "end run" to avoid the consequences of not filing an AOM.

At oral argument, defense counsel did not challenge the veracity of plaintiff's certification regarding Ciuia's licensure status, but argued Diamond was a separate "entity," and as plaintiff alleged in its complaint, a "licensed insurance producer." Therefore, an AOM was required. See N.J.S.A. 2A:53A-26(o) (listing "an insurance producer" as a "licensed person" to which the AMS applies). Plaintiff's counsel countered by arguing its claim against Diamond was "respondeat superior," and because Ciuia was unlicensed, an AOM against Diamond was not necessary. Travelers' took no position in writing or at argument on the motions.

Although he had initially indicated his decision would be forthcoming, the judge sent counsel a letter a few days later directing the attorneys to "take certain, specific, and limited discovery . . . solely and only on the specific issue of the licensure status of Diamond . . . ." He also directed Diamond to produce "all documents" relating to the issue and produce a witness for plaintiff to depose; the judge ordered further briefing to follow.

Defendants supplied Henry Pareja's certification. Pareja owned Diamond, which was a licensed insurance producer. The certification had documentation attached that established Diamond's licensure status. As per the judge's instructions, plaintiff deposed Pareja.

Three days later, plaintiff moved to file a different amended complaint naming Pareja as a defendant. Plaintiff alleged Pareja was "negligent in his supervision and management of Ciuia." A separate count realleged the negligence of Ciuia and Diamond in failing to procure the insurance policies, but in both counts, plaintiff alleged that Diamond was liable under a respondeat superior theory. The amended complaint again asserted a breach of contract claim.

The judge heard oral argument on defendants' motion to dismiss and plaintiff's cross-motion to amend the complaint and thereafter issued a written decision. He entered two orders on May 2, 2022, dismissing plaintiff's complaint for failure to file an AOM and denying plaintiff's motion to amend the complaint.[2]

Plaintiff moved for reconsideration. Travelers filed a letter brief supporting the motion with respect to the dismissal of the complaint against Ciuia. Defendant objected because Travelers had previously taken no position and otherwise opposed plaintiff's motion. The judge's June 28, 2022 order partially granted the motion for reconsideration by reinstating the complaint

[2] The judge entered a third order that denied plaintiff's motion to strike defendants' pleading. The propriety of that order is not before us.

"solely as to the individual liability of . . . Ciuia." We granted plaintiff leave to appeal from the May 2 orders; Ciuia has not sought leave to appeal from June 28 order.

Plaintiff argues the judge erred in dismissing the complaint against Diamond because it sought to hold Diamond vicariously liable under a theory of respondeat superior and an AOM was not required. Travelers joins in plaintiff's argument. Plaintiff also contends that the judge abused his discretion by not permitting the filing of an amended complaint, and, all its claims, in particular, the breach of contract claim, were subject to the "common knowledge" exception to the AMS.

We agree that plaintiff's initial complaint can be fairly read as asserting a vicarious liability cause of action against Diamond under the theory of respondeat superior. We also agree that no AOM was required because of the common knowledge exception to the AMS. We also conclude that the judge mistakenly exercised his discretion in denying plaintiff's motion to amend the complaint. We therefore reverse the orders under review and remand the matter to the Law Division for further proceedings consistent with this opinion.[3]

[3] Plaintiff also argues that the judge mistakenly treated defendants' motion to dismiss as one seeking summary judgment. We do not address the argument given our disposition of the appeal.

I.

In granting defendants' motion to dismiss for failure to file an AOM, the judge concluded plaintiff did not "plead this case as one of vicarious liability, but instead allege[d] a direct negligence claim . . . [against] licensed insurance brokers that are specifically and explicitly defined under N.J.S.A. 2A:53A-26." As a result, citing Haviland v. Lourdes Medical Center of Burlington County, Inc., 250 N.J. 368 (2022), the judge determined the complaint "implicate[d] the licensed entity's standard of care and [p]laintiff was still required to submit [the AOM], which it did not." We agree with Travelers that the judge's "interpretation" of the complaint was "far too conservative," and he misapplied the governing standards for deciding a motion to dismiss.

Pursuant to N.J.S.A. 2A:53A-29, the failure to file and serve a required AOM "shall be deemed a failure to state a cause of action." "Rule 4:6-2(e) motions to dismiss for failure to state a claim upon which relief can be granted are reviewed de novo." Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, PC, 237 N.J. 91, 108 (2019)). "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, 237 N.J. at 107). "The complaint must be searched 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)). Additionally, we "review[] de novo the statutory interpretation issue of whether a cause of action is exempt from the [AOM] requirement," without deference to the trial court's opinion. Cowley v. Virtua Health Sys., 242 N.J. 1, 14–15 (2020) (citing Triarsi v. BSC Group Servs., LLC, 422 N.J. Super. 104, 113 (App. Div. 2011)).

Plaintiff's initial complaint alleged that Ciuia "was employed by Diamond and . . . believed to have been a licensed insurance agent." Plaintiff asserted that Ciuia would "renew policy coverages" as they expired and produce certificates of insurance demonstrating the coverages were in place with Travelers. Attached to the complaint was a purported certificate of insurance for the 2020 calendar year issued by Diamond, which listed Ciuia as the contact person and "authorized representative." We conclude that reviewing the "complaint's factual allegations . . . 'with a generous and hospitable approach,'" Dimitrakopoulos, 237 N.J. at 107 (quoting Printing-Mart, 116 N.J. at 746) as we must, it adequately sets forth a cause of action against Diamond under a

respondeat theory of liability. That conclusion, however, does not end our inquiry.

Most recently, in Haviland, our Supreme Court considered whether "a plaintiff must submit an AOM in support of a vicarious liability claim against a licensed entity, based on the alleged negligent conduct of an employee who is not a 'licensed person' under the AOM statute." 250 N.J. at 371–72. Justice Solomon noted, "our courts have grappled with applying the [AMS] to vicarious liability claims" in a variety of situations. Id. at 379. He cited our opinion in Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590 (App. Div. 2001), for the proposition that "vicarious liability claims are tethered to the [AMS] requirements as to the alleged employee, not the employer." Ibid. See also Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 416 N.J. Super. 1, 3 (App. Div. 2010) (suggesting an AOM is needed to maintain claims of vicarious liability against unlicensed entities premised on the alleged professional negligence of their licensed employees); Hill Int'l Inc. v. Atl. City Bd. of Educ., 438 N.J. Super. 562, 591 (App. Div. 2014) (characterizing claims premised solely on "theories of vicarious liability or agency that do not implicate the standards of care of the defendant's profession" as an exception to the AOM statute); McCormick v. State, 446 N.J. Super. 603,

615 (App. Div. 2016) (recognizing that an AOM is required only "when the plaintiff's claim of vicarious liability hinges upon allegations of deviation from professional standards of care by licensed individuals who worked for the named defendant").

Relying on the language of N.J.S.A. 2A:53A-27, which makes an AOM mandatory when the claim for damages "result[s] from an . . . act of malpractice or negligence by a licensed person in his profession or occupation," the Haviland Court concluded the plaintiff's injuries were alleged to have occurred from the negligence of a radiology technician, who is not a "licensed person" under the AMS. 250 N.J. at 383. The Court held: "the AOM statute does not require submission of an AOM to maintain a vicarious liability claim against a licensed health care facility based on the conduct of its non-licensed agents or employees." Id. at 383–84.

We disagree, however, with plaintiff's assertion that Haviland controls disposition of this appeal. Radiology technicians are not licensed persons under the AMS, but insurance producers, like Ciuia, are "licensed person[s]" pursuant to N.J.S.A. 2A:53A-26(o). Ciuia just happened to be an insurance producer whose license had been suspended at the relevant time and ultimately revoked. Because plaintiff's claim against Ciuia was for "negligence by a licensed person

in his profession or occupation," N.J.S.A. 2A:53A-27, the AMS mandated that plaintiff serve an AOM even though its claim against Diamond was based on the theory of respondeat superior. McCormick, 446 N.J. Super. at 615. Unless there was an applicable exception to the AMS, plaintiff's respondeat superior claim against Diamond based on Ciuia's alleged negligence required plaintiff to serve an AOM stating Ciuia's "practice or work . . . fell outside acceptable professional or occupational standards." N.J.S.A. 2A:53A-27. We conclude, however, an exception does apply.

"The common knowledge exception to the [AMS] applies only when expert testimony is not required to prove a professional defendant's negligence." Cowley, 242 N.J. at 8. "The doctrine . . . is appropriately invoked when the 'carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience.'" Bender v. Walgreen E. Co., Inc., 399 N.J. Super. 584, 590 (App. Div. 2008) (quoting Est. of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454, 469–70 (1999)). "Thus, in the limited cases where a person of reasonable intelligence can use common knowledge to determine that there was a deviation from a standard of care, an expert is no more qualified to attest to the merit of a plaintiff's malpractice claim than a non-expert." Cowley, 242 N.J. at 8–9.

Defendants argue that expert testimony was necessary in this case because the "duties and responsibilities" of an insurance producer regarding the issuance of initial and renewal policies for clients, the placement and confirmation of coverage reflected on a certificate of insurance, and other advice regarding the adequacy of coverage all implicate professional standards. The motion judge accepted these arguments in dismissing plaintiff's complaint, but we do not.

Part of the problem here is the inexactitude of both the initial and proposed amended complaint, and the apparent failure of the court to hold a Ferreira conference.[4] Read through the indulgent prism applicable to motions to dismiss pleadings, however, plaintiff's essential allegation is that for "several years prior to September 24, 2020," the date of its employees' accident, defendants had "agreed to renew policy coverages as and when they expired and[,] in fact, submitted certificates of such insurance" indicating the coverages "were bound for succeeding annual terms." Perhaps those allegations are not true, or

[4] Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 154–55 (2003) (requiring trial judges to conduct a case management conference in all malpractice cases within ninety days of the filing of an answer to address, among other discovery issues, deficiencies in an AOM). The appellate record, including the parties' briefs and the judge's written decisions, never mention a Ferreira conference, which is why we assume one never occurred.

additional discovery may reveal that the facts behind them are more nuanced and complex. But at this stage of the litigation, a lay person is clearly capable of understanding without the aid of expert testimony plaintiff's allegations that, as they had for several years prior to 2020, defendants furnished a certificate of insurance demonstrating renewed coverage for the calendar year and the coverages were not in place when plaintiff pressed its claim.

As Travelers points out in its brief, these allegations are unlike those in Triarsi, where we held that the plaintiff's claim against the defendant insurance broker was not subject to the common knowledge exception to the AMS and required the filing of an AOM. 422 N.J. Super. at 116. In Triarsi, we concluded that

> [i]n light of the direct communication between the carrier and its insured with respect to premium payments, cancellation, and reinstatement, . . . expert testimony would be required to establish that a broker and its agent have a duty with respect to the payment of renewal premiums, avoidance of cancellation, and reinstatement in the event of cancellation.
>
> [Ibid. (emphasis added).]

Plaintiff's complaint alleged Ciuia furnished proof that its workers' compensation coverage was in place when it was not.

Plaintiff's complaint, however, does not allege that defendants failed to provide appropriate advice regarding the necessary coverages or obtained coverage that did not meet its expectation. See, e.g., Rider v. Lynch, 42 N.J. 465, 476 (1964) (noting that an insurance broker's failure to procure the specific coverage requested presents an issue of professional negligence (citing Barton v. Marlow, 47 N.J. Super. 255, 259 (App. Div. 1957))).

We recognize that at this stage of the proceedings, our consideration of the issue is limited "based on the claimed exclusive thrust of [plaintiff's] complaint." Remington & Vernick, 337 N.J. Super. at 599. Should plaintiff seek to broaden its negligence claim against Ciuia and seek to hold Diamond vicariously liable for acts or omission unpled, the policy supporting the AMS could be thwarted. Ibid. Nevertheless, we are confident that the trial court will limit plaintiff's assertions of Ciuia's negligence, and we do not foreclose defendants from seeking appropriate relief as discovery continues.

We reverse the order dismissing plaintiff's claim for failure to comply with the AMS.

II.

Recall at the initial oral argument on defendants' motion to dismiss, plaintiff's counsel asserted that his review of public records failed to reveal that

Diamond was licensed, but defendants' reply to plaintiff's opposition to the motion to dismiss was supported by documents demonstrating that it was licensed. The motion judge ordered the parties to engage in limited discovery regarding Diamond's licensure status and Pareja was deposed.

Plaintiff moved to file an amended complaint that added a count against Diamond and Pareja for negligent "supervision and management of Ciuia and the [a]gency." The amended complaint also sought to add a count against all defendants for breach of contract. Citing Notte v. Merchants Mutual Insurance Co., 185 N.J. 490, 501 (2006), the judge denied the motion because the proposed amendment "would be futile given the failure to file an affidavit of merit." We disagree and reverse.

"Rule 4:9-1 requires that motions for leave to amend pleadings be granted liberally," ibid. (quoting Kernan v. One Wash. Park Urb. Renewal Assocs., 154 N.J. 437, 456–57 (1998)), and "without consideration of the ultimate merits of the amendment," ibid. (quoting Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997)). "We review a trial court's decision to grant or deny a motion to amend the complaint for abuse of discretion." Port Liberte II Condo. Ass'n v. New Liberty Residential Urb. Renewal Co., 435 N.J. Super. 51, 62 (App. Div. 2014) (citing Kernan, 154 N.J. at 457).

The judge's rationale for denying plaintiff's motion to amend was premised on his conclusion that an AOM was necessary to support the negligence claim as originally pled, plaintiff failed to supply an AOM, and amending the complaint was futile because plaintiff had failed to file an AOM in a timely fashion. Having now concluded plaintiff's negligence claim did not need the support of an AOM, the judge's exercise of discretion in denying the amendment "rest[ed] on an impermissible basis" and a mistaken understanding of the applicable law. State v. C.W., 449 N.J. Super. 231, 255 (App. Div. 2017) (quoting State v. Steele, 430 N.J. Super. 24, 34 (App. Div. 2013)). We therefore reverse the order denying plaintiff's motion to amend the complaint without addressing the merits of the new claims, except in one limited respect.

Plaintiff's amended complaint proposed a cause of action again Pareja and Diamond for negligent supervision of Ciuia. There seems to be no question now that Pareja and Diamond are licensed persons under the AMS. In Haviland, the Court noted the plaintiff had not raised "direct claims against the hospital," i.e., the licensed person for purposes of the AMS, "for negligent hiring, training, or supervision of the non-licensed employee." 250 N.J. at 384. In dicta, the Court noted: "[The p]laintiff does not dispute that, had he pursued such a direct claim, it would have been properly dismissed for failure to provide a timely AOM."

Ibid.; see also Remington & Vernick, 337 N.J. Super. at 599 (barring direct claims against the defendant engineering company for "negligent supervision or negligent hiring" in the absence of having served an AOM against it).

We recognize that in addition to these statements from the Court and our court, insurance producers are subject to a highly-regulated statutory scheme, see N.J.S.A. 17:22A-26 to -57, that does not apply to other employers and may indeed affect obligations of an insurance producer vis-à-vis its employees. Therefore, to address these issues, we order that if upon remand plaintiff files the proposed amended complaint asserting a direct claim for negligent hiring, training or supervision against Pareja and Diamond, the court shall conduct a Ferreira conference to decide whether plaintiff is required to file and serve an AOM to support the cause of action.

Reversed and remanded. We do not retain jurisdiction.