

**NOT FOR PUBLICATION WITHOUT THE
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MOERAE MATRIC, INC.,

Plaintiff,

McCARTER & ENGLISH, LLP, BEVERLY
LUBIT, ESQ., JOHN DOES 1-10 and
PROFESSIONAL CORPORATIONS 1-5,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MORRIS COUNTY

DOCKET NO. MRS-L-371-22

CIVIL ACTION - CBLP

OPINION

Argued: July 19, 2024

Decided: July 22, 2024

G. Martin Meyers, Esq. and Susan S. Singer, Esq. of Law Offices of G. Martine Meyers, P.C.,
attorneys for the Plaintiff.

Michael K. Furey, Esq. and Kevin J. Duffy, Esq. of Day Pitney LLP, attorneys for the Defendants.

Frank J. DeAngelis, P.J. Ch.,

I. BACKGROUND INFORMATION

This matter comes before the Court by application of Michael K. Furey, Esq. on behalf of Defendants McCarter & English, LLP (“McCarter”) and Beverly Lubit, Esq. (“Lubit”) (together, “Defendants”) on a motion for summary judgment. A separate matter comes before the Court by application of G. Martin Meyers, Esq., on behalf of Plaintiff Moerae Matrix, Inc. (“Plaintiff” or “Moerae”) on a motion for summary judgment.

Lubit represented Moerae for about ten years prior to joining McCarter. In 2017, after Lubit’s transition to McCarter, she brought the Moerae with her as a client. Verified Complaint, ¶ 11. During McCarter’s representation of Lubit, McCarter requested multiple times that Plaintiff

pay its legal fees, however, Moerae failed to do so. Id. Thereafter, on December 7, 2018, Moerae replaced McCarter with Cooley LLP (“Cooley”).

On December 17, 2018, McCarter filed a UCC-1 Financing Statement with the Delaware Department of State, identifying the debtor as Moerae and McCarter as a secured creditor, which explained that the security interest was related to unpaid attorneys’ fees and expenses. Id. at ¶ 12. Defendants also filed a notice of security interest with the USPTO providing that McCarter had acquired a UCC Financing Statement in the Patents from Moerae, and thus, McCarter had a security interest in the patents. Within ten days of the filing, McCarter sent a notice to Moerae that it had “placed liens” on Moerae’s patents and patent applications.

In March 2019, McCarter sued Moerae to recover said unpaid fees and expenses (“Collection Action”). On June 5, 2020, a judgment was entered against Moerae and in favor of McCarter in the amount of \$837,524.19. The judgment was affirmed on appeal in July 2021.

On March 1, 2022, Moerae sued McCarter and Lubit alleging claims of legal malpractice, breach of fiduciary duty, slander of title, and tortious interference with prospective economic advantage. Id. at ¶1. Moerae did not assert these claims in the Collection Action until after McCarter moved for summary judgment. However, the court barred Moerae from asserting the claims in the Collection Action on the basis that the proposed claims were untimely. Moerae alleged that McCarter’s actions destroyed its ability to obtain FDA approval on its proprietary lead development drug, MMI-0100. They also alleged that McCarter’s liens dissuaded investors from investing in Moerae, ultimately causing its failure. Id. at ¶ 3. Defendants claim that they had a right to a charging lien in patents because of Moerae’s failure to pay McCarter.

In the instant application, all parties move for summary judgment.

II. STANDARD OF REVIEW

Summary judgment must be granted if “the pleadings, depositions, answers to interrogatories and admissions on file, together with 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). The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 520 (1995) (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge must 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." Id. When the facts present "a single, unavoidable resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Id.

III. ANALYSIS

Defendants contend that there are no genuine issues of material facts precluding the grant of summary judgment. First, Defendants argue that the entire controversy doctrine (“ECD”) bars Plaintiff’s claims as it did not assert the claims in this litigation in the Collection Action. Defendants provide that all the claims arise out of the same nucleus of facts and thus, the ECD bars the claims asserted in the instant matter. Defendants submit that the ECD prevents piecemeal litigation by requiring litigants to assert all of their claims against a party arising from the same nucleus of facts or the same transactions in a single case. Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 348 (1984). Defendants contends that in the legal malpractice context, the accrual of a

claim for ECD purposes accrues when a client suffers actual damages, and the claimant knows or should know that its damage is attributable to attorney's negligence. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman, 237 N.J. 91, 115-16 (2019). Further, Defendants provide that it is not necessary that the claimant has suffered all of its damages for the claim to accrue. Id. at 116.

Defendants argue that Plaintiff's claims arise out of the same nucleus of facts as those that gave rise to the Collection Action including (1) Defendants' representations of Plaintiff, (2) Plaintiff's failure to pay Defendants, and (3) the steps Defendants took to preserve its rights to unpaid fees and expenses. Defendants further contend that Plaintiff, in the Collection Action, argued that the "counterclaim arises out of the same factual allegations that gave rise to [McCarter's] claim."

Defendants cite to Borrus, in which a client sued its attorneys for malpractice three years after the firm sued the client and recovered a judgment for unpaid fees. Defendants submit that the attorneys sought dismissal on the grounds that the ECD barred the client from asserting the claim in the second litigation. 273 N.J. at 113. Defendants assert that the New Jersey Supreme Court recognized that malpractice claims are frequently asserted by counterclaims where the attorney has sued for unpaid fees. Id. Further, Defendants submit that the Court recognized that whether the collection action is the proper forum for the malpractice claims to be litigated depends on the circumstances and will be based on "judicial fairness." Id. at 117. Defendants contend that the Court implied that collections actions are always the proper forum for malpractice claims and rejected the client's argument that a collection action is not the proper forum because a dispute about fees does not provide a client with the opportunity to litigate a malpractice claim. Id. at 114.

Defendants argue that Plaintiff's claims accrued no later than the first quarter of 2019 and by then, Plaintiff was aware of the essential facts giving rise to its potential claims against

Defendants. Defendants assert that Plaintiff's counsel advised Plaintiff by early April 2019 that Defendants acted improperly by filing the Notice yet slept on its obligation to assert the claim in the Collection Action. Defendants also contend that it is undisputed that Plaintiff believed, by mid-January 2019, that Defendants' actions would damage its ability to raise capital to fund its operations and harm the company.

Defendants argue that the goals of the ECD are served by the dismissal of the Complaint. Defendants contend that had Plaintiff filed its claim in the Collection Action, the dispute would have been resolved and the inconvenience and duplication of the instant litigation would have been avoided. Defendants assert that Plaintiff did not timely seek leave to file the malpractice and slander of title claims in the Collection Action despite being aware of such possible claims, and thus the ECD bars the claims.

In opposition, Plaintiff argues that Defendant's entire controversy doctrine argument is meritless. Plaintiff first highlights that Defendants' two-year delay in introducing their argument based on the entire controversy doctrine is delayed and thus, constitutes a waiver of the defense. Plaintiff argues that Defendants' entire controversy application would not advance the purposes that the doctrine is designed to accomplish. Plaintiff asserts that Defendants' delay in asserting the defense is responsible for judicial inefficiency that may have occurred.

Additionally, Plaintiff contends that unlike in Borris, where the party against whom the entire controversy defense was asserted failed to make any attempt in the prior proceeding to amend the pleadings to include its subsequently asserted claims, or otherwise notify the moving party of those claims and potential parties. Plaintiff asserts that it did make an effort to do so but that the court exercised its discretion to bifurcate the collection matter and Plaintiff's UCC-related counterclaims. Plaintiff argues that unlike the plaintiff in Borris, who deliberately withheld their

successive claim in the earlier proceeding to deny appropriate case management discretion, it came forward with its proposed claims.

Further, Plaintiff contends that Defendants are judicially estopped from raising the entire controversy doctrine. Plaintiff submits that the fairness and equitable considerations in the particular case are the overriding drivers of the ultimate decision on whether to apply the doctrine. Plaintiff argues that in the Collection Action, Defendants contested Plaintiff's right to assert the UCC claims on the basis that the claims arose from a different set of facts which is contrary to the arguments Defendants present in the instant application. Plaintiff thus argues that Defendants are judicially estopped from taking a litigation position directly contrary to the one they asserted in the earlier proceeding. Kimball International, Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 607 (App. Div. 2000).

Finally, Plaintiff asserts that the entire controversy doctrine does not apply to a new party, like Lubit, who was not a party to the prior action. Plaintiff submits the following:

As the comment to the revised rule [R.4:30A] makes clear...mandatory party joinder under the entire controversy doctrine has been eliminated, and preclusion of a successive action against a person not a party to the first action has been abrogated except in special situations involving both inexcusable conduct...and substantial prejudice to the non-party resulting from omission from the first suit.”

Hobart Bros. v. National Union Fire Ins., 354 N.J. Super. 229, 242 (App. Div. 2002).

Plaintiff contends that even if its claim against McCarter were dismissed on the grounds of the entire controversy doctrine, Plaintiff's claims against Lubit would survive.

In response, Defendants assert that the ECD was pleaded as a defense and that it is not unusual for the ECD defense to be decided at the summary judgment motion stage. Oliver v. Ambrose, 152 N.J. 383, 403 (1998). Additionally, Defendants contend that neither the Trial Court nor the Appellate Division in the Collection Action decided the ECD would not apply. Defendants

instead assert that Trial Court stated that if Plaintiff filed suit, the second court would decide whether the ECD applied.

Further Defendants argue that judicial estoppel does not bar Defendants' assertion of the ECD. Defendants contend that the motion to file counterclaim was denied because the trial court found that it was untimely, and not because the claims arose out of a different set of facts. Defendants assert that for judicial estoppel to apply, the first court must have decided the issue in favor of the estopped party on the basis of the position taken by the party in the earlier litigation. Bhagat v. Bhagat, 217 N.J. 22, 27 (2014).

Additionally, Defendants claim that if the ECD applies to the claims against McCarter, it should also bar the claims against Lubit. Defendants argue that while Lubit was not a party to the Collection Action, Plaintiff sought to join her in the Collection Action, and its claims against McCarter are almost exclusively based on Lubit's conduct as a McCarter partner. Defendants conclude by asserting that Plaintiff's claims arise out of McCarter's representation of Plaintiff and could have been filed in a timely manner in the Collection Action. Defendants argue that the fact that Plaintiff attempted to file its present claims in the Collection Action does not alter the conclusion that it could have asserted all its claims in the Collection Action.

It is established that the objectives of the entire controversy doctrine are "to encourage complete and final disposition through the avoidance of piecemeal decisions and to promote judicial efficiency and the reduction of delay." Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 610 (2015). The doctrine is implemented by R. 4:30A, which provides the following:

Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions).

The doctrine compels “litigants to consolidate their claims arising from a single controversy whenever possible.” Dimitrakopoulous v. Borrus, Goldin, Foley, Vignoulo, Hyman and Stahl, P.C., 237 N.J. 91, 98 (2019). Therefore, if a party fails to properly assert a claim that must be joined in an action, the court may bar that claim under the entire controversy doctrine. Id.

Moreover, in determining whether the doctrine applies, courts must consider whether the party the doctrine is asserted against “had a fair and reasonable opportunity to...litigate[] that claim in the original action.” Hillsborough Twp. Bd. Of Educ. v. Faridy Thorne Frayta, P.C., 321 N.J. Super. 275, 284 (App. Div. 1999). The doctrine applies where “a sufficient commonality of facts undergirds each set of claims to constitute essentially a single controversy that should be the subject of only one litigation.” DiTriolio v. Antiles, 142 N.J. 253, 258 (1995). “In determining whether successive claims constitute one controversy for purposes of the doctrine, the central consideration is whether the claims against the different parties arise from related facts or the same transaction or series of transactions.” Id. at 267. The entire controversy doctrine has been held to encompass “virtually all causes, claims, and defenses relating to a controversy between the parties engaged in litigation.” Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 15, 16 (App. Div. 1989). Thus, the doctrine will serve to bar subsequent litigation “only when a prior action based on the same transactional facts has been tried to judgment or settled.” Arena v. Borough of Jamesburg, 309 N.J. Super. 106, 111 (App. Div. 1998). Finally, the doctrine will not “bar claims that were unknown or had not arisen or accrued at the time of the original action.” Fisher v. Yates, 270 N.J. Super. 458 (App. Div. 1994).

In the instant application, Defendants have established that the entire controversy doctrine is applicable. First, McCarter’s claims in the prior action and Plaintiff’s present claims arise out of the same transaction or occurrence, McCarter’s and Lubit’s representation of Plaintiff. Plaintiff’s

claim for malpractice and other causes of action arose out of the same set of facts that gave rise to McCarter's claim for unpaid fees and expenses. Further, Plaintiff was aware of its claims at the time of the Collection Action. While the New Jersey Supreme Court in Borris provided that "a client whose malpractice claim was not asserted in an attorney's collection action may avoid preclusion of that claim by proving that he or she did not know, and should not reasonably have known, of the existence of the claim during pendency of the collection action[.]" such is inapplicable here. 237 N.J. at 100. The Court reversed and remanded on the basis that the record "did not reveal when the cause of action for legal malpractice accrued...." Id. Further, the Court stated that the accrual date "is sent in motion when the essential facts of the malpractice claim are reasonably discoverable." Id. at 116. Here, the Appellate Division found that Plaintiff "was aware [McCarter] filed the UCC-1 months prior to the filing of plaintiff's complaint in March 2019, the filing of [Moerae]'s answer in June 2019, and Lubit's January 30, 2020 deposition[.]" and there was no justification for its delay in filing the motion to amend in the Collection Action. McCarter & English v. Moerae Matrix, No. A-3775-19, 2021 N.J. Super. Unpub. LEXIS 1576 (App. Div. July 27, 2021). Therefore, Plaintiff had a fair and reasonable opportunity to raise its claims in the Collection Action notwithstanding its untimely motion to amend the pleadings. Finally, the Collection Action was adjudicated on its merits with the trial court granting summary judgment in McCarter's favor and thereafter, the court's decision was affirmed by the Appellate Division.

Similarly, the above discussion applies to Lubit. While Plaintiff asserts that the entire controversy doctrine would not apply to the claims against Lubit, its claims against Lubit are based on her actions and representation of Moerae as a McCarter partner and thus, should have been asserted in the Collection Action. In addition, the proposed amended pleadings were specifically based on Lubit's actions.

Moreover, while Plaintiff asserts that the trial court, in the Collection Action, bifurcated the claims, there is no support for such assertion. The trial court denied Plaintiff's motion to amend on the basis that it was untimely and provided that Plaintiff can file a separate action but that it may be "barred by the statute of limitations or entire controversy doctrine or res judicata." As such, while the plaintiff in Borrus deliberately withheld their successive claim in the earlier proceeding and Plaintiff moved to assert the claims, Plaintiff was responsible for its delay in asserting its claims in the Collection Action. Both the Trial Judge and the Appellate Division noted that Moerae was aware of its claims related to the lien filings before McCarter filed its complaint in the Collection Action.

Further, the Court does not find merit as to Plaintiff's waiver argument as Defendants plead the entire controversy defense in their Answer. There is no requirement under the Court Rules mandating that an ECD claim be filed as a pre-answer motion to dismiss. Next, under judicial estoppel, "a party who advances a legal position that is accepted by the court is barred from advocating a contrary position in a subsequent litigation." Bhagat v. Bhagat, 217 N.J. 22, 36 (2014). Here, while McCarter argued that Moerae's proposed amendments in the Collection Action did not arise from the same facts as the Collection Action, the trial court did not deny the motion to amend on that basis but rather because it was untimely. Therefore, judicial estoppel would be inapplicable.

Finally, Moerae maintains that there is no benefit to applying the ECD because the parties have already litigated this matter. However, extensive judicial resources would be used for an expected lengthy trial and the related evidentiary pre-trial motions.

IV. CONCLUSION

Accordingly, Plaintiff's motion for summary judgment is denied and Defendants' motion for summary judgment, based on the Entire Controversy Doctrine, is granted.