SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2492-22

ALLEN GLUSHAKOW, M.D.,

Plaintiff-Appellant,

v.

KEVIN PERSLEY,

Defendant-Respondent.

Argued April 29, 2024 – Decided June 12, 2024

Before Judges Gilson, DeAlmeida, and Jacobs.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-9084-19.

David Lustbader argued the cause for appellant (Lustbader & Lustbader, attorneys; Philip M. Lustbader David Lustbader, on the briefs).

Joel M. Bacher argued the cause for respondent (Joel M. Bacher and Timothy Joseph Foley, of counsel and on the brief).

PER CURIAM

Plaintiff, Allen Glushakow, M.D., appeals from a Law Division order granting summary judgment in favor of defendant, Kevin Persley, a former patient, based on the entire controversy doctrine. Having reviewed the record and law, we affirm because plaintiff's claims are barred by the governing statute of limitations. N.J.S.A. 2A:14-1.

We derive the following facts from the evidence submitted in support of, and opposition to, the summary judgment motion, "giv[ing] the benefit of all favorable inferences to plaintiff . . . ." Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

Defendant was involved in a car accident on March 4, 2009. He sustained injuries and sought medical treatment from plaintiff, an orthopedic surgeon. Defendant executed two documents concerning payment for medical treatment.

The first document, captioned "Agreement for Payment of Outstanding Bill," is dated October 10, 2009, and provides in pertinent part:

> in consideration of withholding immediate legal action against [defendant] for collection of [defendant's] outstanding bill for medical services rendered, I hereby agree to . . . direct my attorney . . . to pay any such outstanding medical bill due to Dr. Allen S. Glushakow from the proceeds of any settlement or judgment in any case or claim pending on my behalf.

It further provides:

> I understand, however, that my obligation to pay this outstanding bill is in no way contingent upon the outcome of any pending litigation and that I remain primarily responsible for payment of this outstanding bill irrespective of the outcome of any such litigation.

A second document, signed the same day, is captioned, "Release and Assignment of Benefits." It authorizes payment to be made from defendant's insurer directly to Glushakow in satisfaction of bills for services rendered. In pertinent part, it provides:

> regardless of any insurance payment or the outcome of any legal proceeding or settlement, [Persley is] ultimately financially responsible for all charges not otherwise paid by insurance or legal settlement or covered by this authorization . . . payment in full is expected at the time of service.

In January 2010, plaintiff filed a no-fault PIP arbitration against defendant's insurer, State Farm Insurance Company, seeking payment on invoices for medical services rendered related to the accident. At arbitration, plaintiff submitted invoices for services rendered, excluding the period from January 11, 2011 through May 15, 2012, the final date of treatment. The arbitration settled in December 2012, with payment for those invoices submitted, excluding the period between January 11, 2011 and May 15, 2012.

In July 2013, plaintiff filed a second arbitration against defendant's insurer to collect unpaid bills for services rendered between January 11, 2011 through May 15, 2012. In February 2015, a Dispute Resolution Professional (DRP) ruled plaintiff's claims in the second arbitration were barred by the entire controversy doctrine. The DRP found:

> Claimant does not argue that it could not have included the dates of service in the first Demand. It is clear that Claimant did indeed have an opportunity to include these dates, as the prior arbitration settled well after the dates of service at issue herein and a time where the claims were clearly ripe for arbitration. Claimant's analysis fails to provide any explanation as [to] why Claimant did not include the dates of service at issue here in the prior litigation.

In applying the entire controversy doctrine, the DRP concluded plaintiff's claim was, "clearly a case of fragmented, duplicative litigation, involving the same medical provider, rendering treatment to the same patient for injuries sustained in the same motor vehicle accident."

Plaintiff did not appeal the DRP's decision. Instead, in August 2015, plaintiff filed suit against defendant in the Law Division for the unsatisfied invoices. In December 2016, plaintiff voluntarily dismissed that lawsuit based on the prospect of joining as a defendant the attorney who handled plaintiff's original PIP arbitration.

No further filing occurred until December 2019, when plaintiff again filed a complaint in the Law Division seeking payment from defendant for "unpaid bills," alleging breach of the 2009 agreements for payment. Defendant moved for summary judgment, contending plaintiff's claim was barred based on the entire controversy doctrine, collateral estoppel, and the applicable statute of limitations. In opposition, plaintiff's counsel argued that neither collateral estoppel nor the entire controversy doctrine applied in view of the language of the 2009 agreements. Concerning the statute of limitations, plaintiff certified, "[a]ll attorneys present [in the 2015 litigation] agreed to waive the [s]tatute of [l]imitations . . . in exchange [for plaintiff's attorney] to take a voluntary dismissal without prejudice and file a new [c]omplaint, to give everyone an opportunity to have full discovery on the new allegations [against former counsel]." Plaintiff's counsel did not submit to the trial court a written, executed copy of the referenced tolling agreement.

In an oral ruling, the trial court granted defendant's motion and dismissed plaintiff's complaint. The court found plaintiff's claims were barred under the entire controversy doctrine. In that regard, the court reasoned that "this has been in various entities . . . and before various, both arbitrators and judges in this case several times and it should have been resolved before this. So, I'm going to

grant the motion for summary judgment. I feel the entire controversy doctrine applies." A March 17, 2023 order memorializes the trial court's decision.[1]

On appeal, plaintiff raises the following arguments for consideration:

> POINT I: PLAINTIFF AND DEFENDANT ENTERED INTO A MUTUAL CONTRACT THAT THE COURT BELOW IGNORED.
>
> POINT II: THE OPINION OF THE NO-FAULT ARBITRATOR WAS NOT SUPPORTED BY THE [C]ASE UPON WHICH HE RELIED, AND THE JUDGE BELOW SHOULD NOT HAVE GIVEN THE ARBITRATION AWARD ANY CREDENCE.
>
> POINT III: THE COURT'S OPINION BELOW ASSUMED AN IMPROPER SPECULATIVE CONCLUSION NOT SUPPORTED BY THE RECORD, THAT IF PLAINTIFF'S SURGICAL BILL HAD BEEN INCLUDED IN THE FIRST ARBITRATION, IT WOULD HAVE BEEN PAID 100% BY INSURANCE.

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)). Thus, we consider, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that

[1] Although the body of the order is dated February 17, 2023, it contains a "stamped" file dated March 17, 2023, the date on which the trial court placed its oral decision on the record.

one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 536). 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." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)). "To defeat a motion for summary judgment, the opponent must 'come forward with evidence that creates a genuine issue of material fact.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32, (App. Div. 2012)).

If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). "When no issue of fact exists, and only a question of law remains . . . [we] afford[] no special deference to the legal determinations of the trial court." Templo Fuente, 224 N.J. at 199 (citation omitted). Applying the above

standards, we affirm the order granting summary judgment to defendant, albeit for a different reason.

Under N.J.S.A. 2A:14-1, the statute of limitations for a breach of contract claim "commence[s] within six years next after the cause of any such action shall have accrued." The statute of limitations begins when "the party seeking to bring the action ha[s] an enforceable right." Metromedia Co. v. Hartz Mountain Assocs., 139 N.J. 532, 535 (1995) (internal quotation marks and citations omitted). A breach of contract action accrues on "the date upon which the right to institute and maintain a suit first arises." Holmin v. TRW, Inc., 330 N.J. Super. 30, 35 (App. Div. 2000) (quoting Hartford Accident & Indem. Co. v. Baker, 208 N.J. Super. 131, 135-36 (1985)), aff'd, 167 N.J. 205 (2001). Specifically, the right to institute and maintain a suit for a breach of contract accrues either when the breach occurs or when the plaintiff, with the exercise of due diligence, should have discovered the breach. Sodora v. Sodora, 338 N.J. Super. 308, 313 (Ch. Div. 2000); see also Lopez v. Swyer, 62 N.J. 267, 272-73 (1973).

Here, plaintiff's cause of action accrued when he rendered services that went unpaid by the insurance company. As noted, the 2009 agreement provided, "payment in full is expected at the time of service." Plaintiff continued to

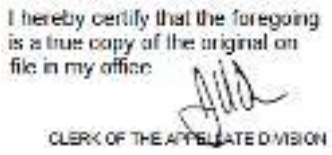
provide treatment to defendant until a final office visit in May 2012, before the PIP claim's resolution in December 2012. So, any breach of contract claim accrued by May 2012, when plaintiff knew or should have known through exercise of due diligence, that the insurer was disputing payment for the services in question that plaintiff had an enforceable right to collect. Under the applicable statute of limitations, plaintiff had six years from that date to initiate suit, or no later than May 2018. Plaintiff's complaint in this action, however, was filed on December 12, 2019, approximately a year and a half after the statute of limitations expired. Accordingly, we hold that plaintiff's claims are barred by the applicable statute of limitations.

Plaintiff asserts that the statutes of limitations defenses were tolled by written agreement when the 2015 action was dismissed. The record, however, contains no written tolling agreement. When pressed at oral argument, counsel for plaintiff offered to produce the purported agreement. We then allowed counsel the opportunity to submit that agreement. Counsel, however, was unable to produce a written agreement. Without a written tolling agreement, the

statutes of limitations continued to run and all of plaintiff's claims are time barred.[2]

To the extent we have not addressed any remaining arguments, we find they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-2(e)(1)(E).

We affirm.



[2] We also point out, that plaintiff did not submit the alleged tolling agreement to the trial court and therefore did not properly preserve this argument for appeal. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (explaining that generally appellate courts will not consider arguments not properly raised in the trial court) (citing Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)).