

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2764-20**

**CHRISTOPHER PEPITONE
and MAI TRAN,**

Plaintiffs-Appellants,

v.

**ENGINSPECT, INC., and
FRANK J. TIEDKEN,**

Defendants-Respondents.

Submitted March 24, 2022 – Decided April 5, 2022

Before Judges Mawla and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law
Division, Monmouth County, Docket No. DC-006500-
20.

Law Office of Jarred S. Freeman, LLC, attorneys for
appellants (Jarred S. Freeman, on the briefs).

Law Office of Gerald F. Strachan, attorneys for
respondents (Matthew R. Panas, on the brief).

PER CURIAM

Plaintiffs Christopher Pepitone and Mai Tran appeal from a May 21, 2021 order granting defendants Eginsect, Inc. and Frank Tiedken's motion for summary judgment. We reverse and remand.

We discern the following facts from the record. Plaintiffs hired defendants to conduct an inspection related to the purchase of a home located in Atlantic Highlands. On or around March 26, 2020, defendants provided their home inspection report. In the relevant portions of the report, defendants claimed the roof was at the beginning of its useful life. By viewing the roof from the ground, climbing a ladder, and walking up on it, defendants estimated that the roof was between zero and five years old. Defendants also highlighted that the "[r]oof sheathing is 'blackened' and has condensation signs in areas." Finally, defendants did not observe "obvious deflection or bowing of the roof structure in the exposed and accessible areas."

On or around April 29, 2020, plaintiffs closed on the home. After closing, plaintiffs noticed significant and recurring problems with the roof. Plaintiffs subsequently retained Lawrence Butto, who conducted an inspection of the home and issued an initial report on July 23, 2020. Butto indicated that "[t]here [are] some soft sections on the rear roof sheathing that will need repair in the near future. Please warn anyone to use caution when walking on this section of

the roof until it is repaired." Butto noted "signs of heavy moisture condensation in the attic" causing "blackening and delamination of the roof sheathing." Butto suggested that the material of the roof could cause the sheathing to flex and sag, creating soft spots. Butto also highlighted a crack in the roof deck.

On October 8, 2020, plaintiffs filed a complaint in the special civil part, alleging: 1) consumer fraud¹; 2) breach of contract; 3) promissory estoppel; 4) unjust enrichment; and 5) breach of the implied covenant of good faith and fair dealing. In their complaint, plaintiffs claimed "defendants' failure to properly provide an industry standard inspection report prohibited the proper evaluation when purchasing [the property]."

On March 5, 2021, defendants amended their answers to interrogatories to include the expert report of Leo Stinson from National Forensic Consultants. Stinson opined that defendants acted within the standard of care. Specifically, Stinson explained the state requirements do not necessitate that home inspectors walk on every area of the roof and that damage could have occurred to the roof during the four months between inspections. Additionally, Stinson stated that

¹ Plaintiffs voluntarily dismissed the consumer fraud count with prejudice.

the area of damaged roof deck might not have been visible from the area of the pulldown stairs and that defendants were not required to enter an unfloored attic.

On March 12, 2021, plaintiffs requested and were granted a thirty-day adjournment for additional discovery. On April 11, 2021, discovery concluded. On May 3, 2021, defendants filed a motion for summary judgment.²

On May 7, 2021, plaintiffs emailed defendants Butto's supplemental report. Butto's supplemental report opined "[t]he failure to identify the compromised roof is a clear deviation from the reasonable standard of care for a licensed home inspector." Butto stated that in light of his own inspection, defendants erred in declaring the roof was at the beginning of its useful life and that there was no obvious bowing of the roof structure.

On May 17, 2021, the judge held a Rule 104 hearing to determine Butto's qualifications as an expert. Butto testified that he had been performing home inspections in New Jersey and New York for many years. When questioned about whether he had a current license in either state, Butto stated his wife handled the administrative duties. He also stated the license numbers listed on the cover page of his initial report were assigned to him by the company he

² Defendants also filed a motion to bar Butto's report, but the judge never ruled on that motion.

previously worked for. Butto was unaware if he had a license in his name since forming his own company.

On May 21, 2021, the return date of the motion for summary judgment, the judge issued an order granting the motion and dismissing plaintiff's complaint. In her written opinion, the judge reasoned summary judgment was appropriate because plaintiffs failed "to proffer an expert report evidencing negligence or a deviation from the standard of care." In specific reference to Butto's initial report, the judge found:

Butto never opines that [defendants] . . . deviated from any standards of care in performing their inspection. Nor does he opine that any of the conditions that he observed present on or about July 23, 2020 were also present at the time of [defendants'] inspection on March 26, 2020. . . . Butto never opines that [d]efendants were required to inspect certain areas that they failed to inspect or perform a more thorough inspection at the time of their inspection on March 26, 2020. The Butto Report makes no mention of the home inspection report issued by defendants on March 26, 2020 or the findings therein.

Regarding Butto's qualifications in the industry, the judge found "[n]either the NY nor NJ license numbers contained in his report are attributable to him. A search of NJDCA^[3] shows that he does not possess a license to perform Home

³ New Jersey Department of Community Affairs.

Inspection Services."⁴ The judge stated, "even assuming that Butto can qualify as an expert . . . his report provides no evidence by which the factfinder could find that [defendants] . . . deviated from the accepted standard of care for a licensed Home Inspectors or was negligent."

Although Butto submitted a supplemental report, the judge found plaintiffs submitted the supplemental report "after the filing of the [s]ummary [j]udgment motion and well after the discovery end date. Plaintiff[s] did not amend [their] answers to interrogatories to name such report." The judge further stated, "[t]he supplemental report does not state that the findings he observed on July 23, 2020 were present – or even were likely present – on the date of . . . [defendants'] inspection on March 23, 2020." For all those reasons, the judge granted defendants' motion for summary judgment. This appeal followed.

On appeal, plaintiffs present the following arguments:

POINT I

THE TRIAL COURT ERRED BY GRANTING DEFENDANT[S] MOTION FOR SUMMARY JUDGMENT.

A. The Trial Court Erred by [L]imiting a
[R]eview of the [C]ase to . . . Butto's March
26, 2020 Report.

⁴ N.J.S.A. 2A:53A-26, which defines "licensed person" as used in the affidavit of merit statute, N.J.S.A. 2A:53A-27, does not list a home inspector.

B. Even [W]ithout the Supplemental Expert Report Summary Judgment [S]hould [H]ave [B]een [D]enied [B]ecause [T]here is a [Q]uestion of [F]act for the [J]ury.

POINT II

THE TRIAL COURT ERRED BY HEARING DEFENDANT[S] SUMMARY JUDGMENT MOTION WITHIN [THIRTY] DAYS OF TRIAL.

We review a trial court's grant of summary judgment de novo, applying the same standard as the trial court. Conley v. Guerrero, 228 N.J. 339, 346 (2017). 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)).

Rule 4:46-1 provides "[a]ll motions for summary judgment shall be returnable no later than [thirty] days before the scheduled trial date, unless the court otherwise orders for good cause shown." Here, the parties appeared before the judge on May 21, 2021, and the trial was scheduled for June 14, 2021, making the motion returnable twenty-four days before the scheduled trial date.

Therefore, the judge erred in hearing the motion for summary judgment in violation of Rule 4:46-1.

Although a judge may consider an untimely motion for good cause, the judge, in granting defendants' motion for summary judgment, failed to articulate any good cause for allowing the untimely summary judgment motion. "Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990); see also R. 1:7-4. Although we review this issue under the plain error standard, it is evident that permitting the judge to consider and subsequently grant defendants' untimely motion for summary judgment without making findings for good cause was "clearly capable of producing an unjust result." R. 2:10-2.

Because we find the judge erred in hearing defendant's motion for summary judgment, we need not address whether the judge erred in granting the motion. We note, however, in granting the motion it appears the judge may have resolved competing fact issues in favor of the moving defendants. In that regard, because home inspectors are not protected by the Affidavit of Merit statute, N.J.S.A. 2A:53A-26(a)-(q), Butto's licensure history may have gone to the weight of his testimony rather than his qualifications as an expert per se. On

remand, therefore, we direct the judge to make specific legal and factual determinations regarding Butto's qualifications as an expert and the admissibility of Butto's supplemental report.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION