SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3558-20

BOROUGH OF MANVILLE,
a municipality located in the
County of Somerset, State of
New Jersey,

Plaintiff-Appellant,

v.

FRANCIS P. LINNUS,
a duly licensed Attorney-at-
Law of the State of New Jersey,

Defendant-Respondent.

Submitted May 16, 2022 – Decided May 25, 2022

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0588-21.

Peter A. Ouda, attorney for appellant.

Marshall, Dennehey, Warner, Coleman & Goggin, attorneys for respondent (Howard B. Mankoff and Walter F. Kawalec, III, on the brief).

PER CURIAM

In this legal malpractice case, plaintiff Borough of Manville appeals from an order granting defendant Francis P. Linnus's motion to dismiss the complaint for failure to state a claim upon which relief may be granted pursuant to Rule 4:6-2(e). Plaintiff claims the court erred as a matter of law by finding the complaint did not assert a timely malpractice claim under the applicable statute of limitations and by granting defendant's motion on statute of limitations grounds without conducting an evidentiary hearing. We agree, and we therefore reverse and remand for further proceedings.

I.

We begin by noting the parties present a somewhat confusing record on appeal. Defendant moved to dismiss plaintiff's complaint pursuant to Rule 4:6-2(e), which required the court to "examine[] 'the legal sufficiency of the facts alleged on the face of the complaint,' limiting its review to 'the pleadings themselves.'" Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019) (citation omitted) (first quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989); and then quoting Roa v. Roa, 200 N.J. 555, 562 (2010)). And, in its bench opinion supporting the order from which the appeal is taken, the court made clear its

decision was based solely on its review of the allegations in the complaint and documents—emails—referenced in the complaint. See Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015) (explaining in reviewing a motion to dismiss "a court may consider documents specifically referenced in the complaint 'without converting the motion into one for summary judgment'" (quoting E. Dickerson & Son, Inc. v. Ernst & Young, LLP, 361 N.J. Super. 362, 365 n.1 (App. Div. 2003))).

However, the record on appeal includes a "Statement of Material Facts" that does not include a caption and is not signed but refers to a certification from defendant's counsel supporting the asserted facts. The record also includes documents titled "Opposition to Statement of Material Facts" and "Counterstatement of Material Facts" that also lack captions and signatures but cite to a certification from plaintiff's current mayor, Richard Onderko. The record further includes Onderko's certification, which bears the caption of this matter in the trial court and states it is submitted "in opposition to the . . . motion to dismiss." In addition, the record includes a "Response to Plaintiff's Counterstatement of Material Facts" that lacks a caption and signature, and five additional documents showing various emails.

The various statements of material fact suggest the court was presented with a motion for summary judgment, see R. 4:46-2 (requiring statements of material fact in support of motions for summary judgment), but there is no record defendant moved for summary judgment or that the court considered a request for summary judgment made by either of the parties. Thus, for purposes of our de novo review of the court's order dismissing the complaint pursuant to Rule 4:6-2(e), see Dimitrakopoulos, 237 N.J. at 107, we do not consider any of the putative statements of material fact, the apparent responses to them, or Onderko's certification. We limit our review, as did the motion court, to "the pleadings themselves," ibid. (quoting Roa, 200 N.J. at 562), as well as the emails the parties agree are referenced in the complaint, and we "examine[] 'the legal sufficiency of the facts alleged on the face of the complaint,'" ibid. (quoting Printing Mart, 116 N.J. at 746). We therefore summarize the facts alleged in the complaint as supplemented by the referenced emails.

The complaint alleges defendant is an attorney who holds himself out as "specializing in municipal law and related issues." Plaintiff appointed defendant to serve as its Borough attorney from January 1, 2008, through December 31, 2014, and engaged defendant as an independent contractor during the same period. In connection with his association with plaintiff, defendant was enrolled

in the New Jersey State Health Benefits program from March 1, 2008, through December 31, 2014, with member and spousal health care coverage paid for by plaintiff. During that time, plaintiff paid $118,250.82 for defendant's and his wife's health care coverage in the program.

The complaint further alleges that in 2019, the State of New Jersey, Division of Pension and Benefits, investigated "the legality and legitimacy" of defendant's entitlement to health care benefits from plaintiff. The investigation began in response to a request from plaintiff's Borough Administrator. According to the complaint, when defendant, who was reappointed as plaintiff's Borough attorney on January 1, 2019, became aware of the investigation, "he sought to obstruct, suppress and restrain" the Borough Administrator from further action and he directed the Borough Administrator "to cease and desist from any further communication with the State of New Jersey." When the Borough Administrator did not comply with defendant's directive, her employment was terminated, and she filed "suit against [plaintiff,] successfully establishing her claims as a '[w]histleblower' under the New Jersey Conscientious Employee Protection Act." N.J.S.A. 34:19-1 to -14.

The complaint further alleges that John Sloth, the head investigator with the "Pension Fraud and Abuse Unit," issued a July 22, 2019 report finding

defendant "was illegally and improperly enrolled in the State Health Benefits Program in Manville from March 1, 2008 through December 31, 2014." More particularly, the report determined that "[d]espite specific guidance given by the Department of Local Government Services that [defendant's] relationship with Manville was contrary to State [l]aw and IRS [r]egulations, [defendant] continued to engage in the same relationship with Manville," and that even after defendant was "informed . . . in 2011 of guidance from the IRS that [he] could not be engaged both as an independent contractor and employee," defendant "continued to engage [his law] firm for the services to [plaintiff], while allowing [himself] to be paid on payroll and receive State administered [h]ealth [b]enefits for those services." The Chief of the Health Benefits Bureau determined defendant "had improperly received $118,251.82 in health benefits at the expense of [plaintiff's] taxpayers."

Plaintiff's complaint also alleged defendant had been "made aware of the impropriety of his employment agreement with" plaintiff, and that he "knew or should have known that the manner in which he was being compensated would result in him being deemed unqualified to receive the . . . benefits." The complaint further averred that, for example, defendant was informed in a September 2008 email that his compensation agreement "was contrary to law

and should be reexamined," but he never advised plaintiff that his agreement was contrary to law or that the issue should be referred to other "dis-interested legal counsel." The complaint avers that Sloth's report refers to a 2011 email to defendant from the then-Borough Administrator advising plaintiff that "he could not be an independent contractor and employee at the same time."

Plaintiff alleged that although defendant knew his employment arrangement "was improper and did not qualify him for benefits, [he] continued to advise [plaintiff] to continue the arrangement," and "consistently took a legal position that was contrary to law . . . and to the detriment of his client." The complaint alleged defendant committed legal malpractice by "advocat[ing] for these benefits and negligently, incorrectly[,] and knowingly advis[ing] [plaintiff] of his eligibility for health benefits," and by "knowingly and incorrectly advis[ing] [plaintiff] and direct[ing] . . . that health benefits be paid for him and his wife." According to the complaint, defendant "deviated from accepted standards of care and was negligent in his representation of" plaintiff, and he caused plaintiff damages, including its expenditure of $118,250.82 for health benefits to which neither he nor his wife were entitled.

As noted, defendant moved for dismissal of the complaint for failure to state a claim upon which relief may be granted. See R. 4:6-2(e). Defendant

asserted the complaint, filed on April 27, 2021, was time-barred under the six-year statute of limitations for legal malpractice actions. See N.J.S.A. 2A:14-1; see also Vastano v. Algeier, 178 N.J. 230, 236 (2003) ("N.J.S.A. 2A:14-1 requires that a legal malpractice action commence within six years from the accrual of the cause of action."). Plaintiff opposed the motion, arguing the complaint was timely filed because its legal malpractice claim did not accrue until it received the 2019 Sloth report.

The court heard argument on the motion and, in a decision from the bench, determined plaintiff first became aware of issues related to defendant's eligibility for the health care benefits when its Borough Administrator exchanged the 2008 and 2011 emails with plaintiff that are referenced in the complaint. The court noted a September 5, 2008 email from defendant to the State stating he was plaintiff's Borough attorney; explaining he had an employment agreement pursuant to which he received a bi-monthly salary and received "non-payroll compensation for additional professional services"; providing the resolutions authorizing his employment and provision of additional legal services; and requesting an "interpretation of [his] eligibility" for health care benefits at plaintiff's expense. The email was also sent to plaintiff's then-Borough Administrator and two other employees.

The court also cited a September 29, 2008 email response from the Deputy Director of the New Jersey Division of Local Government Services advising defendant in pertinent part it had been determined his "arrangement is not authorized under N.J.S.A. 43:15A-7.2,"[1] and noting that if his compensation is "salary based," plaintiff "is obligated to test [his] employment circumstances under IRS employee/contractor standards to be sure [he] meet[s] the bona fide employee test." The email further suggested that defendant and plaintiff "review his compensation arrangements and revise them immediately as [the State] conclude[d] they are contrary to law." (Emphasis added).

The motion court further explained that in a September 29, 2008 email from defendant to the Borough Administrator, defendant stated he received "an advisory opinion . . . regarding those positions for mandatory inclusion in the State's Defined Contribution Retirement Plan" and the opinion was that "based upon [his] employment agreement and professional services agreement, [he was] currently not eligible" for benefits. He further advised the Borough

[1] In pertinent part, N.J.S.A. 43:15A-7.2(a) provides that "[a] person who performs professional services for a political subdivision of the State . . . under a professional services contract . . . on the basis of the performance of the contract, shall not be eligible for membership in the Public Employees' Retirement System." The statute provides for exceptions to its prohibition that are not at issue here.

Administrator he was "reviewing [his] employment contract/professional services agreement to determine whether any modifications are necessary." The email did not include the State's "advisory opinion" as an attachment or refer to the State's suggestion defendant's arrangement with plaintiff should be "revise[d] immediately" because it is "contrary to law."

The court also relied on an April 11, 2011 email to which reference is made in the complaint. In that email, plaintiff's Borough Administrator provided defendant with "some literature from the IRS concerning employee/independent contractor status," and noted he spoke to an IRS representative about defendant's "current contract" status. The Borough Administrator also noted an "official determination" of worker status for purposes of tax withholding for the IRS would take six to eight weeks, and the administrator "need[ed] an answer" to develop a "budget for the year." The email also noted "the issue of [h]ealth [c]overage is based on employee status."

The motion court reasoned that based on those emails plaintiff either knew or had reason to know defendant committed the alleged malpractice claimed in the complaint. The court therefore concluded that because plaintiff's complaint was filed more than six years after those emails were exchanged, and defendant's

association with plaintiff ended in 2014, the 2021 complaint is barred by the six-year statute of limitations set forth in N.J.S.A. 2A:14-1.

The court entered an order dismissing the complaint with prejudice. This appeal followed.

II.

We conduct a de novo review of an order dismissing a complaint for failure to state a claim upon which relief may be granted pursuant to Rule 4:6-2(e). Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). Our review requires an examination of "'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 108). We must also thoroughly search the complaint, "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." Printing Mart, 116 N.J. at 746.

"In this context, we accept as true the complaint's factual assertions." Grillo v. State, ___ N.J. Super. ___, ___ (App. Div. 2021) (slip op. at 4) (citing Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165-66 (2005)); Craig v. Suburban Cablevision, 140 N.J. 623, 625 (1995) (in determining a "defendants'

motion to dismiss, we accept as true the facts alleged in the complaint"). A complaint should be dismissed only where it "states no claim that supports relief, and discovery will not give rise to such a claim." Dimitrakopoulos, 237 N.J. at 107.

Ordinarily, "a legal-malpractice action accrues when an attorney's breach of professional duty proximately causes a plaintiff's damages." Grunwald v. Bronkesh, 131 N.J. 483, 492 (1993). However, our Supreme Court has "recognized . . . the unfairness of an inflexible application of the statute of limitations when a client would not reasonably be aware of 'the underlying factual basis for a cause of action' to file a timely complaint," Vastano, 178 N.J. at 236 (quoting Grunwald, 131 N.J. at 492-93), and it determined the "discovery rule [applies] in those cases in which the injury or wrong is not readily ascertainable through means of reasonable diligence," ibid.

More particularly, "a professional malpractice claim accrues when: (1) the claimant suffers an injury or damages; and (2) the claimant knows or should know that its injury is attributable to the professional negligent advice." Vision Mortg. Corp. v. Patricia J. Chiapperini, Inc., 156 N.J. 580, 586 (1999) (quoting Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280, 296 (1995)). Under the discovery rule, "the statute of limitations begins to run" on a legal

malpractice claim "only when the client suffers actual damage and discovers, or through the use of reasonable diligence should discover, the facts essential to the malpractice claim." Grunwald, 131 N.J. at 494. In determining whether a plaintiff knew or should have known that an injury is attributable to the defendant, the critical inquiry is "whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another." Caravaggio v. D'Agostini, 166 N.J. 237, 246 (2001).

Here, because we consider the timeliness of the legal malpractice claim in the context of a motion to dismiss under Rule 4:6-2(e), the factual basis for our analysis is necessarily limited to the allegations in the complaint, see Baskin, 246 N.J. at 171, that we must accept as true, Grillo, ___ N.J. Super. at ___ (slip op. at 4), as well as the documents to which the complaint refers, see Myska, 440 N.J. Super. at 482. And we must review the complaint and documents with great liberality to ascertain whether a fundament of a timely malpractice cause of action is asserted. See Printing Mart, 116 N.J. at 746.

Defendant's argument that the facts alleged in the complaint, and the emails referenced in the complaint, do not suggest the fundament of a timely cause of legal malpractice fails to afford the allegations the liberal reading to which they are entitled. To be sure, the September 2008 emails make clear

plaintiff was aware of an issue concerning defendant's eligibility for health benefits. The 2011 email upon which the court relied primarily relates to defendant's status as an employee or independent contractor for purposes of determining budget issues, but the Borough Administrator also noted a determination of employee status concerning eligibility for health benefits as well.

What is missing from the emails is any support for a finding plaintiff knew or should have known defendant provided erroneous legal advice, or failed to provide required legal advice, such that he was at fault for what was later determined by Sloth in his 2019 report to be plaintiff's erroneous payment for defendant's health care benefits.

More particularly, the State's September 29, 2008 email was sent to defendant and informed him he was not entitled to receive benefits, but the email does not reflect that the State sent its opinion to any other representative of plaintiff. Defendant's September 29, 2008 email to the Borough Administrator states he received an advisory opinion from the New Jersey Division of Government Services, but it does not include the opinion as an attachment. Instead, defendant advised the Borough Administrator he received an "opinion" that he was "currently not eligible for" benefits, and defendant further advised

he intended to review his arrangement to determine if any "modifications [were] necessary." Thus, defendant's email states only that he would determine whether changes were required to allow his continued receipt of the benefits.

That statement made by defendant to his client appears to be an incomplete, misleading, and inaccurate recitation of the State's September 29, 2008 email response to the inquiry about his eligibility for benefits. The State did not advise defendant he should review his agreements and determine in the first instance whether any "modifications were necessary." The State's email advised defendant he and plaintiff should "review his compensation arrangements and revise them immediately as [the State] conclude[d] they are contrary to law."

In any event, defendant's September 29, 2008 email to the Borough Administrator does not provide reason for plaintiff to know or have reason to know that defendant committed professional malpractice—later alleged in its complaint—by either failing to provide correct legal advice to plaintiff concerning his eligibility for benefits or by failing to inform plaintiff he was not entitled to the benefits. To the contrary, the email demonstrates only defendant informed his client that he intended to review a legal issue concerning his eligibility for benefits "to determine whether any modifications are necessary."

Similarly, the April 12, 2011 email upon which the motion court relied does not include any information supporting a determination plaintiff knew or should have known defendant committed malpractice in the manner later alleged in the complaint—by providing incorrect or incomplete advice to plaintiff about his eligibility for health care coverage. The email requests only that defendant complete a form to allow a determination whether he should be classified as an employee or independent contractor for tax and budgeting purposes. And, although the email mentions that health care benefits are based on "employee status," that reference supports only a conclusion plaintiff was aware defendant's status was pertinent to his eligibility for benefits.

In our assessment of whether the complaint on its face alleged a timely asserted cause of action, we must also read the emails in the context of the factual averments that we accept as true. The complaint alleges defendant committed malpractice by failing to "share information about what he had learned about eligibility for health insurance benefits from" plaintiff, by "advocat[ing] for these benefits and negligently, incorrectly and knowingly advis[ing] [plaintiff] of his eligibility for health benefits," by "incorrectly advis[ing] [plaintiff] and direct[ing] . . . that health benefits be paid to him and his wife," and by "advis[ing] [plaintiff] to continue" his employment

"arrangement" while plaintiff paid for the benefits. The emails do not undermine the allegations; they are consistent with the allegations.

The emails show only plaintiff was aware that defendant's eligibility for benefits was related to the status of his relationship with plaintiff. The emails and the allegations in the complaint, when read liberally, support plaintiff's claim that defendant, in his role as Borough attorney, addressed and resolved the eligibility issue as early as 2008, and that he thereafter erroneously advised plaintiff he was eligible for the benefits, or purposely failed to advise plaintiff he was ineligible for the benefits.

Arguing, as defendant does, that the emails show plaintiff was aware there was an issue concerning defendant's eligibility misses the point by ignoring that raising issues with an attorney alone does not provide the client with actual knowledge, or a reason to know, that the attorney acted negligently by providing incorrect advice about the issue. Through its incorporation of the emails in its complaint, plaintiff recognizes it was made aware of eligibility issues as early as 2008, but its malpractice claim is founded on the clearly stated contention that defendant negligently and perhaps intentionally failed to provide proper legal advice to plaintiff concerning his eligibility for the benefits, thereby obtaining benefits to which neither he nor his wife were entitled.

As we have explained, in the application of the discovery rule, accrual of a legal malpractice claim occurs when a plaintiff suffers an injury and damages, and, more pertinent here, when "the claimant knows or should have known that its injury is attributable to the professional negligent advice." Vision Mortg. Corp., 156 N.J. at 586. The emails offer no basis to conclude plaintiff knew or should have known defendant was negligently providing or failing to provide competent advice concerning the benefits eligibility issue.

Accepting as true the allegations in the complaint, defendant provided erroneous advice, or failed to provide correct advice knowing he was not entitled to the benefits, throughout his tenure as plaintiff's attorney from 2008 through 2014. The complaint further alleges plaintiff did not become aware of defendant's alleged negligence until 2019, and that allegation is not in any manner undermined or contradicted by the emails. Thus, on the face of the complaint, including by reference the emails, there is no basis to conclude as a matter of law plaintiff's complaint is untimely. We therefore reverse the court's order and remand for further proceedings.

We decide only that the court erred by granting defendant's motion to dismiss under Rule 4:6-2(e) on timeliness grounds. We do not decide the complaint is timely. On remand, the parties may continue to litigate the

timeliness issue and the court may in due course conduct a Lopez[2] hearing to address the timeliness issue based on a robust record beyond that which is provided by the mere allegations in the complaint.

Moreover, we express no view on the merits of plaintiff's malpractice claim, and nothing in this opinion should be construed to the contrary. In accordance with the standard applicable to a motion to dismiss under Rule 4:6-2(e), our discussion of plaintiff's claim necessarily required that we accept the allegations as true and broadly read the allegations in plaintiff's favor to determine if they support a legally cognizable claim. Nothing in this opinion shall be interpreted as findings of fact as to plaintiff's allegations or defendant's actions. Any such findings may only be properly made either on a summary judgment record or after a trial.

Reversed and remanded. We do not retain jurisdiction.

[2] Lopez v. Swyer, 62 N.J. 267, 275-76 (1973).