SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0011-16T2

WIDMAN, COONEY, WILSON,
MCGANN & FITTERER,

Plaintiff-Respondent,

v.

MAUREEN HECK,

Defendant-Appellant.

Submitted October 23, 2017 – Decided December 6, 2017

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2312-15.

Bendi Rindosh, attorneys for appellant (Jason A. Rindosh, on the briefs).

Traub, Lieberman, Straus, & Shrewsberry, LLP, attorneys for respondent (Aileen F. Droughton, of counsel and on the brief; Laura M. Faustino, on the brief).

PER CURIAM

Defendant Maureen Heck appeals from a June 29, 2016 order confirming an arbitration award granting summary judgment in

plaintiff Widman, Cooney, Wilson, McGann & Fitterer's (Widman) favor, and an August 19, 2016 denial of a motion for reconsideration. We affirm.

We discern the following facts from the record. Widman previously represented defendant in an attorney's fee dispute with a former firm and in a civil action regarding the administration of her father's estate. On June 22, 2015, Widman filed a complaint alleging defendant owed $74,742.35 in attorney's fees. Defendant counterclaimed, asserting Widman was professionally negligent in handling the settlement of the estate litigation. Widman originally represented itself on both claims.

A Ferreira[1] conference was held on October 29, 2015 for the legal malpractice claim and shortly thereafter, Widman retained counsel to represent it in the legal malpractice counterclaim but continued to represent itself on the fee claim. Defendant, who represented herself, did not serve an expert report in support of her claim.

On April 6, 2016, the case proceeded to mandatory, non-binding arbitration. An attorney from Widman appeared on the fee claim

[1] Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003), requires a case management conference early in the stages of malpractice actions to address the sufficiency or deficiency of a plaintiff's Affidavit of Merit, which is an expert's sworn statement attesting that there exists a "reasonable probability" that the professional's conduct fell below acceptable standards.

and the firm's counsel appeared on the malpractice claim. Defendant appeared pro se. The arbitrator entered an award in favor of Widman for $74,742.35 and found no cause for defendant's legal malpractice counterclaim.

On April 29, 2016, defendant filed a demand for a trial de novo within the thirty-day limits of Rule 4:21A-6. Defendant attempted to serve Widman's counsel with notice of the trial de novo demand by mail, but service was not timely due to an incorrect address, and defendant made no attempt to serve Widman.

On May 12, 2016, Widman's counsel moved to confirm the arbitration award and, in the alternative, for summary judgment on the counterclaim. After receiving the motion, on May 20, 2016, defendant faxed Widman's counsel a letter, requesting withdrawal of the motion because she had filed a demand for a trial de novo. Defendant attached a return to sender notice dated May 6, 2016 showing the attempted service. The May 20, 2016 letter also referenced that it was faxed to a lawyer at Widman. Defendant thereafter retained counsel who submitted opposition to the motion on defendant's behalf.

On June 29, 2016, after hearing argument and placing her findings on the record, the trial judge confirmed the $74,742.35 arbitration award and granted summary judgment in Widman's favor. In particular, the judge found the de novo notice was timely filed

but not timely served. After reviewing the certification and attachments submitted by defendant the judge declined to find sufficient cause to relax the thirty-day service requirement, because when defendant learned the notice was not served within thirty days, she failed to take any corrective steps until she received Widman's motion. The judge granted Widman summary judgment on the counterclaim because defendant did not respond to or deny anything set forth in plaintiff's statement of undisputed material facts and did not provide an expert's report supporting her malpractice claim before the close of discovery.

Defendant moved for reconsideration, which the court denied on August 19, 2016. This appeal followed.

On appeal, defendant argues the trial judge abused her discretion in refusing to relax the Rule 4:21A-6(b)(1) service requirements under the doctrine of substantial compliance. Defendant further asserts the trial court erred in granting summary judgment in favor of plaintiff because genuine issues of material fact precluded the entry of summary judgment. We disagree.

I.

Following the issuance of an arbitration award, the trial court shall,

> upon motion of any of the parties, confirm the arbitration decision, and the action of the court shall have the same effect and be

> enforceable as a judgment in any other action; unless one of the parties petitions the court within 30 days of the filing of the arbitration decision for a trial de novo[.]
>
> [N.J.S.A. 2A:23A-26.]

Rule 4:21A-6(b), in pertinent part, provides:

> An order shall be entered dismissing the action following the filing of the arbitrator's award unless:
>
> (1) within 30 days after filing of the arbitration award, a party thereto files with the civil division manager and serves on all other parties a notice of rejection of the award and demand for a trial de novo[.]

We have said "the requirement of service should be strictly enforced[.]" Jones v. First Nat. Supermarkets, Inc., 329 N.J. Super. 125, 127 (App. Div.), certif. denied, 165 N.J. 132 (2000). "[T]he thirty-day period for filing a demand for a trial de novo may be relaxed only upon a showing of extraordinary circumstances." Flett Assocs. v. S.D. Catalano, Inc., 361 N.J. Super. 127, 131 (App. Div. 2003) (citing Hartsfield v. Fantini, 149 N.J. 611 (1997) and Wallace v. JFK Hartwyck at Oak Tree, 149 N.J. 605 (1997)).

However, "[w]hen a party undertakes to comply with a statutory requirement, but fails to comply strictly, and there is no showing another party has been prejudiced, 'courts invoke the doctrine of substantial compliance to avoid technical defeats of valid claims.'" Corcoran v. St. Peter's Med. Ctr., 339 N.J. Super. 337,

341-42 (App. Div. 2001) (quoting Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 239 (1998)). Indeed, "the substantial compliance doctrine applies to the filing requirement of Rule 4:21A-6(b)(1)." Id. at 342.

In order to avail itself of the substantial compliance doctrine, the moving party must show:

> (1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim, and (5) a reasonable explanation why there was not a strict compliance with the statute.
>
> [Barow, supra, 153 N.J. at 239 (citing Bernstein v. Bd. of Trs., 151 N.J. Super. 71, 76-77 (App. Div. 1977)).]

In Corcoran, supra, 339 N.J. Super. at 337, we said a defendant who mistakenly served a demand for trial de novo to the plaintiffs' original counsel, instead of its substituted counsel, substantially complied with the service requirement when plaintiffs were not prejudiced by the delay, the defendant took a "series of steps" to comply with the service requirement, and the defendant provided a reasonable explanation for its failure to strictly comply. Id. at 343-44. However, in Woods v. Shop-Rite Supermarkets, 348 N.J. Super. 613 (App. Div.), certif. denied, 174 N.J. 38 (2002), the plaintiff did not substantially comply with the service requirement because the plaintiff failed altogether

to serve the defendant with a demand and provided no "explanation for the failure to serve the demand . . . upon defendant." Id. at 618.

Here, defendant did not strictly comply with the service requirement for a trial de novo, and she demonstrated neither substantial compliance nor any extraordinary circumstances.

Since Widman represented itself as to the affirmative fee action, defendant was required to serve both Widman and its counsel. Defendant offers no explanation for not providing notice to Widman separately. Further, her notice to Widman's lawyer was returned undelivered because of an insufficient address. Nowhere in any of her submissions to the motion judge did defendant certify when the undelivered mail was returned to her or what steps she took when she received it.

In support of her motion for reconsideration, defendant secured an unsworn letter from the postmaster stating the postal service cannot confirm when defendant received the returned letter. However, this overlooks the obvious, that defendant herself knows when she received it and omitted such information from her certification in opposition to Widman's motion. The undelivered letter may have been returned within the thirty-day filing period, in which case defendant knew, or should have known, neither Widman nor its lawyer had notice. Despite this knowledge,

defendant did not explain what action she took, if any, until May 20, 2017. As such, defendant did not demonstrate a "series of steps" to comply with the service requirement.

The trial judge found defendant's failure to comply with the strict service requirement prejudiced Widman's ability to prepare for trial, which was scheduled for July 18, 2016, soon after the expiration of the trial de novo filing period.

We discern no error in the court's determination, and find the trial judge properly confirmed the arbitration award.

II.

Defendant further argues the trial court erred in granting summary judgment to Widman on the legal malpractice claim because genuine issues of material fact precluded summary judgment.

We review a grant of summary judgment under the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 145 N.J. 608 (1998). An opposing party who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the un-contradicted facts in the movant's papers. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954)); R. 4:46-2.

In order to survive summary judgment, defendant would have to demonstrate a viable legal malpractice claim. She had to establish: "[1] the existence of an attorney-client relationship creating a duty of care upon the attorney; [2] that the attorney breached the duty owed; [3] that the breach was the proximate cause of any damages sustained; and [4] that actual damages were incurred." Cortez v. Gindhart, 435 N.J. Super. 589, 598 (App. Div. 2014), certif. denied, 220 N.J. 269 (2015) (citation omitted).

Expert testimony is ordinarily required in a legal malpractice case. Kranz v. Tiger, 390 N.J. Super. 135, 147 (App. Div.), certif. denied, 192 N.J. 294 (2007). "Expert testimony is required in cases of professional malpractice where the matter to be addressed is so esoteric that the average juror could not form a valid judgment as to whether the conduct of the professional was reasonable." Sommers v. McKinney, 287 N.J. Super. 1, 10 (App. Div. 1996) (citing Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982)). It follows from this that lack of expert testimony is not fatal to a legal malpractice claim only in the rare cases "where the duty of care to a client is so basic that it may be determined by the court as a matter of law." Ibid. (citing Brizak v. Needle, 239 N.J. Super. 415, 429 (App. Div.), certif. denied, 122 N.J. 164 (1990)).

As the trial court noted, defendant neither submitted a timely expert report nor did she argue her issue was "so basic that it may be determined by the court as a matter of law" and thereby did not require an expert.

Further, though defendant alleged several discovery issues which prevented her from challenging the plaintiff's statement of facts, we find these arguments to be without merit.

First, defendant asserted she was prevented from obtaining her file from Widman for her expert's review. However, she did not seek the court's assistance either by compelling the file's production, moving to extend discovery, or requesting leave to submit the report late. Next, defendant contended her case received an incorrect track assignment, but the judge noted defendant never requested a change of track assignment as set forth under Rule 4:5A-2.

We recognize that the United States Supreme Court stated in Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652, 654 (1972), that a self-represented litigant's pleadings are held to a less stringent standard than an attorney's. However, self-represented litigants are not entitled to greater rights than litigants represented by counsel, and are expected to adhere to the court rules. Rubin v. Rubin, 188 N.J. Super. 155, 159 (App. Div. 1982); Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super.

90, 99 (App. Div. 2014). Moreover, by the time defendant was in the defensive posture of responding to Widman's summary judgment motion she was represented by counsel, yet defendant inexplicably did not challenge plaintiff's statement of material facts.

Accordingly, the trial court correctly granted summary judgment in plaintiff's favor.

III.

Defendant also asserts the court abused its discretion in denying her motion for reconsideration and for a change of track. We disagree.

Reconsideration is reserved "for those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). The decision to deny a motion for reconsideration falls "within the sound discretion of the [trial court], to be exercised in the interest of justice." Ibid. A party's motion for reconsideration "shall state with specificity the basis on which it is made, including a statement of the matters or

controlling decisions which counsel believes the court has overlooked or as to which it has erred." R. 4:49-2.

Defendant's motion does not state with specificity the errors she alleges the trial court made. Thus, defendant failed to show the judge expressed her decision based upon a palpably incorrect or irrational basis. Further, she failed to show that the judge either did not consider, or otherwise failed to appreciate the significance of probative, competent evidence sufficient to vacate the previously entered orders, reopen discovery, and change the track assignment. As such, we discern no error in the trial judge's denial of defendant's motion for reconsideration and to change track.

All additional arguments introduced by defendant are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.