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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-4189-15T2

SEAMUS R. HALLORAN,

Plaintiff-Appellant,

v.

BENJAMIN A. STANZIALE, JR., ESQ.;
STANZIALE & STANZIALE;
MICHAEL DEMARCO; and
DEMARCO & DEMARCO,

Defendants-Respondents.

Argued October 17, 2017 — Decided November 14, 2017

Before Judges Yannotti, Leone and Mawla.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-
0271-14.

Angela M. Roper argued the cause for appellant
(Roper & Thyne, LLC, attorneys; Kenneth S.
Thyne, on the brief).

William F. O'Connor, Jr. argued the cause for
respondents Michael DeMarco and DeMarco &
DeMarco (McElroy, Deutsch, Mulvaney &
Carpenter, LLP, attorneys; Mr. O'Connor, of
counsel and on the brief).

Michael P. Chipko argued the cause for respondents Benjamin A. Stanziale, Jr. and Stanziale & Stanziale (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys; Maxwell L. Billek, of counsel; Mr. Chipko, on the brief).

PER CURIAM

Plaintiff Seamus R. Halloran appeals from an order entered by the Law Division, which granted summary judgment to defendants and denied his cross-motion for leave to file a late expert report. We affirm.

I.

The following facts are taken from the record. On January 9, 2014, plaintiff filed a legal malpractice action against Benjamin A. Stanziale, Jr., Esq., Stanziale & Stanziale (collectively Stanziale), and Michael DeMarco, Esq., and DeMarco & DeMarco (collectively DeMarco) claiming damages arising from a Chapter 7 Bankruptcy proceeding involving real estate owned by plaintiff.

Anthony Rottino and Paragon Federal Credit Union (Paragon) had a competing mortgage on plaintiff's home located in Saddle River (property). Paragon instituted a foreclosure action on the property, and engaged in litigation over mortgage priority against Rottino, who was represented by DeMarco. Plaintiff, who initially was self-represented, asked Rottino if he could recommend an

attorney. Rottino contacted DeMarco, who recommended Stanziale. Plaintiff alleges DeMarco and Stanziale coerced him to file bankruptcy in order to benefit the interests of DeMarco's client, Rottino.

On June 30, 2015, the trial court issued an order extending discovery to October 6, 2015, and requiring plaintiff to submit an expert report by September 21, 2015. On October 9, 2015, the trial court issued a second order extending discovery to January 31, 2016, and requiring plaintiff to submit an expert report by December 1, 2015. This order noted "should the plaintiff fail to comply with this final discovery schedule, the defendants may move to dismiss the matter in accordance with the Court Rules." On December 4, 2015, the trial court issued a third order extending discovery to March 1, 2016, and requiring plaintiff to submit an expert report by January 20, 2016.

On February 19, 2016, the trial court issued a final order extending discovery to March 17, 2016, and requiring plaintiff to submit an expert report by March 17, 2016. The order, which noted trial was scheduled for June 6, 2016, stated: "No further fact witness to be deposed. All parties have had more than sufficient time to depose whatever fact witnesses they required. Matter has already had in excess of 749 days of discovery." The order further noted: "There shall be no further extensions of the discovery end

date except upon a showing of exceptional circumstances." Plaintiff failed to submit an expert report within the time required.

On March 22, 2016, Stanziale filed a motion for summary judgment due to plaintiff's failure to submit an expert report. On March 31, 2016, plaintiff submitted a letter to the court requesting an additional six weeks to file an expert report. Plaintiff alleged his expert, Bennett Wasserman, Esq. (Wasserman), discovered a conflict and informed him of it on March 29, 2016, twelve days after the March 17 due date set forth in the February 19 order. This was the first time plaintiff identified Wasserman as a potential expert. Plaintiff's letter claimed "counsel for one of the defendants was a member of a firm with whom [Wasserman] had a conflict."

On April 1, 2016, DeMarco filed a motion for summary judgment for plaintiff's failure to submit an expert report. On April 18, 2016, plaintiff filed an opposition to the motions for summary judgment and a cross-motion to permit the late submission of an expert report. Plaintiff requested permission to submit a substitute expert report by Anthony Ambrosio, Esq. (Ambrosio).

On April 29, 2016, the trial court issued an order denying plaintiff's cross-motion for leave to permit the late submission of an expert report, and granted the Stanziale and DeMarco motions

for summary judgment. Plaintiff's expert report was barred because it was not submitted in a timely fashion. Because plaintiff could not sustain his legal malpractice claim against Stanziale and DeMarco without expert testimony, plaintiff's complaint was dismissed on summary judgment with prejudice. Plaintiff now challenges this order.

II.

Our review of the order granting summary judgment is de novo. Graziano v. Grant, 326 N.J. Super. 328, 338 (App. Div. 1999). We "review the trial court's grant of summary judgment under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). The court considers all of the evidence submitted "in the light most favorable to the non-moving party," and determines if the moving party is entitled to summary judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The court may not weigh the evidence and determine the truth of the matter. Ibid. If the evidence presented "show[s] that there is no real material issue, then summary judgment should be granted." Walker v. Atl. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987) (citing Judson v. Peoples Bank and Tr. Co. of Westfield, 17 N.J. 67, 75 (1954)).

Plaintiff argues the trial court erred in dismissing his complaint with prejudice. He asserts the court's desire to expedite cases and principles of judicial economy should not be at the expense of dispensing justice to the aggrieved party. Plaintiff asserts the trial court's dismissal of his complaint was a substantial sanction and that a lesser sanction was appropriate. He argues his claims warrant review on the merits, and the trial court's dismissal does not achieve this result.

As a preliminary matter, the parties do not dispute plaintiff's legal malpractice claim could not proceed without an expert report. Indeed, plaintiff contended he consulted with DeMarco and Stanziale regarding the foreclosure of his home, and alleged they "advised [him] to file bankruptcy, and indicated that [he] would emerge from the bankruptcy and retain his interest in his home and a sizeable payment for his interest." Moreover, plaintiff alleged DeMarco "used the bankruptcy petition to prevent the exposure of Rottino's fraud in the pending Paragon litigation," and "[t]he bankruptcy petition was not filed to benefit [him], but to benefit the interests of DeMarco's client, Rottino." He alleged DeMarco's and Stanziale's conduct "was a deviation from the standards of practice." Plaintiff was required to adduce an expert report to prove these claims.

"[I]n nearly all malpractice cases, plaintiff need[s] to produce an expert regarding deviation from the appropriate standard." Garcia v. Kozlov, 179 N.J. 343, 362 (2004) (citing Brach, Eichler, P.C. v. Ezekwo, 345 N.J. Super. 1, 12 (App. Div. 2001)); see also N.J.S.A. 2A:53A-27. "As the duties a lawyer owes to his client are not known by the average juror, expert testimony must necessarily set forth that duty and explain the breach." Buchanan v. Leonard, 428 N.J. Super. 277, 288 (App. Div. 2012) (quoting Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 78 (App. Div. 2007)) (citation omitted).

Where the standard of care that should guide an attorney in the situation presented would not be readily apparent to persons of average intelligence and ordinary experience, the assistance of an expert opinion is required. See id. at 289. A plaintiff's failure to produce expert testimony in legal malpractice claims is often fatal. See Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 214 (App. Div. 2014).

Thus, expert testimony on plaintiff's behalf was the only means to adduce the necessary proofs to sustain plaintiff's malpractice action against defendants. For the reasons set forth in the next section, the trial court properly denied plaintiff's motion to file a late expert report, which was a prerequisite for offering expert testimony. Therefore, summary judgment was

appropriately granted here because plaintiff lacked any means to prove his malpractice claim to a trier of fact.

III.

Plaintiff argues the late filing of his expert report was not his fault. Specifically, plaintiff asserts he was unable to produce an expert report in a timely fashion because Wasserman alerted plaintiff to an alleged conflict shortly before his report was due. This required plaintiff to retain Ambrosio, who could only produce a report after the expiration of the discovery, thus necessitating an extension of the discovery end date. Plaintiff argues the trial court's dismissal of his claim with prejudice is contrary to the law. He argues the discovery deadline would only be extended by one month, the delay was not caused by plaintiff or his attorney, and defendants would not be prejudiced by an extension of the discovery deadline. We disagree.

"The right of a trial court to manage the orderly progression of cases before it has been recognized as inherent in its function." Casino Reinvestment Dev. Auth. v. Lustgarten, 332 N.J. Super. 472, 488 (App. Div.), certif. denied, 165 N.J. 607 (2000). "As it relates to extensions of time for discovery, appellate courts . . . have [] generally applied a deferential standard in reviewing the decisions of trial courts." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011) (citing Rivers v. LSC

P'ship, 378 N.J. Super. 68, 82-83 (App. Div.), certif. denied, 185 N.J. 296 (2005)). "[W]e apply the same deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard." Ibid. This court "generally defer[s] to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Rivers, supra, 378 N.J. Super. at 80 (citing Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997)). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

"No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." R. 4:24-1(c). To demonstrate exceptional circumstances, the moving party must demonstrate "legitimate problems beyond mere attorney negligence, inadvertence or the pressure of a busy schedule." Pressler & Verniero, Current N.J. Court Rules, cmt. 3 to R. 4:24-1 at 1829 (2018). In Rivers, supra, 378 N.J. Super. at 82-83, we stated that the "'exceptional

circumstances' requirement warranting an extension of discovery will not excuse the late request to secure expert reports, or . . . the absence of expert opinion to support plaintiff's liability claims, which is fatal to [plaintiff's] case, where [plaintiff's] counsel failed to exercise due diligence during the discovery period."

Plaintiff's arguments on appeal are not supported by the record and lack context. The record does not show Wasserman alerted plaintiff to the alleged conflict before his report was due. In any event, plaintiff did not alert the court of the alleged Wasserman conflict until two weeks after the deadline, and after Stanziale had moved for summary judgment. Plaintiff did not file a timely motion or attempt to submit the Ambrosio expert report until April 18, 2016, more than a month after it was due, and after the trial court had already extended the discovery deadline four times. As an explanation for the exceptional circumstances, plaintiff submitted a certification to the trial court on March 31, 2016 stating:

Wasserman became aware that counsel for one of the defendants was a member of a firm with whom he had a conflict. Mr. Wasserman had not previously realized this conflict when he indicated that he would render a report in this matter. . . . Mr. Wasserman has indicated that while he had previously agreed to provide a legal malpractice expert report in this

matter, he now feels uncomfortable doing so because of this conflict.

The trial court stated:

In the instant case, plaintiff asserts that on March 29, 2016, his expert, Mr. Wasserman, determined that he could not serve as an expert because of an alleged conflict. Nowhere in the papers submitted in support of the cross-motion does plaintiff or Mr. Wasserman ever describe the nature of the conflict. Furthermore, Mr. Wasserman's disclosure regarding the alleged conflict did not take place until two weeks after his expert report was due (March 17, 2016) in accordance with the February 19 order.

. . . .

It is simply inconceivable to this court that Mr. Wasserman only realized he had a conflict in this matter on March 29, 2016 (after his expert report was due).

. . . .

In this case, Plaintiff attempted to serve its expert report from Mr. Ambrosio on April 18, 2016, well after the time for providing such report was required under the February 19 order and all other prior order[s] entered by the court. Plaintiff's counsel provides a cursory certification to support the late filing which is insufficient. Plaintiff's counsel makes no certification and fails to set forth any facts demonstrating due diligence and proffers no adequate explanation for the delay.

Furthermore, if this court were to permit plaintiff to now serve its late expert report, defendants would be unduly prejudiced in preparing their defense in this matter since defendants would then be required within less

than 30 days to obtain their own expert report and to prepare for the June 6 trial. Additionally, at this late date, further extension to allow for discovery will only unduly lengthen the already protracted discovery in this matter and perhaps necessitate an adjournment of the trial. Since more than 800 days of discovery have already passed in the matter, there is no reasonable justification for further delay at this late date.

For all of these reasons set forth above, the court finds no exceptional circumstances which would allow plaintiff to provide his late expert report from Mr. Ambrosio.

The trial court's reasoning is sound. Plaintiff's certification was submitted after the already extended discovery end date and failed to identify any facts demonstrating due diligence. Plaintiff offered no explanation for the delay in securing an expert report during the over 800 days of discovery and after four discovery extensions by the trial court.

At oral argument, plaintiff blamed defendants' failure to schedule deposition dates as a reason for the late submission of his expert report. This does not constitute exceptional circumstances as plaintiff could have sought enforcement of the discovery deadlines before expiration of the discovery end date. We fail to see how extending discovery for a fifth time with an impending trial, satisfies the goals of an expeditious resolution

of this dispute for plaintiff, and accords defendants justice and an opportunity to defend plaintiff's claims.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION