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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4347-14T2

THE ESTATE OF JOAN RUSSO
BY NICHOLAS RUSSO, ADMINISTRATOR
AND ADMINISTRATOR AD PROSEQUENDUM
OF THE ESTATE OF JOAN RUSSO
and NICHOLAS RUSSO, INDIVIDUALLY,

Plaintiffs-Appellants,

v.

SOMERSET MEDICAL CENTER;
DR. KIRAN CHAUDHRY; and
DR. NARINDER DHILLON-ATHWAL,

Defendants-Respondents,

and

STAFF OF SOMERSET MEDICAL CENTER,
INCLUDING NURSES AND OTHER HEALTH
CARE PERSONNEL; DR. CHAN MEI-YOUNG;
DR. SHEHZANA ASHRAF; DR. CHRISTINE
IBRAHIM; LOIS TALTY, NURSING
SUPERVISOR; DR. AMAVISCU and
DR. SUBRATI,

Defendants.

Argued January 25, 2017 – Decided February 15, 2017

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1327-12.

Louis J. Santore argued the cause for appellants.

Raymond J. Fleming argued the cause for respondent Somerset Medical Center (Sachs, Maitlin, Fleming, & Greene, attorneys; Mr. Fleming, of counsel and on the brief; Christopher Klabonski, on the brief).

Patricia M. Watson argued the cause for respondents Dr. Kiran Chaudhry and Dr. Narinder Dhillon-Athwal (MacNeill, O'Neill & Riveles, LLC, attorneys; Jay Scott MacNeill, of counsel; Ms. Watson, on the brief).

PER CURIAM

In this medical malpractice case, plaintiff appeals from companion orders entered on February 20, 2015, which granted summary judgment to defendants Dr. Kiran Chaudhry and Dr. Narinder Dhillon-Athwal and denied plaintiff's motion to extend discovery. Plaintiff also appeals from April 24, 2015 orders that granted summary judgment to defendant Somerset Medical Center ("SMC") and denied reconsideration of the discovery extension motion. We affirm.

Joan Russo ("decedent") was seventy-four years old when she died on October 14, 2010, one day after being admitted to SMC for treatment of deep vein thrombosis. On October 1, 2012, plaintiff Nicholas Russo, individually and in his capacity as administrator

of decedent's estate, filed this action alleging medical malpractice by defendants and others who allegedly treated decedent at SMC.

The court conducted a case management conference (CMC) on July 22, 2013, and entered a case management order (CMO) on that date requiring plaintiff's expert report be produced by December 30, 2013. The CMO also established May 30, 2014, as the discovery end date (DED).

The court held another CMC on February 3, 2014, and entered a second CMO extending the date for plaintiff's expert report to May 30, 2014, and the DED to July 30, 2014. On August 4, 2014, a third CMC was conducted, at which the court ordered that the "final report" of plaintiff's expert, Kevin E. Bell, M.D., be produced by August 29, 2014, and the DED was extended to January 16, 2015. A trial notice dated August 11, 2014, originally scheduled trial for October 20, 2014. Trial was thereafter rescheduled for April 20, 2015.

Dr. Bell's narrative report is dated August 5, 2014, and is approximately one and one-half pages in length. It recounts decedent's admission to SMC on October 13, 2010, "with an extensive right lower extremity deep vein thrombosis." The next day, she "lost consciousness in the bathroom and sustained a head injury. She was resuscitated, and later had a second cardiac arrest with

pulseless electrical and died at 7:48 [on] October 14, 2010." Dr. Bell concluded his report as follows:

> I await full discovery before writing my final report in this matter but there are some clear deviations from accepted standards of care in the treatment of Joan Russo during her [SMC] [h]ospitalization.
>
> 1. With the past history of a DVT and pulmonary embolism with the new deep vein thrombosis, a venous filter should have been placed to prevent pulmonary embolism.
>
> 2. Her dose of Coumadin should have been adjusted to take into account her age and low platelet count.
>
> 3. With the aforementioned risk factors for a fall, that is a lower extremity clot, age greater than [seventy] and the knowledge she was on a blood thinner with low platelets, fall precautions should have been in place to prevent injuries such as the one that occurred on October 14, 2010.

Dr. Bell's August 5, 2014 report was the sole expert report produced by plaintiff during the extended discovery period. Efforts to take Dr. Bell's deposition were impeded by scheduling difficulties, including Dr. Bell's limited availability, and ultimately defendants opted not to depose him.

Following the close of discovery, Drs. Dhillon-Athwal and Chaudhry moved for summary judgment on the ground that Dr. Bell: did not attribute any of the deviations listed in his report to them; failed to opine how the alleged deviations proximately caused

injury or death to decedent; and failed to offer an opinion as to decedent's cause of death. Plaintiff opposed the motion, and on February 11, 2015, moved to extend discovery in order to produce Dr. Bell for a deposition. Plaintiff argued that "exceptional circumstances" existed warranting an extension, including an eye injury plaintiff's counsel sustained in May 2014, a heart attack suffered by counsel's secretary in February 2013, and that counsel had been unaware Dr. Bell had a past relationship with both defense counsel.

On February 20, 2015, Judge Edward M. Coleman denied plaintiff's motion to extend discovery and entered summary judgment in favor of Drs. Dhillon-Athwal and Chaudhry. In a comprehensive written opinion, the judge reasoned:

> While the [c]ourt is sympathetic to [p]laintiff's counsel's misfortunes, as the [m]oving [d]efendants point out, Dr. Bell has been [p]laintiff's expert since the infancy of this matter, and discovery has already been extended three times. The [c]ourt acknowledges that a denial of [p]laintiff's motion for an extension of discovery would be fatal to [p]laintiff's claim as to the [m]oving [d]efendants. However, the [c]ourt does not find that exceptional circumstances exist in this matter that would warrant a grant of [p]laintiff's requested relief, nor is there any reason for the [c]ourt to relax the requirements regarding extension of discovery when a trial date has been set. Plaintiff argues that there was difficulty in getting dates from [p]laintiff's expert, Dr. Bell, for deposition. As mentioned, Dr. Bell

> has been involved in this case close to its inception and [p]laintiff does not offer any legitimate excuse as to why she could not schedule her own expert for a deposition sooner. Accordingly, the [c]ourt denies [p]laintiff's cross-motion to extend discovery.
>
> Given this denial of an extension for discovery, as mentioned above, the [c]ourt finds that summary judgment is appropriate. Plaintiff's expert report does not mention either of the [i]ndividual [d]efendants, and it fails to identify which if any [d]efendants deviated from accepted standards of care, or how the deviations enumerated in that report caused any injuries to or the death of Joan Russo. Plaintiff's expert has not even issued a final report, nor has [p]laintiff offered any reason as to why there has been such a delay. Further, counsel for [d]efendants represented during oral argument on this motion that they will not be taking the deposition of Dr. Bell and therefore argue for summary judgment based on Dr. Bell's submitted report, which the [c]ourt has already stated fails to identify which [d]efendants deviated from the accepted standards of care and how such deviations caused injuries to the decedent. Therefore, [p]laintiff cannot prove her claims against these two individuals. Additionally, the [c]ourt agrees that neither res ipsa loquitur nor the [d]octrine of [c]ommon [k]knowledge apply in this matter, nor does [p]laintiff make an argument that either should apply.

SMC thereafter moved for summary judgment on grounds similar to those advanced by Drs. Dhillon-Athwal and Chaudhry. SMC also sought dismissal of plaintiff's respondeat superior claims based on the fact that summary judgment had now been granted dismissing

plaintiff's claims on the merits against the co-defendant doctors. Plaintiff again opposed the motion, and moved for reconsideration of the order denying a discovery extension.

On April 24, 2015, Judge Coleman found that plaintiff did not meet "his burden on a standard for reconsideration. Plaintiff has not argued that any 'exceptional circumstances' exist that warrant reconsideration of the [c]ourt's denial of his motion to extend discovery." The judge again noted that defendants did not intend to depose Dr. Bell. "Therefore, there was and still is no necessity for discovery to be re-opened."

Judge Coleman also noted his prior ruling that plaintiff had failed to prove any wrongful acts by the co-defendant doctors. Accordingly, he concluded:

> Plaintiff would not be able to succeed on the respondeat superior claim against [SMC] if [p]laintiff cannot prove in the first instance that any of the co-[d]efendant doctors were negligent. As a result, there is no vicarious liability on the part of [d]efendant hospital. . . . Accordingly, to the extent that [p]laintiff's claims against [SMC] are based on a theory of respondeat superior, the [c]ourt dismisses these claims and grants summary judgment in favor of [SMC]. Further, the [c]ourt does not find that [p]laintiff alleges any claim against [SMC] other than those claims sounding in vicarious liability. Therefore, the [c]ourt finds that [SMC's] motion for summary judgment should be granted in its entirety.

Plaintiff appeals from the February 20, 2015 and April 24, 2015 orders. He argues, among other things, that: (1) the court erred in failing to find exceptional circumstances existed that warranted an extension of discovery; (2) Dr. Bell's opinion was supported by the factual evidence and was not a net opinion; and (3) Dr. Bell's opinion was sufficient to allow plaintiff to proceed on a theory of res ipsa loquitur, thus rendering summary judgment inappropriate. Having reviewed the record, we find insufficient merit in plaintiff's arguments to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated in Judge Coleman's thoughtful written opinions. We add only the following comments.

Defendant's motion to extend discovery was governed by Rule 4:24-1(c), which provides that, regardless of the consent of the parties, "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." As we have explained, to obtain an order extending discovery based upon "exceptional circumstances," the moving party must satisfy four criteria:

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period;

> and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
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> [Rivers v. LSC P'ship, 378 N.J. Super. 68, 79 (App. Div.), certif. denied, 185 N.J. 296 (2005).]

In reviewing on appeal the application of these factors, we accord considerable deference to the trial court. Generally speaking, we do not second-guess the trial court's rulings on discovery matters unless the court has manifestly abused its discretion. See, e.g., Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011); Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997).

"Exceptional circumstances" were not present in this case. We find that the trial court acted within its discretionary authority in denying plaintiff's motion. We discern no circumstances beyond plaintiff's control that prevented him from timely completing discovery, especially considering two generous extensions of the DED were previously granted. In any event, the fact that defendants chose not to depose Dr. Bell rendered plaintiff's request for an extension moot.

We review summary judgment decisions de novo and apply the same standard utilized by the trial court, namely, whether the evidence, when viewed in a light most favorable to the non-moving party, raises genuinely disputed issues of fact sufficient to

warrant resolution by the trier of fact or whether the evidence is so one-sided that one party must prevail as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

Guided by this standard, we conclude that summary judgment was properly granted. Dr. Bell's report fails to support a claim of negligence. Although it sets forth deviations from accepted standards of care, it fails to identify which, if any, defendants deviated or how the deviations enumerated in the report caused injury or death to the decedent.

Finally, plaintiff seeks to establish an inference of negligence by reliance upon the doctrine of res ipsa loquitur. Res ipsa loquitur, a Latin phrase meaning "the thing speaks for itself," permits an inference of negligence, establishing, in turn, a prima facie case of negligence. Jerista v. Murray, 185 N.J. 175, 191-92 (2005). In order to invoke the doctrine, a plaintiff must establish that "(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality [causing the injury] was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect." Mayer v. Once Upon a Rose, Inc., 429 N.J. Super. 365, 373 (App. Div.

2013) (quoting Szalontai v. Yazbo's Sports Cafe, 183 N.J. 386, 398 (2005)); Buckelew v. Grossbard, 87 N.J. 512, 525 (1981) (quoting Bornstein v. Metro. Bottling Co., 26 N.J. 263, 269 (1958)).

The mere existence of a possibility of a defendant's responsibility for a plaintiff's injuries is insufficient to impose liability. Szalontai, supra, 183 N.J. at 399.

> In the absence of direct evidence, it is incumbent upon the plaintiff to prove not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference . . . and would exclude the idea that it was due to a cause with which the defendant was unconnected.
>
> [Ibid. (citation omitted).]

The doctrine is inapplicable if it is equally likely that the negligence causing the injury "'was that of someone other than the defendant.'" Bornstein, supra, 26 N.J. at 273 (citation omitted).

While plaintiff was not required to exclude all other possible causes of decedent's death, he was at least required to establish that it is more probable than not that defendants' conduct was the proximate cause of her death. See Jerista, supra, 185 N.J. at 192. Plaintiff failed to do so here. The trial court properly determined that negligence could not be inferred from Dr. Bell's report, since there was no evidence of the cause of decedent's death, and Dr. Bell did not opine if, or how, the enumerated deviations caused her injury or death. "Res ipsa loquitur is not

a panacea for the less-than-diligent plaintiff or the doomed negligence cause of action." Szalontai, supra, 183 N.J. at 400.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION