SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5300-14T3

YVONNE M. MARRERO,

Plaintiff-Appellant,

v.

NEW JERSEY EYE CENTER, P.A.
d/b/a DELLO RUSSO LASER VISION,

Defendant-Respondent.

Submitted September 27, 2016 – Decided April 24, 2017

Before Judges Reisner, Rothstadt, and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-2384-13.

The Perez Law Firm, LLC, attorneys for appellant (Santos A. Perez, on the brief).

Biancamano & DiStefano, P.C., attorneys for respondent (George Karousatos, of counsel; Andrew Marra, on the brief).

PER CURIAM

Plaintiff Yvonne M. Marrero appeals from Law Division orders granting defendant New Jersey Eye Center, P.A.'s motions to dismiss

in lieu of an answer and summary judgment resulting in the dismissal of the entirety of her complaint. Plaintiff also appeals discovery orders: denying her two motions to strike defendant's answer and counter-claim; denying her motion for reconsideration of the motion to strike defendant's answer and/or compel defendant's discovery responses; granting defendant's cross-motion to extend discovery; and granting defendant's two motions to compel her deposition. After reviewing the record, in light of the contentions advanced on appeal, we affirm.

I.

We begin with a brief background, reciting only those facts and procedural history from the record that are necessary for our decision. Plaintiff began working for defendant in October 2007, as a receptionist. Defendant, a business owned by Joseph Dello Russo, M.D., provides eye exams, contact lenses, eyeglasses, and cataract surgery. Dr. Russo also owns Laser Eye Institute, L.L.C., which comprises four separate L.L.C.'s operating as Dello Russo Laser Vision centers providing lasik surgery in the New Jersey and New York metropolitan area.

At the end of December 2012, plaintiff used five days of authorized vacation time to assist her mother who had suffered a heart attack. According to plaintiff, she advised a co-worker that she would be out of work on January 4, 2013 due to her

mother's worsening condition. On January 12, plaintiff submitted a letter to defendant requesting personal leave from January 21 to February 11, without stating the reasons. That same day, defendant issued a memo approving plaintiff's paid leave from work for a different period, January 14 through January 20, and specified that any absence after that period would be unpaid. The record is unclear why leave was granted for a different period than plaintiff requested. On January 14, plaintiff's mother passed away. Two weeks later, on January 28 or 29, she telephoned defendant to report her loss.

In a February 1 email to plaintiff, defendant terminated plaintiff for reasons detailed in an attached letter. The letter asserted that plaintiff took a leave of absence to "'reconsider' [her] time here," and that she sought employment elsewhere but defendant declined her request to return to work because of numerous performance issues. The letter also asked plaintiff to sign an attached separation agreement, which provided that her employment was terminated effective January 19 and she would be paid a lump sum separation payment of $3293 gross earnings (minus required withholdings) in exchange for releasing any claims against defendant arising from her employment.

Plaintiff did not sign the separation agreement. Instead, four months later, she sued defendant in a seven-count complaint

alleging: violation of the Federal Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 to 2654, and its state counterpart, the New Jersey Family Leave Act (NJFMLA), N.J.S.A. 34:11B-1 to -16; violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49; workplace harassment in violation of 42 U.S.C. § 2000e; intentional infliction of emotional distress; negligent infliction of emotional distress; and breach of contract. In response, defendant filed a Rule 4:6-2(e) motion to dismiss in lieu of answer. On June 27, the motion court dismissed all claims without prejudice except those alleging violations of FMLA/NJFMLA and for breach of contract.

The ensuing discovery period was contentious resulting in numerous motions. On March 13, 2014, the court granted plaintiff's motion compelling defendant to answer interrogatories. On February 6, 2015, it denied plaintiff's motion to strike defendant's answer and dismiss its counterclaim with or without prejudice due to deliberate delay of discovery, and granted defendant's cross-motion to extend discovery and compel plaintiff's deposition. Plaintiff's reconsideration motion regarding that order was denied on March 6, but the court granted defendant's cross-motion to re-depose plaintiff because her deposition was curtailed when her father fell ill and she also failed to produce requested documents. On May 1, plaintiff's

motion seeking reconsideration of the February 6 and March 6 orders was denied and discovery was extended again to allow for plaintiff's re-deposition.

Less than thirty days before the trial, Judge Rudolph A. Filko, who did not rule on the Rule 4:6-2(e) motion to dismiss but ruled on all the discovery motions except the initial motion, accorded defendant the opportunity to move for summary judgment to dismiss the balance of plaintiff's claims. On June 12, 2015, the judge issued an order dismissing plaintiff's FMLA/NJFMLA and breach of contract claims.

Judge Filko determined that the FMLA/NJFMLA did not apply to defendant because it did not employ at least fifty employees. The judge rejected plaintiff's contention that defendant was integrated with the four lasik vision centers to satisfy the minimum employee requirement. The judge reasoned that the five entities had separate federal tax identification numbers, different payrolls, and were operationally and financially independent. Furthermore, the judge found that combined, the entities employed no more than forty-three employees. The other remaining claim, breach of contract, was also dismissed based on the finding that there was no evidence of a contract between the parties. The judge found support in defendant's employee manuals and human resources records, which stated that defendant's

employees are employed at-will without employment contracts. This appeal followed.

II.

Initially, we address plaintiff's argument that she was deprived of outstanding discovery thereby making summary judgment premature. In particular, plaintiff contends that defendant waited until its reply to her summary judgment opposition to provide a certification regarding the number of employees in all of the entities in which Dr. Della Russo held an interest. She also asserts that the judge should not have considered the certification, and by estoppel should have applied the FMLA/NJFMLA for equitable reasons. We disagree.

Appellate review of a ruling on a motion for summary judgment is de novo, applying the same standard governing the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). Thus, we consider, as the motion judge did, "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 406 (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, (1995)). "If there is no genuine issue of material fact," an appellate court must then "decide whether the trial court correctly interpreted the law."

DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). We accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013) (citing Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009)). With these principles in mind, we conclude that there is no reason to disturb the motion judge's grant of summary judgment dismissing the balance of plaintiff's complaint.

We first point out that plaintiff's contention that the FMLA/NJFMLA should apply due to estoppel was not raised before the motion judge and will not be considered on appeal because it does not "go to the jurisdiction of the trial court or concern matters of great public interest." Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

As for the alleged incomplete discovery, we are satisfied that it was not an impediment to considering and granting summary judgment. We recognize that defendant's interrogatory answers could have been more forthcoming. However, it was incumbent upon plaintiff to file a motion to seek answers that were more responsive. Plaintiff instead filed a motion to strike defendant's interrogatory answers, which the motion court denied, yet extended discovery and allowed plaintiff to depose Dr. Della Russo. Thus,

plaintiff had ample opportunity to conduct discovery regarding the doctor's various vision care operations. Moreover, plaintiff fails to indicate how further discovery would have revealed evidence that defendant employed more than fifty employees among the combined entities.

We agree with Judge Filko that the protections of the FMLA/ NJFMLA should not be afforded to plaintiff. Both statutes allow an employee to take an unpaid leave to care for a family member with a serious medical condition. 29 U.S.C.A. § 2612(b)(1); N.J.S.A. 34:11B-3(g). For either statute to apply, the employer must employ "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C.A. § 2611(4)(A)(i); see also, N.J.S.A. 34:11B-3(f)(3). Combining all the employees of entities that plaintiff contends are under defendant's control amounts to forty-three employees and falls short of the required fifty employees. At the summary judgment argument plaintiff conceded she could not dispute that fact.

We next address the dismissal of plaintiff's breach of contract claim. Plaintiff argues that the court did not provide her with sufficient time to respond to the summary judgment motion in which defendant for the first time addressed the merits of the breach of contract argument. She nonetheless contends for the

first time on appeal that under Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. 284 (1985) modified, 101 N.J. 10, 297-98 (1985), she had a contract with defendant because its employee manual provided that she be entitled to certain benefits. We disagree.

We do not address plaintiff's Woolley claim because she did not raise it before the motion court. Zaman, supra, 219 N.J. at 226-27. Moreover, we conclude the argument lacks merit. There is nothing in the employee manual that affords defendant's employees a leave of absence to care for a family member as provided by the FMLA/NJFMLA. In fact, the manual specifically provides that such leave is only available at a location with at least fifty employees. As noted, that threshold was not met even if all the employees of Dr. Della Russo's five entities were combined. Further, plaintiff had the opportunity during the discovery to obtain the necessary proofs to prosecute her contract claim but did not do so. There is no merit to avoiding summary judgment by contending that she did not have time to identify the facts and the law to support her claim.

Next, we address plaintiff's argument that the court erred in granting defendant's Rule 4:6-2(e) motion to dismiss her negligent and intentional infliction of emotional distress claims. She contends she was subjected to emotional distress when she was demoted at a meeting on January 4, 2013, and later terminated

effective on January 19, in retaliation for taking time off to care for her ill mother. Yet, plaintiff argues that to the extent her complaint does not properly address negligent and intentional infliction of emotional distress, she seeks leave to amend the complaint. We see no merit to this argument.

Our review of a trial court's dismissal of a complaint pursuant to Rule 4:6-2 is de novo. Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 287 (App. Div. 2014). "[O]ur inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Green v. Morgan Props., 215 N.J. 431, 451 (2013) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). Accordingly, "[t]he essential test is simply 'whether a cause of action is "suggested" by the facts.'" Ibid. (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Thus, we must "search[] the complaint in depth and 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." Id. at 452 (quoting Printing Mart-Morristown, supra, 116 N.J. at 746).

Our review is "one that is at once painstaking and undertaken with a generous and hospitable approach." Ibid. (quoting Printing Mart-Morristown, supra, 116 N.J. at 746). Nonetheless, dismissal is required "where the pleading does not establish a colorable

claim and discovery would not develop one." State v. Cherry Hill Mitsubishi, Inc., 439 N.J. Super. 462, 467 (App. Div. 2015).

Applying these standards, we are convinced that plaintiff's complaint did not set forth colorable claims of negligent or intentional infliction of emotional distress and were properly dismissed without prejudice on defendant's Rule 4:6-2(e) motion. We agree with the motion judge's reasoning that there was insufficient pleading of intentional infliction of emotional distress because the gravamen of the complaint was wrongful termination without any alleged harassment by defendant. As for negligent infliction of emotional distress, he found that the complaint failed to set forth the elements of the claim as articulated in Jablonowska v. Suther, 195 N.J. 91 (2008).[1] We do not address plaintiff's argument that she should be permitted to amend her complaint because she did not request such permission

[1] Plaintiff must allege that:"(1) the defendant's negligence caused the death of, or serious physical injury to, another; (2) the plaintiff shared a marital or intimate, familial relationship with the injured person; (3) the plaintiff had a sensory and contemporaneous observation of the death or injury at the scene of the accident; and (4) the plaintiff suffered severe emotional distress." Id. at 103 (citing Portee v. Jaffee, 84 N.J. 88, 97 (1980).

from the motion court following the dismissal without prejudice. Zaman, supra, 219 N.J. at 226-27.

Plaintiff's remaining arguments address discovery orders, reconsideration of those orders, and the court's decision not to impose the sanction of attorney fees for alleged discovery violations. We review these orders for abuse of discretion. See State v. Enright, 416 N.J. Super. 391, 404 (App. Div. 2010), certif. denied, 205 N.J. 183 (2011) (discovery order); Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 462 (App. Div.), certif. denied, 174 N.J. 544 (2002) (motion for reconsideration); Rendine v. Pantzer, 141 N.J. 292, 317 (1995) (order for attorney fees). From our review of the record, we are convinced there was no abuse of discretion. Plaintiff's arguments are without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed.