SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0832-15T2

BARRY HIRSCHBERG and
ELIZABETH HIRSCHBERG,

Plaintiffs-Appellants,

v.

FIDELITY NATIONAL TITLE
INSURANCE COMPANY, THE
ESTATE OF SYDNEY STOLDT and
GOODMAN, STOLDT & HORAN,

Defendants-Respondents,

and

JENSEN & MAROTTA ASSOCIATES,
INC., DAN JENSEN and J & M
TITLE SERVICES, INC.,

Defendants.

Argued January 17, 2018 – Decided February 9, 2018

Before Judges Fuentes, Manahan and Suter.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4468-13.

Barry Hirschberg, appellant, argued the cause pro se.

Hugh A. Keffer argued the cause for respondent Fidelity National Title Insurance Company (Fidelity National Law Group, attorneys; Hugh A. Keffer, on the brief).

Joanna Piorek argued the cause for respondents the Estate of Sydney Stoldt and Goodman, Stoldt & Horan (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys; Joanna Piorek, of counsel and on the brief; Michael McAndrew, on the brief).

PER CURIAM

Plaintiffs Barry and Elizabeth Hirschberg (the Hirschbergs) appeal from three orders of the Law Division, which resulted in the dismissal of their claims against defendants Fidelity National Title Insurance Company (Fidelity), the Estate of Sydney Stoldt, and Goodman, Stoldt & Horan (collectively, the Stoldt defendants).

On appeal, the Hirschbergs raise the following points:

POINT [I]

THE COURTS BELOW ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE AND BECAUSE THE CRITERIA FOR GRANTING SUMMARY JUDGMENT HAVE NOT BEEN MET.

POINT [II]

THE COURTS ERRED IN SUMMARY JUDGMENT WHICH WAS IMPROVIDENTLY GRANTED AGAINST THE WEIGHT OF THE EVIDENCE.

POINT [III]

THE LOWER COURTS ERRED IN DISMISSING PLAINTIFFS CONSUMER FRAUD CLAIM BECAUSE THEY MISINTERPRETED THE GENUINE ISSUES OF MATERIAL

FACTS AS TO WHETHER SECURITY VIOLATED BASIC STATUTORY AND CONTRACTUAL OBLIGATIONS WHICH CONSTITUTE AN UNCONSCIONABLE COMMERCIAL PRACTICE UNDER THE CONSUMER FRAUD ACT.

POINT [IV]

PLAINTIFFS' CLAIMS ARE NOT BARED [SIC] BY THE DOCTRINE OF COLLATERAL ESTOPPEL BECAUSE THE CASE AT HAND, AS IT RELATES TO THE SMOTHERGILL MATTER, DOES NOT SATISFY THE COLLATERAL ESTOPPEL REQUIREMENTS.

POINT [V]

THE ORDERS GRANTING SUMMARY JUDGMENT ARE CONTRARY TO RULE 4:46-3 CASE NOT ADJUDICATED ON MOTION, AND RULES 1:7-4(A) REQUIRED FINDINGS AND 1:7-5 TRIAL ERRORS.

POINT [VI]

THE COURTS' ERRED BY IGNORING THE PLEADED CLAIMS RESULTING IN THE UNWARRANTED GRANTING OF SUMMARY JUDGMENT BECAUSE OF THE FALSE, MISLEADING AND UNSUPPORTED STATEMENTS AND MISREPRESENTATIONS OF FACTS MADE BY BOTH DEFENDANTS.

POINT [VII]

ISSUES OF CREDIBILITY AND THE FACTS REQUIRE THE DENIAL OF SUMMARY JUDGMENT.

POINT [VIII]

THE SMOTHERGILL LITIGATION RECORD SUPPORTS PLAINTIFFS' ARGUMENT OF LEGAL MALPRACTICE, NEGLIGENCE AND CONSUMER FRAUD BECAUSE THE CLAIMS ASSERTED IN THAT MATTER EMINATED [SIC] FROM THE MALFEASANCE IN 1978 OF STOLDT AND FIDELITY DEFENDANTS.

POINT [IX]

THE CONTINUING RELIANCE BY OTHERS ON THE EXISTENCE OF THE TERMINATED GERMAN [SIC] RIGHT OF WAY GRANTED BY DEED BOOK 776, PAGE 258[,] CONTINUE TO BE A SOURCE OF UNWARRANTED LITIGATION FOR THE PLAINTIFFS.

In their reply brief, the Hirschbergs raise the following additional points:

[POINT I]

BUT FOR DEFENDANT'S NEGLIGENCE, THE SMOTHERGILLS COULD NOT HAVE FILED THEIR CLAIMS AGAINST THE PLAINTIFFS, BECAUSE THE REFERENCE OF DEED BOOK 776, PAGE 258[,] IS A "DEFECT" IN PLAINTIFFS' DEED.

[POINT II]

FIDELITY'S LEGAL ARGUMENTS IN THEIR POINT III[1] SHOULD BE DISREGARDED BY THE COURT BECAUSE THEY ARE MISPLACED, MISREPRESENTED AND ARE NOT SUPPORTED BY THE FACTS.

[POINT III]

BOTH DEFENDANTS REFERENCE JUDGE CONTILLO'S MARCH 3, 2009 OPINION IN THE SMOTHERGILL MATTER HOWEVER, THE APPELLATE COURT DID NOT AFFIRM THE OPINION, BUT RATHER AFFIRMED THE MAY 5, 2009 FINAL JUDGMENT. THE FORM OF JUDGMENT WAS ARGUED ON MAY 4, 2009[,] WHEREIN JUDGE CONTILLO LIMITED HIS FINDINGS TO HIS SELF-AUTHORED MAY 5, 2009[,] THREE (3) PAGE FINAL JUDGMENT.

[1] In Point III of its brief, Fidelity argues that the trial court properly found the statute of limitations bars claims arising out of plaintiffs' 1978 purchase of their home.

[POINT IV]

PLAINTIFFS MOVED TO DISMISS THE CLAIMS AGAINST THE JENSEN DEFENDANTS WITH PREJUDICE BECAUSE THIS COURT FOUND THE INITIAL APPEAL TO BE INTERLOCUTORY AND REQUIRED SAME TO PROCEED. FIDELITY NATIONAL TITLE NEVERTHELESS IS THE SUCCESSOR TO SECURITY TITLE INSURANCE COMPANY'S OBLIGATIONS.

[POINT V]

THE TRIAL COURT ERRED BY DISMISSING THE CONSUMER FRAUD CLAIM BECAUSE THE RECORD SHOWS THAT THE AGENT WAS NOT ACTING IN THE CAPACITY OF A LICENSED PROFESSIONAL WHEN HE AGREED TO AND PERFORMED A SEARCH SPECIFICALLY FOR THE PLAINTIFFS OUTSDIDE [SIC] THE SCOPE OF HIS LEARNED PROFESSIONAL STATUS AND BECAUSE THE SEARCH WAS NOT MADE FOR THE WRITING OF AN INSURANCE POLICY.

Having reviewed the record, we conclude that these arguments are all without merit and, except as addressed below, they do not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated in Judge Robert C. Wilson's written opinion dated August 18, 2015. We also affirm for the reasons stated in Judge Charles E. Powers, Jr.'s written opinion attached as a rider to an order dated December 19, 2014. Finally, we affirm for the reasons stated on the record by Judge Kenneth J. Slomienski on January 31, 2014.

Pursuant to the orders entered on the motions for summary judgment, the Hirschbergs' second amended complaint was dismissed as against Fidelity and the Stoldt defendants.[2]

We review a grant or denial of summary judgment de novo, observing the same standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). Summary judgment should be granted only if the record demonstrates there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We consider "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." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). If no genuine issue of material fact exists, the inquiry then turns to "whether the trial court correctly interpreted the law." DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citations omitted).

[2] The Hirschbergs voluntarily dismissed the claims with prejudice against Jensen and Marotta Associates, Inc., and Dan Jensen, individually, prior to the appeal.

The Hirschbergs' claims against Fidelity were dismissed predicated upon collateral estoppel and statute of limitations grounds. After our de novo review of Judge Powers' decision, we conclude his findings and application of controlling law were supported in the factual and procedural record. Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974).

The Hirschbergs' claims against the Stoldt defendants were dismissed predicated upon collateral estoppel and statute of limitations grounds. After our de novo review of Judge Wilson's decision, we conclude his findings and application of controlling law were supported in the factual and procedural record. Rova Farms, 65 N.J. at 484.

Similarly, after our de novo review of Judge Slomienski's decision granting partial summary judgment on Count 5 of the second amended complaint to Fidelity, we conclude his findings and application of controlling law were supported in the factual and procedural record. Ibid.

I.

A court has broad discretion to determine whether application of collateral estoppel is appropriate. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979). Although the doctrine "is designed to protect litigants from relitigating identical issues and to promote judicial economy," a court in exercising its

discretion must "weigh economy against fairness." Barker v. Brinegar, 346 N.J. Super. 558, 566 (App. Div. 2002). "Fundamental to the theory of collateral estoppel is the notion that the earlier decision is reliable, an underlying confidence the result was substantially correct. The premise is that properly retried, the outcome should be the same." Kortenhaus v. Eli Lilly & Co., 228 N.J. Super. 162, 166 (App. Div. 1988) (citing Restatement (Second) of Judgments § 29 cmt. f (Am. Law Inst. 1982)).

Collateral estoppel, also known as issue preclusion, prohibits relitigation of issues if its five essential elements are met. Those elements are that:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
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> [Allen v. V & A Bros., Inc., 208 N.J. 114, 137 (2011) (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521 (2006)).]

"'On the merits' means that the factual issues directly involved must have been actually litigated and determined." Slowinski v. Valley Nat'l Bank, 264 N.J. Super. 172, 183 (App. Div. 1993). "In the case of a judgment entered by confession,

consent, or default, none of the issues is actually litigated." Allesandra v. Gross, 187 N.J. Super. 96, 106 (App. Div. 1982) (quoting Restatement (Second) of Judgments, § 27 cmt. e).

We agree that the Hirschbergs sought to re-litigate by their second amended complaint issues relating to a right of way or easement appurtenant to their property and its utilization by others, including their neighbors, the Smothergills. As a result of a dispute that arose over access to that right of way, the Smothergills instituted an action in the Superior Court of New Jersey, Chancery Division. After a bench trial over four days, Judge Robert P. Contillo held that the Smothergills had the right to utilize the right of way, as did the Hirschbergs. Judge Contillo also determined that the Hirschbergs' property was not "land-locked" as they claimed.

We affirmed the decision on appeal in an unpublished opinion. Smothergill v. Hirschberg, No. A-5119-08 (App. Div. Apr. 26, 2010). As such, we agree with the determinations of Judge Powers and Judge Wilson that the Hirschbergs' instant claims against the Stoldt defendants and Fidelity sought re-litigation of issues previously adjudicated and are thus prohibited from raising them anew.

II.

The applicable statute of limitations for legal malpractice is six years, N.J.S.A. 2A:14-1, and specifically requires that actions for legal malpractice be brought within six years from the date the cause of action occurred. Grunwald v. Bronkesh, 131 N.J. 483, 494 (1993). A cause of action for legal malpractice "accrues when an attorney's breach of professional duty proximately causes a plaintiff's damages." Id. at 492. Thus, the statute of limitations starts to run once a plaintiff suffers damages and discovers, or through the use of reasonable diligence should have been discovered, the facts essential to his/her malpractice claim. Lanziano v. Cocoziello, 304 N.J. Super. 616, 621-22 (App. Div. 1997).

A title insurance policy is a contract and, like other contracts, claims under a title policy are governed by the six year statute of limitation. N.J.S.A. 2A:14-1; Azze v. Hanover Ins. Co., 336 N.J. Super. 630, 636 (App. Div. 2001). Generally, causes of action for loss resulting from defects to or impairment of title to real property accrue when the property owner knows or has reason to know of the defect to title. Vision Mortg. Corp. v. Patricia J. Chiapperini, Inc., 156 N.J. 580, 586 (1999).

The Hirschbergs argue that they were unaware of the use of the right of way for twenty-five years and, consequently, their

claim of attorney malpractice against the Stoldt defendants and their contractual claims against Fidelity should not here been barred. However, this lack of knowledge claim was refuted by the record. Upon review of the record before them, Judge Powers and Judge Wilson, each properly found that the Hirschbergs' claims were barred as they had notice as early as 1994 or as late as 1997, of a potential defect in their deed that could have resulted in a diminution of the value of their property. Yet, they failed to institute a malpractice claim against the Stoldt defendants and a breach of contract claim against Fidelity under the title policy within the applicable statute of limitations for each putative cause of action.

In sum, we hold that there is no need for this court to engage in a detailed analysis of matters that have been considered and rejected by the court at both the trial and the appellate level. The Hirschbergs' contentions are not strengthened by repetition and do not alter the undisputed facts and procedural history which comprise the record of this case.

Affirmed.