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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-2129-16T3

RALPH NUZZO,

Plaintiff-Appellant,

v.

PETER BRAY and THE LAW FIRM OF
BRAY & BRAY, LLC,

Defendants-Respondents.

Argued February 14, 2018

Re-argued telephonically March 23, 2018 –
Decided May 8, 2018.

Before Judges Koblitiz and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Docket No. L-
3410-15.

Charles D. Hellman argued the cause for
appellant (Guarino & Co. Law Firm, LLC,
attorneys; Philip L. Guarino, on the brief).

Ryan K. Brown argued the cause for respondent
(Hoagland, Longo, Moran, Dunst & Doukas, LLP,
attorneys; Ryan K. Brown, of counsel and on
the brief).

PER CURIAM

Plaintiff Ralph Nuzzo appeals from an August 25, 2016 order granting defendants Peter Bray and the law firm of Bray & Bray, LLC's motion to dismiss plaintiff's legal malpractice claim and a September 30, 2016 order dismissing the remaining breach of contract claim. He also appeals from a January 6, 2017 order denying reconsideration. Defendants allowed a debt to expire in a collection case without advising plaintiff. Plaintiff's failure to timely submit an Affidavit of Merit (AOM) resulted in the dismissal of both the malpractice and the breach of contract claims. We decline to consider a newly raised issue concerning the effect of filing an amended answer. We affirm.

On October 5, 2015, plaintiff filed a complaint against defendants alleging, in count one, professional malpractice and, in count two, breach of contract. The complaint stemmed from a December 15, 1992 judgment against Gabriel Juliano in the amount of \$2,568,349. In 2005, plaintiff retained defendant Peter Bray to represent plaintiff in collecting on the judgment. The short letter which served as the retainer agreement between the parties did not include renewal of the judgment. Plaintiff alleges the agreement nonetheless included both collecting on and renewing the judgment. Bray did not advise plaintiff that the judgment would have to be renewed prior to the judgment's expiration, nor did he timely renew the judgment.

Bray was unsuccessful in his attempts to renew the judgment after it expired, although he filed a motion to renew the judgment, sought reconsideration of the denial of that motion, and filed an unsuccessful appeal. Nuzzo v. Juliano, No. A-5736-12 (App. Div. May 23, 2014). Plaintiff claims, upon information and belief, that judgment-debtor Juliano now has significant assets to pay the judgment. Defendants' March 18, 2016 answer asserted as a defense that plaintiff was obliged to provide an AOM "in this matter."

On May 17, 2016, at the first sixty-day deadline contained in the AOM statute,¹ defense counsel consented to a thirty-day extension. Plaintiff's counsel certified he believed a Ferreira² conference would be conducted within those thirty days. Plaintiff's counsel also certified he does not regularly handle malpractice cases and was unaware of "any limitations on the length of additional time that could be afforded by the [c]ourt to supply an [AOM]."

Defendants subsequently filed a motion to dismiss based on plaintiff's failure to submit an AOM within 120 days of defendants' answer. Defendants also filed an amended answer with consent of plaintiff on August 17, 2016.

¹ N.J.S.A. 2A:53A-27.

² Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003).

On August 25, 2016, the court entered an order granting defendants' motion to dismiss plaintiff's professional malpractice claim and denying without prejudice the application to dismiss the breach of contract claim. The court wrote on the order:

This court finds plaintiff's reliance on Buck v. Henry^[3] [and] their point that it creates a safe harbor because a Ferreira conference was not held to be incorrect. Buck v. Henry is limited to medical malpractice [and] for the reasons on the record 8/5/16.^[4]

Defendants subsequently filed a motion requesting the court to reconsider its denial of their motion to dismiss the breach of contract claims. Defendants argued that the court should dismiss plaintiff's breach of contract claim under Couri v. Gardner, 173 N.J. 328 (2002), because the underlying factual allegations of plaintiff's contract claim required proof of a deviation from the professional standard of care, thereby requiring plaintiff to timely submit an AOM.

Plaintiff countered that defendants agreed to collect on the judgment, and part of the agreement was to renew the judgment so that defendants could fulfill their contractual obligation of collecting the judgment. Plaintiff asserted that missing the

³ Buck v. Henry, 207 N.J. 377 (2011)

⁴ The court did not render a definitive decision on August 5th and offered no other reasons.

renewal date, like missing a statute of limitations deadline, is an issue that can be proven without an expert.

The agreement, as set forth in the retainer letter, reads that, if retained, counsel "would be paid all disbursements incurred, such as depositions costs, subpoena services fees, photocopies, filing fees, faxes, messenger services, etc., together with twenty (20%) percent of all funds recovered under the Judgment (If there is no recovery, then no fees would be owed.)"

The court dismissed the remaining breach of contract claim, determining an expert was needed to determine "the professional standard . . . for continuing attempts to collect well past two, three, four, five years and whether or not renewal was part of that obligation."

I.

Issues of law are reviewed de novo, according no deference to the interpretative analysis of the trial court. The Palisades at Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC, 230 N.J. 427, 442 (2017). Failure to provide an AOM "shall be deemed a failure to state a cause of action." N.J.S.A. 2A:53A-29. Thus, a dismissal for failure to provide a timely AOM is reviewed de novo. See Bacon v. N.J. State Dep't of Educ., 443 N.J. Super. 24, 33 (App. Div. 2015) (employing a plenary standard of review over

a trial court's decision to grant a motion to dismiss for failure to state a claim). That dismissal should be "'with' prejudice, unless a plaintiff can demonstrate the existence of extraordinary circumstances." Czepas v. Schenk, 362 N.J. Super. 216, 224 (App. Div. 2003) (citing Cornblatt v. Barow, 153 N.J. 218, 242, 246 (1998)).

In a legal malpractice claim, a plaintiff is required to provide an AOM. See N.J.S.A. 2A:53A-26 to -29. The statute "allows a plaintiff a maximum of 120 days [after the answer is filed] in which to file the affidavit." Barreiro v. Morais, 318 N.J. Super. 461, 470 (App. Div. 1999). It is "the Legislature's intent that the statute facilitate the weeding-out of frivolous lawsuits." A.T. v. Cohen, 231 N.J. 337, 346 (2017). "Under the AOM statute, [] the failure to file an appropriate affidavit within the statutory time limits may result in dismissal of even meritorious cases." Buck, 207 N.J. at 382.

Two equitable remedies exist that "temper the draconian results of an inflexible application" of the AOM statute. A.T., 231 N.J. at 346 (quoting Ferreira, 178 N.J. at 151). "A complaint will not be dismissed if the plaintiff can show that he [or she] has substantially complied with the statute." Ferreira, 178 N.J. at 151 (citing Palanque v. Lambert-Woolley, 168 N.J. 398, 405-06 (2001)). Plaintiff does not claim he substantially complied with

the AOM requirement. Secondly, "a complaint will be dismissed without prejudice if there are extraordinary circumstances to explain noncompliance." Ibid. (citing Palanque, 168 N.J. at 404-05; Cornblatt, 153 N.J. at 246-47).

Courts have not fully defined what constitutes "extraordinary circumstances," but "'attorney inadvertence' will not, standing alone, support a finding of extraordinary circumstances" entitling a plaintiff "to a remedy of dismissal of a complaint without prejudice." Estate of Yearby v. Middlesex Cty., ___ N.J. Super. ___, ___ (App. Div. 2018) (slip op. at 4) (quoting A.T. 231 N.J. at 349). "[C]arelessness, lack of circumspection, or lack of diligence on the part of counsel are not extraordinary circumstances which will excuse missing a filing deadline." Palanque, 168 N.J. at 405 (quoting Burns v. Belafsky, 326 N.J. Super. 462, 470, (App. Div. 1999)). "[P]arties are presumed to know the law and are obliged to follow it." Paragon, 202 N.J. at 424.

"To ensure that challenges to affidavits of merit do not become 'sideshows' overwhelming our civil justice system," our Supreme Court has "required that a 'case management conference be held within ninety days of the service of an answer in all malpractice actions.'" Buck, 207 N.J. at 394 (quoting Ferreira, 178 N.J. at 154). At the Ferreira conference, a "defendant is

required to advise the court whether he [or she] has any objections to the adequacy of the affidavit." Ibid. (quoting Ferreira, 178 N.J. at 155).

Buck held that "[i]f the court determines that an [AOM] is deficient, a 'plaintiff has to the end of the 120-day time period to conform the affidavit to the statutory requirements.'" 207 N.J. at 394 (quoting Ferreira, 178 N.J. at 155). Buck, therefore, does not extend the 120-day period for submitting an AOM. When read in conjunction with Paragon, a case that Buck cited several times and did not overrule, the failure to hold a Ferreira conference does not toll the time period and cannot, alone, be a basis for overturning a motion to dismiss for failure to submit an AOM.

Unlike the situation here, the plaintiff in Buck did submit a timely AOM from a psychiatrist, but the court failed to hold a Ferreira conference to address the defendant's objections to the affidavit. 207 N.J. at 383-85. Buck discussed the AOM statute "particularly as it applies to medical malpractice cases," and "the role of the Ferreira conference in effectuating" the AOM statute. Id. at 388.

Thus, plaintiff's counsel's belief that a Ferreira conference would be held before a dismissal was entered is not on its own an extraordinary circumstance. See A.T., 231 N.J. at 348.

II.

With regard to the breach of contract claim, the Legislature has decided that a judgment remains outstanding for twenty years and may be renewed for another twenty years. N.J.S.A. 2A:14-5. Failure to renew a judgment after the initial twenty-year period effectively bars the judgment-creditor from enforcing the judgment. See N.J.S.A. 2A:17-3. These statutes, read in conjunction, "create a twenty-year statute of limitations as to judgments." Adamar of New Jersey, Inc. v. Mason, 399 N.J. Super. 63, 67 (App. Div. 2008) (quoting Giordano v. Wolcott, 46 N.J. Super. 278, 282 (App. Div. 1957)).

Plaintiff argues that no AOM was required for his breach of contract claim. When analyzing whether the statute applies to a particular claim, a court must consider:

(1) whether the action is for "damages for personal injuries, wrongful death or property damage" (nature of injury); (2) whether the action is for "malpractice or negligence" (cause of action); and (3) whether the "care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint [] fell outside acceptable professional or occupational standards or treatment practices" (standard of care).

[Id. at 334 (quoting N.J.S.A. 2A:53A-27).]

Our Supreme Court explained that "[i]t is not the label placed on the action that is pivotal but the nature of the legal inquiry."

Id. at 340. The Court summarized:

[W]hen asserting a claim against a professional covered by the statute, whether in contract or in tort, a claimant should determine if the underlying factual allegations of the claim require proof of a deviation from the professional standard of care for that specific profession. If such proof is required, an [AOM] shall be mandatory for that claim, unless either the statutory, N.J.S.A. 2A:53A-28, or common knowledge exceptions apply.

[Id. at 341.]

Plaintiff relies on the facts in Couri as support that the AOM statute does not apply to plaintiff's breach of contract claim. In Couri, the plaintiff retained the defendant, a psychiatrist, to write a report for the plaintiff on visitation issues in his divorce case. 173 N.J. at 331. The psychiatrist allegedly breached the agreement by distributing a copy of the report to the plaintiff's wife without receiving the plaintiff's consent or showing him the report first. Ibid. The plaintiff sued the psychiatrist for breach of contract, which the trial court dismissed for failure to submit an AOM, and our Supreme Court reversed, finding that the plaintiff's breach of contract claim did not require expert support. Id. at 341.

In deciding whether the AOM statute applied to a breach of contract claim, the Court stated that a court must "determine if the underlying factual allegations of the claim require proof of a deviation from the professional standard of care" and "[i]f such proof is required, an AOM shall be mandatory." Ibid. Here, given that the contract did not mention renewal of the judgment, whether failure to renew the judgment was a deviation from a lawyer's obligation, or standard of care, requires expert opinion. An AOM is therefore necessary.


For the first time at appellate oral argument, plaintiff contended that the filing of an amended answer without an amended complaint after the expiration of the statutory 120 day period for filing an AOM tolled the statutory timeframe. Although we permitted the parties to submit supplemental briefs and oral argument on this point, we now decline to consider a new legal issue not raised before the motion court and raised so late in the appeal. See Cranford Dev. Assocs., LLC v. Twp. of Cranford, 445 N.J. Super. 220, 232 (App. Div. 2016).

Although courts "are loath to visit the sins of the lawyer upon the innocent client," we are not at liberty to disregard clearly defined statutory requirements absent evidence supporting grounds for equitable relief. Yearby, ____ N.J. Super. at ____

(slip op. at 27) (quoting SWH Funding Corp. v. Walden Printing Co., 399 N.J. Super. 1, 14 (App. Div. 2008)).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION