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OF THE COMMITTEE ON OPINIONS

M.G. McLAREN, P.C. and McLAREN  
TECHNICAL SERVICES, INC. both d/b/a/  
McLAREN ENGINEERING GROUP,

Plaintiffs,

v.

HACKENSACK STEEL CORP., JOHN  
DOES 1-10 (being fictitious names for  
persons unknown) and ABC CORPS 1-10  
(being fictitious names for entities unknown),

Defendants.

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – BERGEN COUNTY**

DOCKET NO. **BER-L-1847-18**

TEACHERS VILLAGE PROJECT A  
QALICB URBAN RENEWAL ENTITY,  
LLC,

Plaintiffs,

v.

HACKENSACK STEEL CORP. and M.G.  
McLAREN, P.C. d/b/a McLAREN  
ENGINEERING GROUP,

Defendants.

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – BERGEN COUNTY**

DOCKET NO. **BER-L-913-19**

Civil Action

**OPINION**

**Argued: April 24, 2020  
Decided: May 18, 2020**

**HONORABLE ROBERT C. WILSON, J.S.C.**

Christopher V. Raupers, Esq. appearing on behalf of M.G. McLaren, PC and McLaren Technical Services, Inc. d/b/a McLaren Engineering Group (from L'Abbate, Balkan, Colavita & Contini, L.L.P.)

James A. Kosch, Esq. and Omar A. Barentto, Esq. appearing on behalf of Teachers Village Project A QALICB Urban Renewal Entity, LLC (from McCarter & English, LLP)

**PROCEDURAL HISTORY**

**THIS MATER** was initiated on December 3, 2018 when Teachers Village filed a complaint against McLaren alleging that McLaren committed professional malpractice by

breaching the standard of care required for designing certain steel components that were to be manufactured by Hackensack. The Complaint was initially filed in Essex County but was subsequently transferred to Bergen County. On March 13, 2018 McLaren filed a Complaint against Hackensack to collect on an account. Hackensack filed a counterclaim against McLaren on May 15, 2018 alleging that McLaren's design documents were deficient. McLaren filed an Answer on June 6, 2018 denying the allegations.

On January 2, 2019, Hackensack filed its Answer to the Complaint filed by Teachers Village and brought crossclaims against McLaren. McLaren filed its Answer on February 27, 2019. McLaren's answer demanded an affidavit of merit. The Case Information Statement filed with McLaren's answer identified the claims as professional malpractice. The 120-day period during which Teachers Village was required to file an affidavit of merit expired on June 27, 2019. Teachers Village has thus far failed to file an affidavit of merit.

### **FACTUAL BACKGROUND**

**THIS MATTER** arises from allegations of professional malpractice. McLaren and Hackensack Steel Corp. were hired to provide engineering and manufacturing services to Teachers Village, a mixed-use community (the "Project"). In its complaint, Teachers Village alleged that McLaren breached its written contract by failing to properly design the steel components used for the Project and failed to exercise due care when designing the steel components. McLaren filed its Answer on February 27, 2019. The Case Information Statement identified the claims as professional malpractice. As such, Teachers Village was required to file an affidavit of merit. Teachers Village provided engineering reports but never provided an

affidavit merit. The deadline for filing the affidavit of merit was June 27, 2019. McLaren has now filed a motion to dismiss for failure to timely provide an affidavit of merit.

**MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)**

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations “to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . .” Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See, NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The “test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts.” Printing Mart, 116 N.J. at 746. However, “a court must dismiss the plaintiff’s complaint if it has failed to articulate a legal basis entitling plaintiff to relief.” Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

## RULES OF LAW AND DECISION

### **I. The Claim Must Be Dismissed Because New Jersey Law Requires the Filing of an Affidavit of Merit in Professional Negligence Claims**

N.J.S.A 2A:63A-27 provides that:

In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that 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. The court may grant no more than one additional period, not to exceed 60 days, to file for the affidavit pursuant to this section, upon a finding of good cause

This statute “requires a plaintiff in a malpractice action to serve on a defendant within 120 days of receipt of the answer an expert’s sworn statement attesting that there exists a ‘reasonable probability’ that the professional’s conduct fell below acceptable standards.” Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 146 (2003). The purpose behind the affidavit of merit is to require the plaintiffs to show early on in the litigation process that their claim is meritorious and to simultaneously weed out claims that are not. See In re: Petitioner of Woodrow Hall, 147 N.J. 379 (1997).

#### **A. Teachers Village Complaint Must be Dismissed**

Failure to serve an affidavit in compliance with the statute is grounds for a dismissal with prejudice. N.J.S.A. 2A:53A-29 states that, “if defense counsel files a motion to dismiss after the 120-day deadline and before plaintiff has forwarded the affidavit, the plaintiff should expect that the complaint will be dismissed.” Ferreira, 178 N.J. at 154.

Teachers Village Complaint is a claim for professional malpractice. Count IV is explicitly labelled a “Design Defect/Professional Malpractice”. Teachers Village claims that

McLaren failed to exercise the standard of care required for the design of the steel components. Teachers Village asserts that they have suffered damages and that McLaren is the type of company subject to a professional standard of practice. As an engineering firm, McLaren is certainly within the definition of a licensed professional that must act within professional standard of care.

### **B. Teachers Village Breach of Contract Claim Must be Dismissed**

Count III of Teachers Village Complaint alleges that McLaren committed a breach of contract. The alleged breaches however are not a separate and distinct claim from the professional malpractice claim. The allegations of breaches of contract stem from the professional malpractice. It is well-settled law that if the underlying factual allegations are of professional malpractice, then the Statute is applied to a claim of breach of contract. See A. Manganaro Consulting Eng'rs v. Carneys Point Township Sewerage Auth., 344 N.J. Super 343, 349 (App. Div. 2001).

Teachers Village breach of contract claim is redundant to their professional malpractice claim. In Manganaro, the Court ruled if the elements of the breach of contract would require expert testimony to prove, then the claim requires an affidavit of merit. See Id. at 349. Plaintiffs cannot simply mask a professional malpractice claim as a breach of contract.

## **II. Hackensack Steel Corps. Claims Against McLaren Should be Dismissed with Prejudice**

Hackensack Steel Corps. ("Hackensack") claims against McLaren should be dismissed with prejudice for failure to submit an affidavit of merit. The analysis repeats what is discussed above.

Similarly, Hackensack's breach of contract counter and crossclaims should be dismissed as they are in essence professional malpractice claims. Hackensack alleges that McLaren entered

into an agreement with Hackensack to provide professional engineering services for the Teachers Village Project, was obligated to prepare engineering plans in furtherance of Hackensack's work on the project, breached its contractual obligations by failing to adhere to the requirements of the subcontract, and therefore caused delays in the execution of the work. These allegations follow the same vein as those made by Teachers Village. The allegations are in fact professional malpractice claims masked as breach of contract claims.

**A. Hackensack's Claims for Indemnification Should be Dismissed With Prejudice**

Hackensack's claims for indemnification are derivative of the underlying claim by Teachers Village. Hackensack's indemnification claims cannot survive once the underlying claims have been dismissed.

**III. The Lack of a Ferreira Conference Does Not Preclude Dismissal**

The requirement to timely file an affidavit of merit is not mitigated by the lack of a Ferreira conference. The purpose of a Ferreira conference is to identify the issues surrounding an affidavit of merit Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003). Ferreira states that "a case management conference be held within ninety days of the service of an answer in all malpractice actions." Id. at 154.

In Paragon Constr. V. Peachtree Condo Ass'n, 202 N.J. 415 (2010), the Court addressed whether the lack of a Ferreira conference was fatal to a motion to dismiss based on failure to file an affidavit of merit. Due to a mischaracterization in the Case Information Statement of professional malpractice claims as instead sounding in breach of contract, a Ferreira conference was never held. The third-party defendant in Paragon filed a motion to dismiss for failure to file an affidavit of merit. Subsequently the third-party defendant filed an affidavit of merit prior to the return date. The Supreme Court determined that the failure to hold a Ferreira conference had

no impact on the time limits and that litigants cannot rely upon the scheduling of a conference to toll the statutory time frame. Paragon, supra at 415 (2010).

In the instant case, the plaintiff's initial Case Information Statement improperly categorized the Complaint as a breach of contract. Regardless of whether a Ferreira conference was scheduled, the parties were obligated to file the affidavit of merit within the statutory timeframe. Lack of a Ferreira conference does not defeat a motion to dismiss based on failure to file the affidavit of merit.

### **CONCLUSION**

For the aforementioned reasons, McLaren's Motions to Dismiss are **GRANTED**.