

Jennifer L. Startzel, Esq.-NJ ID No. 155962015
Kirmser, Lamastra, Cunningham & Skinner
202A Hall's Mill Road
PO Box 1675
Whitehouse Station, New Jersey 08889-1675
(908) 572-3600
Attorneys for Defendant Fox & Roach LP d/b/a
Berkshire Hathaway HomeServices Fox &
Roach, Realtors

MARIA PENDONDJIS;

Plaintiff

v.

FOX & ROACH REALTORS; FJ 23 LLC;
HOMESTARR REALTY; ARRA WOODSON;
ABC, INC.; DEF, INC., JOHN and JANE DOES
I-V, fictitious defendants,

Defendants

And

FJ 23, LLC,

Defendant and Third-Party Plaintiff

v.

ARRA WOODSON; HOMESTARR REALTY,

Third-Party Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY
DOCKET NO. MON-L-3206-21

CIVIL ACTION

ORDER

THIS MATTER having come before the Court upon the Motion of Kirmser, Lamastra, Cunningham & Skinner (Jennifer L. Startzel, Esquire, appearing), attorneys for Defendant Fox & Roach LP d/b/a Berkshire Hathaway HomeServices Fox & Roach, Realtors, for an Order; being opposed by the Law Offices of Nelson, Fromer, Crocco & Jordan (Charles M. Crocco, Esquire,

appearing), attorneys for Plaintiff Maria Pendondjis; the Court having reviewed the papers submitted in support thereof and in opposition thereto, as well as the oral arguments of counsel; and for good cause shown;

IT IS ON THIS 2nd day of June, 2022,

ORDERED that Defendant Fox & Roach LP d/b/a Berkshire Hathaway HomeServices Fox & Roach, Realtors' motion to dismiss is hereby **DENIED**; and it is further

ORDERED that a copy of this Order be deemed served upon all counsel upon filing of this Order on E-courts.

/s/ *Gregory L. Acquaviva*
Gregory L. Acquaviva, J.S.C.

Statement of Reasons

This motion to dismiss presents a question of first impression: whether an affidavit of merit is required pursuant to N.J.S.A. 2A:53A-27 for a personal injury matter asserted against a licensed realtor where such license is not specifically enumerated in the statutory definition of “licensed person” in N.J.S.A. 2A:53A-26. For the reasons that follow, including traditional canons of statutory construction, in the absence of a specific reference to realtors or other real estate professionals in the statutory definition of “licensed person,” this court holds that an affidavit of merit is not required and, accordingly, the motion to dismiss is denied.

I.

The underlying facts as gleaned from the complaint are straightforward. In April 2021, Maria Pendondjis attended an open house. The property was listed for sale by the movant here, Fox & Roach Realtors (“Fox & Roach”). Pendondjis was accompanied by her own realtor, defendant Arra Woodson, a real estate agent with defendant Homestarr Realty. During her tour of the home, Pendondjis fell, suffering injury. This suit followed.

Fox & Roach now moves to dismiss the matter for failure to state a claim, invoking N.J.S.A. 2A:53A-26, the so-called Affidavit of Merit Statute (“AoM Statute”).

II.

The AoM Statute, specifically N.J.S.A. 2A:53A-27, provides that in any action for damages for personal injury allegedly resulting from the malpractice or negligence of a “licensed person,” a plaintiff shall timely provide “an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill, or knowledge exercised or exhibited in the . . . work that is the subject of the complaint, fell outside acceptable professional or occupation standards or treatment.”

The AoM Statute’s purpose is simple – requiring a “threshold showing” to ensure that a malpractice claim has some semblance of merit. In re Petition of Hall, 147 N.J. 379, 391 (1997). Thus, the AoM Statute weeds out the frivolous. A.T. v. Cohen, 231 N.J. 337, 346 (2017). The purpose is not to “bar[] meritorious claims brought in good faith,” Paragon Constrs., Inc. v. Peachtree Condo Ass’n, 202 N.J. 415, 421-22 (2010) (quotation omitted), nor to “create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims,” Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 151 (2003). Rather, the AoM Statute “curtail[s] insubstantial claims through the claimant’s inability to present a supportive affidavit early on, before significant litigation time and expense are incurred.” A.T., 231 N.J. at 348.

Failure to provide the required affidavit of merit is a failure to state a cause of action and requires dismissal with prejudice, absent certain equitable circumstances, designed to “temper the draconian results of an inflexible application of the statute.” Id., 231 N.J. at 346 (quotations and citations omitted).

The foregoing principles are not and, indeed, cannot be disputed. Rather, the dispute here is whether a realtor or other licensed real estate professional is subject to the AoM Statute.

That analysis begins with the statute’s text. Most recently amended in 2019, N.J.S.A. 2A:53A-26 defines “licensed person” as “any person who is licensed as” one of 17 enumerated professions including an accountant, architect, attorney, engineer, land surveyor, pharmacist, veterinarian, insurance producer, midwife, site remediation professional, and a variety of medical professionals. Realtor, real estate agent, and real estate professional are not enumerated.

Where a question of statutory interpretation is posed, courts “begin with the statute’s plain language – our polestar in discerning the Legislature’s intent.” L.W. v. Toms River Reg’l

Schs. Bd. of Educ., 189 N.J. 381, 400 (2007) (Zazzali, C.J.). “If the language is plain and clearly reveals the statute’s meaning, the Court’s sole function is to enforce the statute according to its terms.” Frugis v. Bracigliano, 177 N.J. 250, 280 (2003).

Plain statutory language “should be given its ordinary meaning.” Merin v. Maglaki, 126 N.J. 430, 434 (1992). Accordingly, it is only where a statute is “silent or ambiguous” that a court may properly consider the Legislature’s intent in interpreting a statute. See Accountemps v. Birch Tree Group, 115 N.J. 614, 622 (1989); Union County Bd. of Chosen Freeholders v. Union County Park Comm’n, 41 N.J. 333, 337 (1964).

Stated alternatively, a court’s function is not to “rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language.” O’Connell v. State, 171 N.J. 484, 488 (2002); accord Crster v. Bd. of Comm’rs of Newark, 9 N.J. 225, 230 (1952) (observing it is not judiciary’s function to “write in additional qualification which the Legislature pointedly omitted in drafting its own enactment”).

Particularly relevant here is the canon of statutory construction expressio unius est exclusio alterius, meaning “expression of one thing suggests the exclusion of another left unmentioned.” Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102 (2004). Boiled to its core, such is Pendondjis’ opposition here.

The Appellate Division has opined on this canon’s application to N.J.S.A. 2A:53A-26 in Saunders v. Capital Health System at Mercer, which addressed whether an affidavit of merit was required in a personal injury action against a licensed midwife – a profession, like realtor here, not enumerated in the statutory definition of “licensed person.” 398 N.J. Super. 500 (App. Div. 2008). The unanimous panel held that an affidavit of merit “is not required when licensed

midwives, as well as other unspecified licensed professionals, are sued in their professional capacity.” Id. at 508 (emphasis added).

In so holding, Saunders observed that “[h]ad the Legislature intended N.J.S.A. 2A:53A-26 to apply to other unspecified licensed health providers, it could easily have prefaced the licensed persons listed with the words ‘including but not limited to.’ It chose not to do so.” Ibid.¹

The same result must occur here for the same reason. The Legislature chose, in narrow, yet plain, language to not include realtors, real estate agents, or real estate professionals in the 17 enumerated professionals expressly enumerated in N.J.S.A. 2A:53A-26’s definition of “licensed person.” Nothing in the statutory language indicates that the list is inclusive, as opposed to exclusive.² Nothing indicates that the Legislature sought to cast a wide net to capture the myriad, unspecified, unenumerated licensed professionals regulated in New Jersey. Rather, the AoM Statute’s plain language is narrow and specific. That legislative decision to enumerate specific professions – as opposed to using broad catch-all language – is dispositive here.

Therefore, pursuant to the clear, express, plain, and unambiguous statutory language, an affidavit of merit is not required in a personal injury action against a realtor, real estate agent, or

¹ Approximately six months following Saunders, legislation was introduced in the Assembly to include licensed midwives in the definition of “licensed professionals.” That legislation was subsequently re-introduced the next legislative session, ultimately being signed into law November 12, 2010.

² Fox & Roach does not reference Saunders in its papers. Instead, Fox & Roach highlights Waller v. Lomax, 2010 N.J. Super. Unpub. LEXIS 1504 (App. Div. 2010), an unpublished, non-binding decision that applied the AoM Statute to a title insurance agent. Putting aside its unpublished status, the panel there found that the defendant acted in a role “the same or similar as that of an attorney” – a role conceded by the plaintiffs there. Accordingly, because a suit against an attorney would require an affidavit of merit, the panel affirmed the trial court’s conclusion that an affidavit of merit was required. Again, putting aside the unpublished nature of that decision, Waller is distinguishable in that there is no allegation that Fox & Roach was acting in a capacity “the same or similar” to an enumerated licensed professional here.

real estate professional – professionals not specifically enumerated as “licensed persons” in N.J.S.A. 2A:53A-26.

Importantly, however, this conclusion, at this early stage of litigation, in no way comments on whether expert testimony may be needed to address the standard of care required by real estate professionals and whether such standard of care was breached here. See generally, Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993).

Finally, Fox & Roach contends Presiding Judge Bauman’s case management order establishing a deadline for submission of an affidavit of merit changes the balance. That argument is without merit.

This contention is not supported by any legal authority. See 700 Highway 33 LLC v. Pollio, 421 N.J. Super. 231, 238 (App. Div. 2011) (noting requirement that parties make “an adequate legal argument” in support of claims). More specifically, Fox & Roach fails to cite any authority that a case management order trumps a statute. Moreover, no argument is asserted as to how imposition of a deadline on a possible form of discovery creates a mandatory obligation to provide such. To be sure, Presiding Judge Bauman’s case management order can easily be read to implicitly set forth a deadline for an affidavit of merit, if required or necessary. Accordingly, this Court is unpersuaded by Fox & Roach’s unsupported contention.

Accordingly, for the foregoing reasons, Fox & Roach’s motion to dismiss is denied.