

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the 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-2336-20**

**TARA NOVEMBRE and
ANIELLO NOVEMBRE,**

Plaintiffs-Appellants,

v.

**NEW JERSEY NETS,¹ JAMES
LOCKWOOD, ESQ.,² PAUL
SODERMAN, ESQ., ZUCKER,
FACHER & ZUCKER,³ PAUL
SODERMAN, LLC, and CHARLES
MIERSWA,**

Defendants-Respondents.

Argued December 6, 2022 – Decided December 28, 2022

¹ The proper designation for this defendant is Brooklyn Nets, LLC f/k/a New Jersey Basketball, LLC.

² Plaintiffs dismissed their claims against defendant James Lockwood, Esq. with prejudice in a November 10, 2020 consent order.

³ In an April 10, 2021 order, the claims against defendant Zucker, Facher & Zucker were dismissed based on lack of prosecution by plaintiffs.

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4248-20.

Kenneth S. Thyne argued the cause for appellants (Simon Law Group, attorneys; Kenneth S. Thyne, of counsel and on the briefs).

Robert C. Neff, Jr., argued the cause for the respondents Brooklyn Nets, LLC, and Charles Mierswa (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys; Robert C. Neff, Jr., of counsel and on the brief).

Kevin R. Reich argued the cause for respondents James Lockwood, Esq., Paul Soderman, Esq., and Paul Soderman, LLC (Gibbons, PC, attorneys; Frederick W. Alworth and Kevin R. Reich, on the brief).

PER CURIAM

Plaintiffs Tara and Aniello Novembre⁴ appeal from two November 13, 2020 orders dismissing their complaint against defendants Paul Soderman, Esq., Paul Soderman, LLC (Soderman defendants), Brooklyn Nets, LLC f/k/a New Jersey Basketball, LLC (Nets), and Charles Mierswa. Plaintiffs also appeal from a March 30, 2021 order awarding sanctions and entering judgment in favor of

⁴ Aniello Novembre asserted a per quod claim seeking damages for injuries suffered by his wife. We use the term plaintiff to refer solely to Tara Novembre.

the Soderman defendants and against plaintiffs and their attorneys in the amount of \$13,930. We affirm all orders on appeal.

We presume the parties are familiar with the facts from their previously filed actions. We recited the facts giving rise to plaintiffs' personal injury claims in our unpublished decisions in Novembre v. Snyder High School, No. A-3426-09 (App. Div. Jan. 17, 2012), certif. denied, 210 N.J. 262 (2012) (first action) and Novembre v. New Jersey Nets, No. A-3313-15 (App. Div. July 18, 2019) (second action).

In the first action, filed in January 2007, plaintiffs alleged that while attending a Nets home game in January 2005, a student from Snyder High School seated in the row above them fell on plaintiff and injured her. The first action proceeded to trial, and a jury found no cause of action based on plaintiff's failure to prove proximate cause. Plaintiffs appealed and we affirmed.

In the second action, filed in January 2012, plaintiffs alleged defendants, including the Nets and Lockwood, concealed information relevant to identifying the high school students who attended the Nets game on the date plaintiff suffered her injuries. Plaintiffs asserted that if the Nets provided information identifying the high school sooner, they would have been able to ascertain the

name of the student who fell on plaintiff and such evidence would have established proximate cause to prevail in the first action.

Defendants in the second action moved for summary judgment and plaintiffs moved to amend the complaint. In the proposed amended complaint, plaintiffs sought to assert new causes of action, including claims for fraudulent concealment, fraud, and legal malpractice. Plaintiffs also sought to name three additional defendants: the Soderman defendants, Charles Mierswa, and Zucker, Facher & Zucker. The motion judge granted defendants' motions for summary judgment, denied plaintiffs' motion, and dismissed the second action with prejudice. Plaintiffs appealed and we affirmed the dismissal of plaintiffs' second action with prejudice. We also affirmed the denial of plaintiffs' motion for leave to amend the complaint.

On July 20, 2020, plaintiffs filed a third complaint, asserting claims against the Nets, Lockwood, the Soderman defendants, Zucker, Facher & Zucker, and Mierswa (third action). In the three-count complaint, plaintiffs recited verbatim the allegations they sought to include in the proposed amended

complaint in the second action.⁵ On September 11, 2020, defendants moved to dismiss the third action in lieu of filing answers.

On November 13, 2020, the motion judge heard oral argument on defendants' dismissal motions. The judge found plaintiffs' complaint in the third action "against the two adversary lawyers is nearly word for word [a] rehash of the proposed amended complaint [in the second action]." The judge also noted this court and the trial court previously rejected plaintiffs' same arguments. Thus, the judge concluded the doctrine of res judicata barred plaintiffs' claims in the third action and dismissed the third action with prejudice as to all defendants. He also allowed the Soderman defendants to file a motion for sanctions.

On December 2, 2020, the Soderman defendants moved for sanctions against plaintiffs and their attorneys. On February 1, 2021, the judge granted the Soderman defendants' motion for sanctions and awarded counsel fees. In granting the motion, the judge wrote: "(1) [p]laintiffs and their counsel knew or

⁵ In fact, the complaint in the third action asserted "fraudulent concealment/spoliation [of the] video and script evidence" against Mierswa, Lockwood, and the Nets (identical to count three in the proposed amended complaint in the second action), fraud against the Soderman defendants (identical to count four in the proposed amended complaint in the second action), and legal malpractice against the Soderman defendants (identical to count five in the proposed amended complaint in the second action).

should have known that the [c]omplaint was barred by res judicata; and[] (2) the [c]omplaint was filed in bad faith and for an improper purpose." On March 30, 2021, the judge entered a judgment against plaintiffs and plaintiffs' attorneys in the amount of \$13,930.⁶

Plaintiffs appealed from the March 30, 2021 judgment and the November 13, 2020 orders dismissing the third action with prejudice. On appeal, plaintiffs argue the judge erred in dismissing the third action based on the entire controversy doctrine⁷ and res judicata. They further contend the claims asserted against defendants in the third action are "sustainable as a matter of law." Plaintiffs also argue the judge erred in awarding counsel fees to the Soderman defendants. We disagree.

I.

We first address plaintiffs' claim that the judge erred in granting defendants' motions to dismiss the third action because their claims were not barred by res judicata. We review de novo a trial court's decision to grant a

⁶ The record on appeal contains a warrant to satisfy judgment based on the payment of the entire judgment amount by plaintiffs' counsel on April 21, 2021.

⁷ The judge's dismissal of the third action was based solely on the doctrine of res judicata. We need not address plaintiffs' argument that the judge erred in dismissing third action based on the entire controversy doctrine because we are satisfied the judge properly dismissed the third action as res judicata.

motion to dismiss under Rule 4:6-2(e). Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). In considering a Rule 4:6-2(e) motion, the trial court must examine the legal sufficiency of the facts alleged on the face of the complaint and must limit its review to the pleadings. Id. at 107. The test for determining the adequacy of a pleading is "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

A.

Plaintiffs argue the judge erred in dismissing the third action based on the doctrine of res judicata because the judge failed to make a "determination . . . with respect to the alleged misrepresentation" regarding the presence of ushers at the Nets game. They contend the judge dismissed the third action based on the erroneous assumption that the judge in the second action addressed the merits of their claims related to fraudulent concealment, fraud, and legal malpractice. Plaintiffs assert the judge's dismissal of the second action, denial of their motion to amend the complaint in that action, and denial of their motion for reconsideration was premised on procedural grounds based on the judge's finding that the proposed amended pleading was untimely. Plaintiffs maintain

neither the judge handling the second action nor the judge handling the third action addressed the merits of their claims and, therefore, res judicata did not support dismissal of the third action.

"[T]he doctrine of res judicata provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." Villanueva v. Zimmer, 431 N.J. Super. 301, 311 (App. Div. 2013) (quoting Velasquez v. Franz, 123 N.J. 498, 505 (1991)). "A judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits 'as fully and completely as if the order had been entered after trial.'" Velasquez, 123 N.J. at 507 (quoting Gambocz v. Yelencsics, 468 F.2d 837, 840 (3d Cir. 1972)). A dismissal of a complaint for failure to state a claim is an adjudication on the merits and res judicata unless the judge dismisses the complaint without prejudice. Id. at 507-08.

Here, it is undisputed that the third action involves the same parties as contemplated in the proposed amended complaint in the second action. Further, the causes of action advanced in the third action repeat the exact same causes of action as the proposed amended complaint in the second action. Thus, the issue

before us is whether the claims alleged in the third action were "finally determined on the merits" by the judge who dismissed the second action.

Contrary to plaintiffs' argument, the judge's reasons for denying leave to amend the complaint in the second action were not purely procedural. The judge addressed the merits of plaintiffs' proposed claims and expressly found that the proposed claims in the second action were futile even under the judge's "liberal assessment" of those claims. The judge comprehensively analyzed the proposed claims and explained why they were unable to survive a motion to dismiss.

In denying plaintiffs' motion for leave to file an amended complaint in the second action, the judge first considered the timing of the application. The motion judge explained that plaintiffs' counsel was provided a "quick sheet" and "script" from the night of the game attended by plaintiffs in April 2014. The judge found the quick sheet and script provided information that allowed plaintiffs to pursue further discovery to identify the students seated in the section above plaintiffs. However, plaintiffs did not seek further discovery based on those documents.

Moreover, the judge noted plaintiffs' counsel deposed a Nets representative in July 2014, who testified there were ushers assigned to the section where plaintiffs sat and there was a video from that night. Based on the

deposition testimony, the judge found had plaintiffs pursued that discovery, they would have been aware of a potential claim for fraudulent concealment as early as 2014. However, plaintiffs did not pursue a claim for fraudulent concealment until nearly a year later and after the close of discovery.

In addition to addressing the timing of plaintiffs' motion for leave to amend the complaint in the second action, the judge also addressed the merits of plaintiffs' proposed claims. The judge explained why plaintiffs' proposed fraudulent concealment claim was futile. Plaintiffs contended the Soderman defendants knew there were no ushers assigned to the section of the arena where plaintiffs sat based on an unredacted May 26, 2005 memorandum belatedly provided to plaintiffs in January 2015. However, the proposed fraudulent concealment claim was directed to the Nets and Mierswa, not the Soderman defendants.

Further, there was no evidence in the record that the Nets or Mierswa withheld information to prove a claim for fraudulent concealment. The record reflects that the Nets and Mierswa provided information in their possession and instructed plaintiffs' attorney to seek any additional information from their insurance carrier. Thus, plaintiffs failed to allege essential facts to support a claim against the Nets or Mierswa for fraudulent concealment.

Regarding the futility of the proposed fraud claim against the Soderman defendants in the second action, the judge held alleged discovery violations failed to "give rise to actionable fraud under New Jersey law." Further, in denying leave to amend the complaint, the judge found "there was no reliance on any alleged fraud relating to the existence/non-existence of an usher since [p]laintiffs' own witnesses testified in the [first action] that ushers were present in their section and described what they looked like."

Additionally, plaintiffs sought to amend their complaint in the second action to assert legal malpractice claims against the Soderman defendants. Plaintiffs claimed the Soderman defendants made "false and misleading statements [] in discovery in the [first action]," constituting a breach of a duty of care owed to them.

The judge found plaintiffs' claim for legal malpractice "fail[ed] because [the Soderman defendants] had no attorney-client relationship with [p]laintiffs." The judge held that because plaintiffs' interests were clearly adverse to the Soderman defendants, they "owed no duty to [p]laintiffs; thus no claim for legal malpractice [was] viable."

Having reviewed the record and the judge's reasons for denial of leave to amend the complaint in the second action, we are satisfied the judge's

determination constituted a final determination on the merits. The judge explained why each proposed amendment to the complaint in the second action was futile and stated "futility . . . [was] a sufficient ground on which to deny the [m]otion." Because the dismissal of the second action was with prejudice as an adjudication on the merits, the judge handling the third action properly dismissed that action as barred by res judicata.

Further, our July 18, 2019 unpublished decision regarding the dismissal of the second action constituted the law-of-the-case. In that opinion, we considered plaintiffs' arguments related to dismissal of the second action, including denial of their motion to amend the complaint. We affirmed both the dismissal of the second action and the denial of plaintiffs' motion for leave to amend. See Novembre, No. A-3313-15, slip op. at 15. Because we addressed the denial of leave to amend the complaint in the second action, plaintiffs' attempt to relitigate that issue in this appeal is precluded under the law-of-the-case doctrine. See Slowinski v. Valley Nat'l Bank, 264 N.J. Super. 172, 179 (App. Div. 1993) (finding the law-of-the-case doctrine applies where a different appellate panel is asked to reconsider the same issue in a subsequent appeal). Plaintiffs offer no reason why we should not follow our prior opinion.

B.

Even if we agreed that res judicata did not bar plaintiffs' third action, which we do not, plaintiffs' claims failed on the merits as a matter of law.

1.

We reject plaintiffs' assertion that a discovery violation by adverse counsel supports a fraud claim. Plaintiffs cited no New Jersey state court case holding a discovery violation constitutes a claim for common law fraud. To the contrary, the remedy for discovery violations includes dismissal of a pleading, suppression of asserted defenses, and imposition of monetary sanctions. See R. 4:23-5.

Additionally, to prove a common law fraud claim, a plaintiff must demonstrate that the defendant made a misrepresentation or omission of a material fact, with knowledge of its falsity, upon which the plaintiff reasonably relied, and resulting damages. See DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 336 (App. Div. 2013).

Here, plaintiffs were unable to demonstrate reasonable reliance to prove their fraud claims against the Soderman defendants. In 2010, plaintiffs' witnesses testified during the trial in the first action that there were ushers in attendance at the basketball game the night that plaintiff was injured. Thus,

plaintiffs could not have relied on the unredacted May 26, 2005 memorandum, which they obtained in January 2015, stating there were no ushers in plaintiffs' section of the arena to prove their fraud claims.

2.

Similarly, plaintiffs have no legal malpractice claims against the Soderman defendants. To sustain a cause of action for legal malpractice, a plaintiff must show "(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff." Jerista v. Murray, 185 N.J. 175, 190-91 (2005) (quoting McGrogan v. Till, 167 N.J. 414, 425 (2001)). "[T]he grounds on which any plaintiff may pursue a malpractice claim against an attorney with whom there was no attorney-client relationship are exceedingly narrow." Green v. Morgan Properties, 215 N.J. 431, 458 (2013). While there are limited circumstances where an attorney may be liable to a non-client, those circumstances are limited to third parties, not adverse parties. Ibid.

Here, plaintiffs lacked the requisite attorney-client relationship to pursue a legal malpractice action against the Soderman defendants. The cases relied

upon by plaintiffs are inapplicable as none of the cited cases involved a legal malpractice action against adverse counsel.

3.

Further, plaintiffs failed to allege facts sufficient to sustain a claim for fraudulent concealment against the Nets and Mierswa. To prove a claim for fraudulent concealment, a plaintiff must establish:

(1) [t]hat defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation; (2) [t]hat the evidence was material to the litigation; (3) [t]hat plaintiff could not reasonably have obtained access to the evidence from another source; (4) [t]hat defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation; and (5) [t]hat plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.

[Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81, 118 (2008) (quoting Rosenblit v. Zimmerman, 166 N.J. 391, 406-07 (2001)).]

Plaintiffs failed to demonstrate that the Nets and Mierswa intentionally withheld evidence for the purpose of disrupting the litigation, namely a script and video evidence from the night plaintiff suffered her injuries. In our unpublished opinions, we agreed with the trial court that there was no information intentionally withheld by the Nets or Mierswa.

Therefore, even if plaintiffs' claims in the third action were not precluded by the doctrine of res judicata, we are satisfied the claims in the third action were not sustainable as a matter of law and, thus, the judge properly dismissed the third action with prejudice.

II.

We next consider plaintiffs' claim that the judge abused his discretion in awarding counsel fees to the Soderman defendants. "Although New Jersey generally disfavors the shifting of attorneys' fees, a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001) (internal citations omitted). "[A] reviewing court will disturb a trial court's award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)).

Plaintiffs argue the judge erred in granting Rule 1:4-8 sanctions to the Soderman defendants. Plaintiffs claim their legal arguments were not frivolous because, in arguing res judicata was inapplicable, they relied on the 2015 motion judge's opinion stating his denial of the motion to amend the complaint was based on procedural grounds. Plaintiffs also contend they relied in good faith

on New Jersey case law in asserting causes of action for fraud and legal malpractice against the Soderman defendants. We disagree.

Rule 1:4-8 supplements N.J.S.A. 2A:15-59.1, which allows trial courts to grant attorney's fees if "the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous." A complaint, counterclaim, crossclaim, or defense is frivolous if either (1) it "was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury;" or (2) the nonprevailing party knew, or should have known, that it "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b).

"Imposing sanctions is not appropriate where a party 'has a reasonable good faith belief in the merit of his action.'" Tagayun v. AmeriChoice of New Jersey, Inc., 446 N.J. Super. 570, 580 (App. Div. 2016) (quoting J.W. v. L.R., 325 N.J. Super. 543, 548 (1999)). In Tagayun, we held the trial judge did not abuse her discretion "in finding the filing of an amended complaint by both plaintiffs asserting the same claims that had just been dismissed by the court and adding defendants' counsel as parties was frivolous." Id. at 581. We held the

plaintiffs had "no right to force" the defendants to defend against a complaint asserting the same causes of action that the trial court previously dismissed.

Ibid.

We are satisfied that the trial judge did not abuse his discretion in granting attorney's fees to the Soderman defendants. Plaintiffs' counsel knew, or should have known, based on the disposition of the second action by the trial court as well as this court, that the claims in the third action were without reasonable basis in law, and could not be supported by a good faith argument for a modification of existing law.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION