SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1773-20

KERLLY BOBOWICZ and
ERIC BOBOWICZ,

Plaintiffs-Appellants,

v.

HOLY NAME MEDICAL CENTER, INC., ALEXANDER HESQUIJAROSA, M.D., in his individual and official capacity, and MANNY GONZALEZ, in his individual and official capacity,

Defendants-Respondents.

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Argued January 23, 2023 – Decided March 21, 2023

Before Judges Whipple, Mawla, and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5844-18.

Jason A. Rindosh argued the cause for appellants (Bedi Rindosh, attorneys; Jason A. Rindosh, on the briefs).

Rodman E. Honecker argued the cause for respondents Holy Name Medical Center, Inc. and Manny Gonzalez (Windels Marx Lane & Mittendorf, LLP, attorneys; Rodman E. Honecker, on the brief).

Iram P. Valentin argued the cause for respondent Alexander Hesquijarosa, M.D. (Kaufman Dolowich & Voluck, LLP, attorneys; Iram P. Valentin, of counsel and on the brief; David J. Gittines, on the brief).

PER CURIAM

Plaintiffs Kerlly Bobowicz (Kerlly)[1] and her spouse Eric Bobowicz (Eric), appeal from a series of orders: a February 14, 2020 order dismissing their complaint against respondent Manny Gonzalez without prejudice; a June 3, 2020 order denying their motion for leave to file an amended complaint; an August 12, 2020 order denying their motion to compel the deposition of Michael Maron and granting defendant Holy Name Medical Center, Inc.'s protective order; and January 28, 2021 orders granting defendant Dr. Alexander Hesquijarosa's and Holy Name's motions for summary judgment and denying plaintiffs' cross-motion for summary judgment. Plaintiffs' case was ultimately dismissed with prejudice.

[1] We refer to plaintiffs individually throughout this opinion by their first names for ease of reference and due to the need to differentiate between the two, who share a last name. In doing so we intend no disrespect.

On appeal, plaintiffs raise numerous arguments, asserting the court erred in granting summary judgment to defendants and abused its discretion by denying leave to amend their complaint. We affirm. Our analysis follows.

I.

The record informs our decision. Kerlly was an administrative employee who worked within the Holy Name Medical Center, Inc. (Holy Name), where she was employed by Excelcare Medical Associates, P.A. (Excelcare) and Health Partner Services, Inc. (HPS). Excelcare is an affiliated medical practice of Holy Name, and HPS is a subsidiary of Holy Name; all are distinct legal entities.

Kerlly was an at-will employee at both HPS and Excelcare. However, when she was hired, she was given a copy of the Holy Name Medical Center Guide, and her performance evaluations were conducted by Holy Name, not the other entities. When she was diagnosed with an illness in 2014, she filed for leave under the Family Medical Leave Act with Holy Name. Kerlly also received Holy Name's "Spirit Award[,]" an analogue to "employee of the year." In 2016, Excelcare promoted Kerlly to the role of office manager and assigned her to work in defendant Dr. Alexander Hesquijarosa's office. Hesquijarosa was also employed by Excelcare.

From April to August 2016, Kerlly and Hesquijarosa had a consensual romantic affair. On July 20, 2016, the two met at a hotel in Edgewater and stayed there for around three hours. When Kerlly returned home that evening, Eric, her husband—who had hired a private investigator—confronted her. She admitted to the affair.

Following this incident, Eric called Maron, president and CEO of Holy Name, and reported the Kerlly-Hesquijarosa affair to his office. Subsequently, defendant Manny Gonzalez—then the vice president of Human Resources (HR) at Holy Name—conducted interviews with Kerlly and Hesquijarosa. Kerlly told Gonzalez that she was pursuing the doctor, disclosed certain marital issues, and expressed a willingness to participate in the investigation. During this investigation, Kerlly did not raise complaints of sexual harassment and did not discuss potential concerns with Hesquijarosa.

Gonzalez indicated that Kerlly and Hesquijarosa working in the same office space raised potential issues concerning conflicts of interest. Kerlly expressed a desire to remain at her current position, but later relented and was transferred elsewhere. A workplace policy allowed coworkers to date, so long as they were not in the same department. Gonzalez noted it was more appropriate to relocate Kerlly, because there were more opportunities for her

outside of the practice which included Hesquijarosa. Kerlly, however, viewed the move as a punishment. She asserted she was physically relocated but was not given an actual job or responsibilities in the new location.

Plaintiffs' marriage was troubled. The couple went to marriage counseling subsequent to her move to Hesquijarosa's office in January 2016. Kerlly made efforts to move out of the marital residence and to split her finances during the affair. At the time, she believed a serious relationship with Hesquijarosa was possible.

Nonetheless, Kerlly now claims that Hesquijarosa was physically intimidating, often made sexual comments at work about his patients' sexual proclivity in front of her and the front desk staff, and discussed female patient's bodies. She concedes she did not report any sexual harassment during her period as office manager, but now asserts various claims of sexual harassment against defendants.

Holy Name's employee handbook outlines reporting procedures for sexual harassment. It instructs employees to submit a complaint to their immediate supervisor, or the HR office, in writing. It further directs employees to advise the offender the behavior is unwelcome. The handbook explicitly forbids retaliation against an employee for reporting a harassment

complaint. Excelcare and HPS do not have separate HR departments; they use Holy Name's.

Hesquijarosa asserts Kerlly initiated the relationship with him due to her personal and marital struggles. He maintains that Kerlly took his number from his employee file, leading the two to become friendlier and affectionate. He insists the relationship was not "unwelcome in any way" and was always consensual.[2]

On September 9, 2016, Kerlly was terminated from her position. The disciplinary notice indicated outstanding bank deposits dating back to November 2015, which were left unsecured in an unlocked office. An investigation revealed thirty-eight deposits, amounting to $3,770, were incomplete at the time she was fired. It was Kerlly's responsibility to complete bank deposits "in a timely manner."

Kerlly believed her firing was retaliatory, related to her affair with Hesquijarosa. She recognized the importance of depositing copays on time, but was "juggling so many things" at the time, so she kept putting the deposits

[2] In 2017, Gonzalez met with Hesquijarosa to discuss Hesquijarosa's relationships with patients or staff of Holy Name. Hesquijarosa admitted to nearly ten relationships with patients, family of patients, and employees. Hesquijarosa was placed on suspension and referred to the Physician Assistance Program. Hesquijarosa resigned in January 2018.

off. Holy Name's employee handbook states: "There is no guarantee of progressive discipline, and employment at Holy Name Medical Center remains at will." It also specifies management and staff "have a legal and ethical duty to avoid relationships, activities, and interests that conflict in any way with the interests of the Medical Center."

II.

In 2018, plaintiffs brought suit against Holy Name, Gonzalez, and Hesquijarosa, asserting various counts of negligent hiring and intentional infliction of emotional distress, plus additional claims under our State's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. During discovery, plaintiffs learned Excelcare and HPS were separate entities from Holy Name. They sought to amend their complaint to include the two, but the statute of limitations barred their inclusion. Plaintiffs also unsuccessfully moved to depose Maron.

Following discovery, on October 16, 2020, Holy Name moved for summary judgment, seeking to dismiss plaintiffs' complaint with prejudice. Hesquijarosa moved for the same. Plaintiffs filed a cross-motion.

Holy Name and Gonzalez argued there was no sexual harassment given the consensual nature of the relationship at issue, and thus no hostile work

environment. Since Kerlly never complained about her relationship with Hesquijarosa, defendants asserted, her termination was not retaliation. Furthermore, Holy Name claimed Kerlly's failure to deposit funds was a serious dereliction of her duties, justifying termination from her position.

Similarly, Hesquijarosa argued the affair was consensual and thus not actionable under the LAD because there was no proof of harassment or discrimination. He further noted physician regulations do not prohibit relationships between coworkers.

On January 28, 2021, the court granted summary judgment in favor of the defendants and dismissed plaintiffs' claims with prejudice. This appeal followed.

III.

We review an appeal from the grant or denial of a motion for summary judgment de novo, applying the same standard as the motion judge. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that 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); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). We must grant summary judgment in favor of a defendant if the plaintiff has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case . . . on which [the plaintiff] will bear the burden of proof at trial." Friedman v. Martinez, 242 N.J. 450, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

IV.

Plaintiffs first assert the summary judgment order dismissing Gonzalez should be reversed. They argue discovery was incomplete and would have led to evidence supporting the claims against him as a supervisory employee who investigated and disciplined plaintiff. In support of this contention, they submit Gonzalez gave substantial assistance to Holy Name and Hesquijarosa's alleged LAD violations, because he had the authority to control Kerlly's transfer and had input in her termination.

We disagree. Under the LAD, an employee aids and abets "when he [or she] knowingly gives substantial assistance or encouragement to the unlawful conduct of [the] employer." Tarr v. Ciasulli, 181 N.J. 70, 84 (2004) (alterations in original) (quoting Failla v. City of Passaic, 146 F.3d 149, 158 (1998)). To do so "require[s] active and purposeful conduct." Id. at 83.

Summary judgment is inappropriate when there is a "likelihood that further discovery will supply the missing elements of the cause of action." Wellington v. Est. of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (quoting Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977)). The opposing party must specify what specific discovery is required. Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007). "When the incompleteness of discovery is raised as a defense to a motion for summary judgment, that party must establish that there is a likelihood that further discovery would supply the necessary information." J. Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J. Super. 170, 204 (App. Div. 1996). "[D]iscovery need not be undertaken or completed if it will patently not change the outcome." Minoia v. Kushner, 365 N.J. Super. 304, 307 (App. Div. 2004).

Plaintiffs have not described any wrongful act by Gonzalez that caused injury beyond alleging his inaction was harmful. However, Kerlly never filed a complaint with him—the matter was only brought to Gonzalez's attention when Eric reported the affair to HR, at which point Kerlly told Gonzalez she wanted to keep working with Hesquijarosa. This is contrary to the "active and purposeful conduct" requirement.

Viewing the record in the light most favorable to plaintiffs, Kerlly's subsequent transfer was appropriate, was not a demotion, and was caused by the prompt investigation by Gonzalez. Plaintiffs have not indicated what type of evidence they expect additional discovery would produce, and how it would reasonably support a contrary conclusion. The trial court's summary judgment order dismissing Gonzalez was proper.

V.

Next, plaintiffs contend the court abused its discretion in denying leave to amend their original complaint to include Excelcare and HPS. They assert Holy Name's corporate structure was unknown prior to discovery—and could only be disclosed by discovery—so the statute of limitations should have been tolled. Specifically, plaintiffs argue the proposed amended complaint would relate back under the fictitious party rule, and thus the trial court abused its discretion in holding the rule did not apply.

We are not persuaded. To the extent plaintiffs seek to assert new causes of action against Holy Name, Excelcare, and/or HPS, these claims are barred by the two-year statute of limitations imposed by N.J.S.A. 2A:14-2(a).

As to adding Excelcare and HPS to the previously extant claims, Rule 4:9-3 allows a complaint to be amended when

> the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth . . . in the original pleading, [and] the amendment relates back to the date of the original pleading . . . . An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and . . . that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by amendment.

Plaintiffs' argument is not salvageable under the relation back doctrine under Rule 4:9-3 because their new claims stem from conduct not alleged in the first initial complaint. Plaintiffs' original complaint sought relief against Holy Name based on the allegations Holy Name negligently failed to "hire doctors possessing such training and skills in their ethical obligations, including compliance with all rules and regulations, as required" and failed to "devote[] their full time to the use and employment of their skills, judgment, and expertise to ensure professionals with the proper qualifications, training, and credentials were hired." In contrast, the amended complaint alleged negligence for failing to enforce anti-harassment policies through monitoring, training, or an adequate complaint system, negligence in granting authority "to prevent, investigate, identify, and rectify hostile work environment or sexual

harassment," and the negligent retention, supervision, and training of Hesquijarosa based on the knowledge of threat of sexual harassment. These allegations do not meet the first requirement of Rule 4:9-3 because the alleged acts are not of the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." R. 4:9-3.

Plaintiffs turn to Rule 4:26-4—the fictitious party rule—for a rationale on which to support their contention that the complaint should be amended. The rule states:

> In any action, . . . if the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification. Plaintiff shall on motion, prior to judgment, amend the complaint to state defendant's true name, such motion to be accompanied by affidavit stating the manner in which that information was obtained.

The fictitious party rule only applies if the defendant's true name is unknown. Greczyn v. Colgate-Palmolive, 183 N.J. 5, 11 (2005). It does not apply "where a plaintiff is unaware that an injury was caused by an identifiable defendant." Ibid. (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 4:26-4 (2005)). "To be entitled to the benefit of the rule, a plaintiff must proceed with due diligence in ascertaining the fictitiously identified

defendant's true name and amending the complaint to correctly identify that defendant." Claypotch v. Heller, Inc., 360 N.J. Super. 472, 480 (App. Div. 2003).

The record belies such due diligence, as plaintiffs did not prove they tried to find the identity of the responsible party prior to filing the complaint or show they took "prompt steps" to substitute once they knew the defendant's true name. See Baez v. Paulo, 453 N.J. Super. 422, 439 (App. Div. 2018). Plaintiffs knew of Excelcare and HPS's existence because they were the entities issuing Kerlly's W-2 forms. Their discrete existence was not hidden.

Furthermore, as the trial court noted, this rule "only allows for the substitution of the correct party for an incorrectly sued party-defendant. It does not allow for the addition of party-defendants who were simply not named in the original [c]omplaint." See Repko v. Our Lady of Lourdes Med. Ctr., Inc., 464 N.J. Super. 570, 576 (App. Div. 2020) ("The 'relation-back' rule cannot cure the failure to file a valid complaint in the first instance."). The rule does not apply where the plaintiff has designated defendants by a fictitious name and later discovers a cause of action against undescribed defendants they seek to join. Greczyn, 183 N.J. at 11.

Plaintiffs fail to fulfill the rule's purpose: "to protect a diligent plaintiff who is aware of a cause of action against a defendant but not the defendant's name, at the point at which the statute of limitations is about to run." Id. at 17-18.

VI.

Next, plaintiffs argue the trial court committed legal error when it analyzed Hesquijarosa's conduct based—in part—on Kerlly's subjective response. We disagree.

Plaintiffs assert this case is subject to the Lehmann standard, which concerns sexual harassment that creates a hostile work environment. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993). Such a claim encompasses allegations of "conduct that occurred because of [a plaintiff's] sex and that a reasonable [individual] would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment." Id. at 603. The conduct must also be unwelcome. Id. at 602; see also Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) ("[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual

harassment claim is that the alleged sexual advances were 'unwelcome.'"). "[A] consensual sexual relationship between employees negates the elements of a hostile environment sexual harassment claim." J.M.L. ex rel. T.G. v. A.M.P., 379 N.J. Super. 142, 148 (App. Div. 2005).

Plaintiffs urge us to apply this standard through the lens of Rios v. Meda Pharm., Inc., 247 N.J. 1 (2021). However, reliance on Rios is misplaced here. Rios restates and applies the standard enunciated in Lehmann in that it requires "an objective rather than a subjective viewpoint because the purpose of the LAD is to eliminate real discrimination and harassment." 132 N.J. at 612. Objectively, a consensual relationship is not discriminatory, nor does it constitute harassment. The trial court used the proper standard and viewed Hesquijarosa's conduct objectively to determine that appellants failed to establish severe and pervasive conduct.

Kerlly never complained about Hesquijarosa's conduct while the affair was ongoing. She pursued Hesquijarosa until she was fired. Indeed, Kerlly averred that at the time Gonzalez transferred her, she was still interested in continuing her relationship with Hesquijarosa. Thus, there was no evidence of hostility in the parties' relationship. See Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 198 (2008) (determining plaintiffs failed to

demonstrate severe or pervasive conduct despite their emotional "subjective reactions to the[] interactions" because "plaintiffs' subjective responses to the allegedly harassing conduct do not control, or otherwise affect, the determination of whether the conduct is severe or pervasive, which requires application of the reasonable-woman standard").

VII.

Finally, we reject plaintiffs' argument a reasonable jury could find Holy Name initiated a specific adverse employment action against Kerlly by pretextually transferring her and then terminating her.

The LAD makes it unlawful "[f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act . . . ." N.J.S.A. 10:5-12(d). "[T]he protection against retaliation embodied in the LAD is broad and pervasive, and must be seen as necessarily designed to promote the integrity of the underlying antidiscrimination policies of the Act . . . ." Young v. Hobart W. Grp., 385 N.J. Super. 448, 465 (App. Div. 2005) (alteration in original) (quoting Craig v. Suburban Cablevision, 274 N.J. Super. 303, 310 (App. Div. 1994)).

Plaintiffs have not demonstrated a prima facie case of retaliation, nor have they demonstrated inconsistencies even tending to suggest a retaliatory

motive. As an initial matter, Kerlly never filed an internal sexual harassment complaint. Her first allegation of such conduct was in this lawsuit in August 2018, nearly two years after her termination. While Holy Name knew of the affair, HR treated the matter as "a personal matter that now bled into the workplace" rather than as a claim for sexual harassment. Kerlly did not engage in a protected activity known to the employer because she never filed a complaint with HR alleging sexual harassment against Hesquijarosa to satisfy the first element of a prima facie claim.

Kerlly was indeed transferred, but this was out of compliance with Holy Name's policy prohibiting a conflict of interest between employees in relations with one another. The transfer was not retaliatory, but rather in conformity with workplace policy. It is true that Kerlly did not want to be transferred, but Gonzalez's rationale—that there were more opportunities for her to be transferred in an administrative role than there were for Hesquijarosa as a physician—was not a retaliatory motivation. Thus, analyzed in the light most favorable to plaintiff—despite plaintiffs' failure to produce a prima facie case—the record supports a conclusion that Holy Name's termination was non-pretextual.

We also reject plaintiffs' argument that New Jersey should recognize a joint employer doctrine under LAD. The joint employment relationship test "exists for various employment-law purposes." DeRosa v. Accredited Home Lenders, Inc., 420 N.J. Super. 438, 463 (App. Div. 2011). "[W]hen two or more employers exert significant control over the same employees, that is, where they share in the determination of matters governing essential terms and conditions of employment, they are considered 'joint employers' . . . ." Ibid. (quoting Commc'ns Workers of Am. v. Atl. Cnty. Ass'n for Retarded Citizens, 250 N.J. Super. 403, 416 (Ch. Div. 1991)). As discussed above, Holy Name is a separate legal entity from Excelcare and HPS, prohibited from sharing operational control. See N.J.A.C. 13:35-6.16. Thus, there is no way for Holy Name to be a joint employer with either entity.

To the extent we have not addressed plaintiffs' remaining arguments, we are satisfied they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.