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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2137-21**

MARZENA JANISZEWSKI,
individually, and as personal
representative/administrator ad
prosequendum of the ESTATE
OF DAMIAN JANUSZCZAK,

Plaintiff-Appellant,

v.

NICHOLAS P. SCUTARI, ESQ.,
d/b/a SCUTARI LAW, and
SCUTARI LAW,

Defendants-Respondents.

Argued May 3, 2023 - Decided July 14, 2023

Before Judges Currier and Enright.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Docket No. L-3024-21.

Gary Schafkopf argued the cause for appellant
(Weisberg Law, attorneys; Matthew B. Weisberg, on
the briefs).

Meredith Kaplan Stoma argued the cause for respondents (Lewis Brisbois Bisgaard & Smith, LLP, attorneys; Meredith Kaplan Stoma, of counsel and on the brief; Thomas F. Holl, on the brief).

PER CURIAM

Decedent Damian Januszczak retained defendants to file a complaint and represent him in a personal injury action (negligence action). After decedent's death, plaintiff Marzena Janiszewski, as administrator of decedent's Estate,¹ instituted an action against defendants, asserting claims of legal malpractice relating to defendants' representation of decedent prior to his death (malpractice action). The trial court granted defendants' Rule 4:6-2(e) motion to dismiss the malpractice action on February 3, 2022. Because plaintiff has set forth a cause of action upon which relief can be granted in the complaint, we conclude the trial court prematurely dismissed the action and reverse.

The negligence action

On September 5, 2017, decedent sustained injuries when he tripped and fell on another's property. He retained defendants later that month to represent him in an action against the property's owners. Defendants filed a complaint against the property owners on July 26, 2019, naming decedent as the sole

¹ We refer to Janiszewski and the Estate collectively as plaintiff. Janiszewski is decedent's sister.

plaintiff. Unbeknownst to defendants, decedent had passed away seven months earlier—on January 9, 2019. Defendants assert they were not informed of decedent's death until September 2019.

Defendants and plaintiff entered into a contingency fee agreement on September 25, 2019. The agreement listed Janiszewski and the Estate as clients. That same day, defendants filed an amended complaint against the property owners, naming as plaintiff "Marzena Janiszewski, Administrator Ad Prosequendum of the Estate of Damian Januszczak."

The property owners moved for summary judgment in October 2020, asserting the claims were barred by the two-year statute of limitations under N.J.S.A. 2A:14-2, and the doctrine of relation back under Rule 4:9-3 did not apply because plaintiff's cause of action did not "arise[] out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." The property owners argued the original pleading was defective since the listed plaintiff—decedent—lacked standing because a complaint cannot be filed by a deceased individual under N.J.S.A. 2A:15-3 and Rule 4:34-1(b). In addition, the property owners asserted plaintiff could not establish a prima facie case of negligence because there was no "direct proof of [the property owners]' alleged negligence" and no circumstantial evidence of a breach of duty. There

was also no evidence, through lay or expert testimony, of the cause of the fall or any defective or dangerous condition. Decedent had not testified before his death and plaintiff could not "point to any action or inaction on the [property owners]' part that caused [decedent]'s claimed fall." The property owners also contended plaintiff could not prove the damages element. Defendants opposed the motion.

After oral argument on January 22, 2021, the court issued an oral decision and accompanying order granting the property owners summary judgment. The court noted plaintiff could not establish negligence with direct evidence because decedent had passed away and plaintiff had no direct information regarding decedent's accident. Therefore, plaintiff could not present proofs regarding a defect or any other reason for decedent's fall. For those reasons, the court found plaintiff could not demonstrate a prima facie case of negligence.

The court also addressed the standing issue, relying on Repko v. Our Lady of Lourdes Med. Ctr. Inc., 464 N.J. Super. 570, 573 (App. Div. 2020), in which this court found a complaint filed by a deceased person was a nullity and Rule 4:9-3 did not permit a subsequently amended complaint to relate back.

The malpractice action

On September 1, 2021, plaintiff filed a complaint against defendants, arguing "[d]efendants knew, or should have known, at the time that [d]efendants initiated the [u]nderlying [m]atter, that [d]ecedent . . . ha[d] passed away approximately seven months prior" and a deceased person is unable to bring suit. Plaintiff further contended defendants erred in not initially naming plaintiff in her capacity as administrator ad prosequendum of decedent's estate, since the statute of limitations expired before the complaint was filed with the correct parties.

Plaintiff also asserted Janiszewski gave defendants information regarding fact witnesses "who were present for the injury," but defendants did not obtain their contact information. In addition, plaintiff alleged "[d]efendants recklessly and/or negligently failed to secure expert opinion testimony concerning the defective condition(s) of the [p]roperty that caused [decedent]'s injuries," as well as expert opinion regarding decedent's injuries and damages.

The complaint then listed three causes of action. Count one asserted professional negligence and professional malpractice for defendants':

(a) [f]ailing to provide appropriate and necessary legal advice and services;

- (b) [f]ailing to maintain adequate, regular, and appropriate communications with [decedent];
- (c) [f]ailing to adequately advise [decedent] as to the status of the [negligence action] and the applicable deadlines concerning the [negligence action];
- (d) [i]nstituting the [negligence action] on behalf of [d]ecedent . . . rather than on behalf of [p]laintiff;
- (e) [f]ailing to institute an action on behalf of the appropriate party . . . prior to the running of the applicable statute of limitations;
- (f) [f]ailing to perform appropriate discovery in the [negligence action], including identifying and obtaining relevant fact witness testimony concerning how the incident occurred;
- (g) [f]ailing to perform appropriate expert discovery in the [negligence action], including identifying and obtaining evidence to establish how the incident occurred;
- (h) [f]ailing to perform appropriate expert discovery in the [negligence action], including securing and obtaining expert opinion testimony concerning the defective condition(s) of the [p]roperty;
- (i) [f]ailing to perform appropriate expert discovery in the [negligence action], including securing and obtaining expert opinion testimony concerning the damages that [decedent] suffered, as well as expert opinion testimony that the alleged damages were a proximate result of the subject incident;
- (j) [f]ailing to appropriately advocate against the [m]otion for [s]ummary [j]udgment; and,

(k) [o]ther conduct that deviated from the applicable standard of care.

The second cause of action was for breach of the covenant of good faith and fair dealing, alleging defendants breached the covenant by "fail[ing] to provide competent legal services." The third cause of action asserted the breach of fiduciary duty.

Defendants moved to dismiss the complaint for failure to state a claim under Rule 4:6-2(e). Defendants asserted they were not notified of decedent's death and plaintiff did not retain their services until after the statute of limitations had run. Defendants also denied plaintiff or decedent ever identified any eyewitnesses. Defendants contended they owed no duty to plaintiff because the attorney-client relationship only began upon execution of the 2019 contingency fee agreement, which occurred after the statute of limitations expired. In addition, because plaintiff could not prove the negligence case, plaintiff failed to establish defendants owed them a duty or breached any duty.

In response, plaintiff asserted she had sufficiently pleaded a cause of action for legal malpractice in alleging "[d]efendants knew or should have known, at the time that [d]efendants initiated the [negligence action], . . . that [decedent] . . . ha[d] passed away" Plaintiff contended defendants had a duty to maintain communication with decedent—their original client.

Furthermore, plaintiff alleged defendants conducted inadequate discovery, evidenced by defendants' admission during oral argument in the negligence action "that [p]laintiff . . . provided [defendants] notice that there were fact witnesses who were present for the injury, but . . . [defendants] did not obtain the contact information for those witnesses." Plaintiff also referred to the lack of direct evidence and expert opinion regarding liability issues and injuries and damages.

On February 3, 2022, the court granted defendants' motion and dismissed the malpractice complaint with prejudice. In a written statement of reasons, the court found plaintiff could not sustain a legal malpractice claim against defendants because "the attorney client relationship was not established until after decedent's death." The court also found it would be "futile" to allow discovery because it was "clear from the motion record" that defendants had not committed malpractice because they timely filed the negligence complaint, and they did not owe Janiszewski or the Estate any duty at the time of decedent's death. The court also stated "[t]here is no duty on [d]efendant[s] to ensure that [their] client is still alive prior to filing a [c]omplaint." Because defendants did not owe a duty to plaintiff, the court concluded plaintiff could not support its claims, requiring dismissal of the complaint.

On appeal, plaintiff contends that the court: erred in its consideration of the duty defendants owed decedent while he was alive; and expressed an inappropriate expert opinion regarding the duty defendants owed decedent.

Our review of a motion to dismiss for failure to state a claim under Rule 4:6-2(e) is de novo. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). We "must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107). A court should search the complaint "thoroughly 'and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Ibid. (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). Such motions should only be granted in "the rarest [of] instances." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165 (2005) (alteration in original) (quoting Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993)). "At this preliminary stage of the litigation [a] [c]ourt [should not be] concerned with the ability of plaintiffs to prove the allegation contained in the complaint. . . . [P]laintiffs are entitled to every reasonable inference of fact."

Ibid. (alterations in original) (quoting Printing Mart, 116 N.J. at 746). If a cause of action is suggested by the facts, the pleading is adequate. Id. at 166 (quoting Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Wickes Cos., 243 N.J. Super. 44, 46 (Law Div. 1990)).

Applying these standards, it was error to dismiss the complaint at this early stage in the litigation. Under the New Jersey Survival Act, N.J.S.A. 2A:15-3, plaintiff had the authority to pursue a legal malpractice action against defendants for any claims decedent had against defendants while decedent was still alive.

Legal malpractice is "grounded in the tort of negligence." Gilbert v. Stewart, 247 N.J. 421, 442 (2021) (quoting Nieves v. Off. of the Pub. Def., 241 N.J. 567, 579 (2020)). The elements of a claim for legal malpractice are: "(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." Ibid. (quoting Nieves, 241 N.J. at 582).

In New Jersey, "the Rules of Professional Conduct [(RPC)] set forth an appropriate standard of care by which to measure an attorney's conduct." Kaplan v.

Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103 (App. Div. 2001) (quoting Baxt v. Liloia, 281 N.J. Super. 50, 57 (App. Div. 1995)).

RPC 1.3 provides "[a] lawyer shall act with reasonable diligence and promptness in representing a client." See Sommers v. McKinney, 287 N.J. Super. 1, 13 (App. Div. 1996) (stating "violation of the [RPC] can be considered evidence of malpractice"). While this is "not a guarantor against errors in judgment, . . . attorney[s] [are] required to exercise on [their] client's behalf the knowledge, skill[,] and ability ordinarily possessed and employed by members of the legal profession similarly situated and to utilize reasonable care and prudence in connection with [their] responsibilities." Gautam v. De Luca, 215 N.J. Super. 388, 396 (App. Div. 1987) (first citing Morris v. Muller, 113 N.J.L. 46, 50 (E. & A. 1934); and then citing Lamb v. Barbour, 188 N.J. Super. 6, 12 (App. Div. 1982)). There is an "obvious duty to timely file and properly prosecute the claims of [the] client." Ibid. Essentially, "[a] lawyer must take 'any steps necessary in the proper handling of the case.'" Ziegelheim v. Apollo, 128 N.J. 250, 260-61 (1992) (quoting Passanante v. Yormark, 138 N.J. Super. 233, 239 (1975)). "Those steps will include, among other things, a careful investigation of the facts of the matter, the formulation of a legal strategy, [and] the filing of appropriate papers" Ibid.

RPC 1.4 provides, in relevant part:

(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.

(b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Courts have found "[e]qually plain [as the duty of diligence] is the responsibility of . . . attorney[s] to inform [their] client[s] promptly of any information important to [them]." Gautam, 215 N.J. Super at 397; Ziegelheim, 128 N.J. at 261. "Accordingly, the lawyer is obligated to keep the client informed of the status of the matter for which the lawyer has been retained, and is required to advise the client on the various legal and strategic issues that arise." Ibid.

Plaintiff alleged in the malpractice action that defendants owed decedent, their client, a duty of care. The complaint detailed numerous breaches of the duty of care, including: the failure to maintain adequate and regular communications; give adequate advice; the failure to conduct appropriate

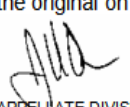
discovery, contact fact witnesses and the failure to obtain expert opinion regarding liability issues and damages.

The legal malpractice complaint sufficiently pleaded a cause of action to withstand dismissal under a Rule 4:6-2(e) motion. Plaintiff is permitted to pursue a claim against defendants for any claims decedent might have had in his lifetime. At this preliminary stage, on this record, the court erred in declaring defendants owed decedent no duty as the RPCs set forth a standard of care.

Plaintiff alleges defendants breached the duty owed to decedent while he was still alive. The court erred in determining, in the context of a Rule 4:6-2 motion, that plaintiff could not prove a breach of the owed duty. As stated, plaintiff has adequately set forth facts in the complaint to proceed with their action.

Reversed. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION