SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3538-20

JOSEPH R. MCFADDEN,
ADMINISTRATOR CTA
FOR THE ESTATE OF
JOAN M. MCFADDEN,

Plaintiff-Appellant,

v.

PENTAGON FEDERAL
CREDIT UNION, a/k/a
PENTAGON FEDERAL
or PENFED, and MORGAN
STANLEY SMITH BARNEY,

Defendants-Respondents.

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Argued May 31, 2023 – Decided July 27, 2023

Before Judges Sumners and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-0544-19.

Herbert J. Stayton, Jr., argued the cause for appellant (Stayton Law, LLC, attorneys; Herbert J. Stayton, on the brief).

Frank J. Cuccio argued the cause for respondents Morgan Stanley Smith Barney LLC (Bressler, Amery & Ross, PC, attorneys; Frank J. Cuccio and Edward A. Velky, on the brief).

PER CURIAM

Plaintiff Joseph McFadden,[1] serving as administrator cum testamento annexo (CTA)[2] of the estate of Joan McFadden, appeals from a Law Division order granting a motion to dismiss plaintiff's complaint against defendant Morgan Stanley with prejudice. The complaint as amended alleges Morgan Stanley allowed over $337,213 to be debited, transferred, or electronically wired from decedent's accounts under the purported authority of an ineffective banking power of attorney. Relying on the four corners of the amended complaint, Judge Susan L. Claypoole found the lawsuit was barred by the statute of limitations.

It is not disputed the alleged misconduct occurred in 2001 and 2002, and the action against Morgan Stanley was not initiated until 2014. Plaintiff acknowledges a six-year statute of limitations governs these claims but asserts

[1] Because several interested parties share the surname McFadden, we refer to them by their first names to avoid confusion. We mean no disrespect in doing so.

[2] This phrase indicates the administrator was appointed by a court because the named executor became unavailable. See In re Est. of Gerhardt, 336 N.J. Super. 157, 166 (Ch. Div. 2000).

that he did not learn of Morgan Stanley's alleged misconduct until 2014, and that the action did not accrue until that discovery. Judge Claypoole determined that because an estate administrator steps into the shoes of the decedent, the statute of limitations begins to run when the decedent knew or should have known of the claim. The judge found that Joan had at least constructive knowledge of the relevant facts prior to her death in October 2002. After carefully reviewing the record in view of the applicable legal principles, we affirm.

I.

We discern the following procedural history and pertinent facts from the record. These facts include allegations contained in plaintiff's complaints as well as an affidavit plaintiff submitted to the trial court. Though the parties dispute which factual contentions ought to be considered at this stage, we have accounted for all of plaintiff's allegations in the interest of giving plaintiff "every reasonable inference of fact." See Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989).

On June 21, 1998, decedent executed a general durable power of attorney and a banking power of attorney (BPOA), which appointed her nephew, John McFadden, as her agent and her niece, Mary Sexton, as an alternate agent. Later that year, she executed a will bequeathing the residue of her estate equally to

John, Joseph, Sexton, and ten of her other nieces and nephews. John and Sexton, who are siblings, were appointed co-executors under the will.

In January 2001, decedent entered a senior living home. At the time, decedent held a brokerage account with Morgan Stanley, where she maintained assets in investment and retirement accounts. Sexton, a Morgan Stanley employee, was the account executive for those accounts.

The BPOA provided it would only become effective upon the occurrence of one of four events:

> (1) Incapacity declared by a court of competent jurisdiction; (2) appointment of a conservator or guardian based upon incapacity; (3) certification of two . . . licensed physicians that [decedent] was incapable of caring for herself and physically or mentally incapable of managing her financial affairs; or, (4) upon executed certification of [decedent] that, after the date thereof, the Agent was fully authorized to act under the Power of Attorney.

None of those contingencies occurred prior to decedent's death.

Between January 2001 and decedent's death on October 17, 2002, over $337,213 was debited, transferred, or electronically wired from decedent's Morgan Stanley accounts under the purported authority of the ineffective BPOA. Those funds were used by John for his personal benefit.

After decedent passed, Sexton renounced her position as co-executor. The next day, John applied for probate in the Burlington County Surrogate's Court, falsely representing he was decedent's only heir or next of kin. Letters testamentary were issued to John by the Surrogate of Burlington County. John proceeded to mishandle the estate assets for his own benefit. In late 2011, John's family became suspicious of him and eventually uncovered his misdeeds.

In March 2012, the beneficiaries under the will filed a complaint against John in the Burlington County Chancery Division, Probate Part. The discovery in that case led the beneficiaries to attempt to add Morgan Stanley and Pentagon Federal as defendants based on their alleged roles in enabling John's conduct. The motion to add Morgan Stanley and Pentagon Federal was denied on December 12, 2014. The probate judge reasoned that adding new defendants would unduly delay the trial and that the action against Morgan Stanley was "likely beyond the six[-]year statute of limitations."

Shortly thereafter, on December 19, 2014, the beneficiaries filed the initial complaint in this matter, claiming breach of contract, breach of fiduciary duty, and negligence against Morgan Stanley and other claims against Pentagon

Federal.[3] After a protracted procedural history that the parties are familiar with, Joseph—then acting as administrator CTA of the estate—replaced the original plaintiffs in this matter in March 2019. Morgan Stanley then moved to dismiss plaintiff's first amended complaint (the FAC) under Rule 4:6-2(e), claiming it failed to allege a breach of duty and was barred by the statute of limitations.

Judge Claypoole heard oral argument on June 7, 2019, and issued an order dismissing the FAC as to Morgan Stanley with prejudice three days later. The order was accompanied by a thirteen-page statement of reasons.

Applying N.J.S.A. 2A:14-1, Judge Claypoole focused on the so-called "discovery rule," which holds the statute of limitations does not begin to run until the plaintiff is aware of the injury and its cause. Morgan Stanley contended the discovery rule was satisfied because bank statements documenting the disputed transfers had been sent to decedent's address of record more than twelve years before the action was filed. It added that plaintiff did not plead a lack of knowledge in the FAC. Plaintiff responded that facts outside the pleadings should be considered under Rule 4:6-2(e). Plaintiff also argued it was Joseph's knowledge that mattered for purposes of the discovery rule because he is the

[3] This appeal pertains only to the action brought against Morgan Stanley. On June 30, 2021, the action against Pentagon Federal, which had been consolidated with another matter, was dismissed following a settlement.

named plaintiff in his capacity as administrator CTA. Plaintiff alternatively sought application of the doctrine of equitable tolling based on John's wrongdoing. Finally, plaintiff claimed Morgan Stanley was collaterally estopped from relying on the statute of limitations because that issue had been resolved in plaintiff's favor in the action against John.

Judge Claypoole ruled, "any and all facts which are argued that are not contained in the [FAC] are not relevant for this [m]otion." She thereupon concluded the claims were barred by the statute of limitations, N.J.S.A. 2A:14-1, noting "the FAC does not allege that [decedent] was unaware of the transactions from her accounts prior to her death." She also found plaintiff's argument that Joseph was the relevant person for purposes of the discovery rule "unpersuasive." She explained:

> An [a]dministrator CTA acts on behalf of the estate of the decedent. Here, the alleged injury relates to [decedent]'s accounts. The administrators CTA act on behalf of the estate and, by extension, [decedent]. Therefore, the [c]ourt finds that the discovery rule would not apply to when the administrators learned of an injury which occurred during the [lifetime] of the decedent. Further, as stated previously, there was never a ruling that [decedent] was incompetent.

Lastly, Judge Claypoole noted there was nothing in the FAC alleging, let alone supporting, the "bare conclusion" that Morgan Stanley was in privity with

John. She therefore rejected plaintiff's collateral estoppel argument. Judge Claypoole concluded, "[b]ased on the above, and given the procedural history of this case, the [c]ourt finds that a dismissal with prejudice is appropriate."

Plaintiff raises the following contentions for our consideration:

> POINT I
>
> A REVIEW OF PLAINTIFF'S [FAC] AND DISCOVERY, TO DATE, PURSUANT TO THE ANALYSIS FOR R. 4:6-2(e) APPLICATIONS, RESULTS IN A CONCLUSION THAT PLAINTIFF HAS PLED A VIABLE CAUSE OF ACTION IN HIS [FAC].
>
> > A. THE COURT BELOW SHOULD NOT HAVE LIMITED ITS CONSIDERATION OF [MORGAN STANLEY]'S MOTION TO DISMISS THE COMPLAINT, PURSUANT TO R. 4:6-2(e), TO ONLY THOSE FACTS CONTAINED IN THE [FAC].
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> POINT II
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> THE PLAINTIFF'S [FAC] IS NOT TIME BARRED BY THE STATUTE OF LIMITATIONS.
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> POINT III
>
> THE FACTS ELICITED THROUGH DISCOVERY, TO DATE, DEFEAT THE DEFENDANT, [MORGAN STANLEY]'S CLAIM OF ENTITLEMENT TO RELIANCE ON N.J.S.A. 46:2B-8.6 AS A DEFENSE TO AND BAR OF LIABILITY TO THE ALLEGATIONS CONTAINED IN THE PLAINTIFF'S [FAC].

POINT IV

THE DEFENDANT, [MORGAN STANLEY], HAD A DUTY OF CARE TO THE PLAINTIFFS AND BREACHED THAT DUTY.

POINT V

DEFENDANT, [MORGAN STANLEY], BREACHED ITS FIDUCIARY RELATIONSHIP WITH THE PLAINTIFF.

II.

We affirm substantially for the reasons set forth in Judge Claypoole's cogent statement of reasons. We add the following comments:

Appellate review of a Rule 4:6-2(e) motion to dismiss for failure to state a claim upon which relief can be granted 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)). The court "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). To determine the adequacy of a pleading, a court must determine "whether a cause of action is 'suggested' by the facts." Printing Mart, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

A Rule 4:6-2(e) dismissal is ordinarily without prejudice, but "a dismissal with prejudice is 'mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted,'" Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 17 (App. Div.) (quoting Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987)), certif. denied, 252 N.J. 258 (2022). A dismissal with prejudice is also appropriate where "discovery will not give rise to such a claim." Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107). An "impediment such as a statute of limitations" indicates the dismissal should be with prejudice. Nostrame v. Santiago, 213 N.J. 109, 127 (2013) (quoting Printing Mart, 116 N.J. at 772).

III.

The threshold question is whether plaintiff's complaint is barred by the statute of limitations. Plaintiff acknowledges that the six-year statute of limitations provided by N.J.S.A. 2A:14-1 applies to these claims. This action was filed more than twelve years after the alleged tortious conduct. Plaintiff raises three theories to circumvent the statute of limitations.

Plaintiff's main argument is that Joseph, as administrator CTA and named plaintiff, did not have knowledge of the injury and its cause until 2014, so the discovery rule preserves the action. Plaintiff alternatively argues the bank

statements documenting the transfers did not go to decedent at her senior living home, so she did not have knowledge of the transactions. Finally, plaintiff mentions equitable tolling as a basis for relief. Morgan Stanley points to the bank statements sent to decedent's address of record to rebut the discovery rule argument and contends that none of plaintiff's arguments concerning lack of knowledge are contained in the FAC.

N.J.S.A. 2A:14-1(a) provides in pertinent part, "[e]very action at law . . . for any tortious injury to real or person property . . . shall be commenced within six years next after the cause of any such action shall have accrued." "The discovery rule delays the accrual of a cause of action until 'the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he [or she] may have a basis for an actionable claim.'" Baird v. Am. Med. Optics, 155 N.J. 54, 66 (1998) (quoting Lopez v. Swyer, 62 N.J. 267, 272 (1973)).

"The discovery rule prevents the statute of limitations from running when injured parties reasonably are unaware that they have been injured, or, although aware of an injury, do not know that the injury is attributable to the fault of another." Ibid. (citing Tevis v. Tevis, 79 N.J. 422, 432 (1979)). "The discovery rule is designed 'to avoid harsh results that otherwise would flow from

mechanical application of a statute of limitations.'" Catena v. Raytheon Co., 447 N.J. Super. 43, 53 (App. Div. 2016) (quoting Vispisiano v. Ashland Chem. Co., 107 N.J. 416, 426 (1987)).

It is long settled that "[t]he executor stands in the shoes of his [or her] testator." Harvester Bldg. & Loan Ass'n of Newark v. Kaufherr, 122 N.J. Eq. 373, 377 (E & A 1937). By its nature, this is a survival action under N.J.S.A. 2A:15-3(a)(1),[4] which specifies, "[e]xecutors, administrators, and administrators ad prosequendum may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he [or she] was living." (Emphasis added). The underscored language forecloses plaintiff's main argument.

Relatedly, in Warren v. Muenzen, we explained that in an action normally governed by N.J.S.A. 2A:14-1 but brought by an estate, the "estate would be

[4] Plaintiff appears to suggest the estate itself, as opposed to decedent, is the injured party. For example, in discussing Morgan Stanley's duty of care, plaintiff analyzes a bank's duty to a non-customer despite decedent having been a customer. The notion that decedent's estate has its own action for injuries to decedent's property that were sustained during decedent's lifetime misconstrues the role of an estate. An estate is not its own separate entity owed independent duties during the decedent's lifetime; it is merely "the collective assets and liabilities of a dead person," Black's Law Dictionary 666 (10th ed. 2014). For that reason, this action falls squarely under N.J.S.A. 2A:15-3.

required to file suit for trespass within six years of the [tortious] event." 448 N.J. Super. 52, 66 (App. Div. 2016). In Warren, we held cause of action accrued for purposes of the discovery rule when the decedent learned of his injury. Id. at 56 n. 4, 59. We described the notion of measuring the statute of limitations from the date of the decedent's death, rather that the date the tort occurred, as an "absurd result," noting that theory could extend the statute of limitations indefinitely. Id. at 63–64. Plaintiff's argument raises similar concerns. We thus concur with Judge Claypoole that the relevant fact-sensitive inquiry is whether and when decedent, not Joseph, reasonably should have been aware of the alleged misconduct by Morgan Stanley.

Judge Claypoole rejected plaintiff's argument that decedent's change of address meant she was unaware of the transfers listed in her bank statements. The discovery rule focuses on what "reasonable diligence and intelligence should have discovered." Baird, 155 N.J. at 66 (quoting Lopez, 62 N.J. at 272). Applying that objective test, we find no basis to disturb Judge Claypoole's determination that the action accrued when the statements were sent. We note plaintiff relies on decedent's capacity to manage her own finances as the basis for the conclusion the BPOA was ineffective. In light of that argument, plaintiff is hard pressed to show that decedent could not have been expected to update

her mailing address or otherwise keep abreast of her finances. We therefore accept Judge Claypoole's finding that decedent had at least constructive knowledge of the claim during her lifetime.

Lastly, plaintiff briefly mentions the concept of equitable tolling. As a general proposition, arguments that are not adequately briefed are deemed waived. Cf. Petro v. Platkin, 472 N.J. Super. 536, 567 (App. Div. 2022) ("An issue that is not briefed is deemed waived upon appeal." (quoting N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015))). In any event, the equitable tolling doctrine is inapposite here.

Equitable tolling applies when (1) the plaintiff was tricked into allowing the deadline to pass by the defendant's misconduct; (2) the plaintiff has been prevented from exercising his or her rights "in some extraordinary way"; or (3) the plaintiff exercised his or her rights in a timely fashion but in some defective manner. Freeman v. State, 347 N.J. Super. 11, 31 (App. Div. 2002) (quoting United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)). "However, absent a showing of intentional inducement or trickery by a defendant, the doctrine of equitable tolling should be applied sparingly and only in the rare situation where it is demanded by sound legal principles as well as the interests of justice." Ibid. (citing Midgley, 142 F.3d at 179).

Here, Morgan Stanley had no role in inducing plaintiff's delay in seeking relief, and plaintiff's initial defective complaint against it was already untimely. Nor are we persuaded this case presents the "rare situation" where "sound legal principles as well as the interest of justice" demand tolling of the statute of limitations. Ibid.

To the extent we have not addressed any remaining arguments plaintiff makes concerning the statute of limitations, they lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). Plaintiff's remaining arguments are rendered moot by our determination that the action was barred by the statute of limitations.

Affirmed.