SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0849-21

BARRY E. LOSASSO
and MICHELE BACINO
LOSASSO,

Plaintiffs-Appellants,

v.

CALVITTI POOLS & SPAS, INC., d/b/a BLUE HAVEN POOLS & SPAS, RAYMOND J. CALVITTI, individually, JEFFREY SCHWARTZ, individually, DOMINICK SOLITARIO, individually, DAVE WINDECKER & SON CONSTRUCTION CO., INC., DAVE WINDECKER, individually, TORPOL CONSTRUCTION LLC, MICHAEL C. WALTER CONSTRUCTION CO., INC., TRI STATE GUNITE OF NEW JERSEY L.P., TRI-STATE STEEL OF PA., INC., PALAZZO POOL FINISHES, K.C.C. POOLS, and AMERICAN POOL PLASTERING,

Defendants,

and

MESKO ENGINEERING ASSOCIATES, INC., VLDG INC., PAUL A. VEGA, individually, R.L. ENGINEERING, INC., and RICHARD EICHENLAUB, JR.,

Defendants-Respondents.

Argued March 29, 2022 – Decided June 6, 2022

Before Judges Fisher, Currier, and Berdote Byrne.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5589-20.

Anthony M. Rainone argued the cause for appellants (Brach Eichler, LLC, attorneys; Anthony M. Rainone, of counsel and on the briefs; Michael A. Spizzuco, Jr., on the briefs).

Joseph A. Petrillo argued the cause for respondents VLDG, Inc. and Paul A. Vega (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Joseph A. Petrillo, of counsel and on the brief).

Walter F. Kawalec, III, argued the cause for respondents R.L. Engineering, Inc., and Richard Eichenlaub, Jr. (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys; Walter F. Kawalec, III, and William F. Waldron, Jr., on the brief).

Reppert Kelly & Vytell, LLC, attorneys for respondent Mesko Engineering Associates, Inc. (Nicholas A. Vytell, on the brief).

PER CURIAM

On leave granted, we consider the trial court's orders dismissing the complaint against certain defendants after plaintiffs failed to timely file the required affidavit of merit under N.J.S.A. 2A:53A-27. Because some allegations against the dismissed defendants are grounded in claims of professional negligence, we affirm the dismissal as to those claims. However, an affidavit of merit is not required to prosecute other claims alleged in the complaint. Therefore, we vacate the portion of the orders that dismissed all claims and remand for further proceedings.

I.

After purchasing a home, plaintiffs began extensive renovations, including the construction of an elevated swimming pool on the external portion of the second floor over some of the living space. Plaintiffs retained defendant VLDG, Inc. to design and manage the renovations. Defendant Paul A. Vega is a licensed architect in New Jersey and a principal of VLDG.

Defendants R.L. Engineering, Inc. (RLE) and Richard Eichenlaub, Jr., a licensed engineer in New Jersey and principal of RLE, were retained as the

structural engineer and for project management services for the home renovations and expansion. Thereafter, VLDG and RLE contracted with defendant Mesko Engineering Associates, Inc. to aid in the design of the swimming pool.[1]

Because the swimming pool leaked, causing damage to plaintiffs' home, litigation ensued. Plaintiffs' second amended complaint included claims against defendants for negligence, breach of contract, breach of the implied covenant of good faith and fair dealing, violations of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, and violations of the New Jersey Truth-in-Consumer Contract, Warranty, and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18. Defendants' respective answers included an affirmative defense stating that plaintiffs were required to serve an affidavit of merit under N.J.S.A. 2A:53A-27.

A.

In April 2021, VLDG moved to dismiss the complaint under Rule 4:6-2 as plaintiffs had not served an affidavit of merit, which was due March 31, 2021. In response, plaintiffs filed an affidavit of merit on May 11.

[1] We refer to respondents VLDG, RLE, and Mesko collectively as defendants.

In opposing the motion, plaintiffs asserted multiple arguments: they did not have to obtain an affidavit to support their claims grounded in negligence against VLDG because VLDG also served as a project manager on the job; the court did not conduct a Ferreira[2] conference; and the time to file the affidavit should be tolled because the parties agreed to go to mediation.

The judge granted VLDG's motion, noting that although the complaint only alleged negligence, the claims were in fact grounded in professional negligence. Therefore, plaintiffs were required to file an affidavit within 120 days of VLDG's answer. The affidavit filed on May 11 was beyond the statutory deadline, and plaintiffs had not demonstrated extraordinary circumstances to toll the statutory period. The court rejected plaintiffs' additional arguments and dismissed all claims against VLDG.

B.

RLE also moved to dismiss the complaint for plaintiffs' failure to serve an affidavit of merit.[3] Plaintiffs opposed the motion, asserting because RLE was retained as a project manager in addition to a structural engineer, they did not need an affidavit of merit to support claims of negligence against a project

[2] Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003).

[3] Plaintiffs have never served an affidavit of merit pertaining to RLE.

manager. In addition, plaintiffs contended they alleged claims against RLE for misrepresenting its knowledge in building the elevated pool—not that it deviated from professional standards.

In its written opinion granting RLE's motion, the court found there was no distinction in these circumstances between an engineer and a project manager, and that the definition of "engineering" under N.J.S.A. 45:8-28(b) included the project management services that RLE was expected to and did perform. Therefore, plaintiffs were required to obtain an affidavit of merit to support their claims against RLE. The court also dismissed the breach of contract, CFA, and TCCWNA claims, finding they were not "separate and distinct from the professional malpractice claim."

C.

Mesko similarly moved to dismiss the complaint after the time expired for plaintiffs to serve an affidavit of merit. In the complaint, plaintiffs alleged the engineering firm was retained to "prepare the plans and specifications for the pool, which were submitted to the local municipality in order to obtain the necessary building permits." Plaintiffs stated Mesko represented itself as a "swimming pool permit specialist that provides pool structural plans to . . . 'only reputable pool companies.'"

For the same reasons expressed in its decisions granting VLDG's and RLE's dismissal motions, the court granted Mesko's motion. The court found the claims against Mesko were grounded in professional negligence and therefore, plaintiffs required an affidavit of merit to pursue their claims against the engineering firm. The court again found the alleged breaches of the CFA and TCCWNA required proof of a deviation from the professional standard of care applicable to engineering. Therefore, those claims could not survive dismissal.

Plaintiffs' subsequent motions for reconsideration of the dismissal orders pertaining to VLDG and RLE were denied. Thereafter, we granted plaintiffs leave to appeal the orders of dismissal and denial of reconsideration.

II.

We review de novo a trial court's determination of a motion to dismiss under Rule 4:6-2(e). Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C., 237 N.J. 91, 108 (2019) (citing Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017)). "[N]o deference [is owed] to the trial court's legal conclusions." Ibid. (citing Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011)).

A.

Plaintiffs assert the trial court erred in finding the complaint only alleged claims of professional negligence against defendants. The complaint also alleged that RLE and VLDG were acting in a non-professional capacity on the construction project. And because defendants were performing services outside their licensed professional occupation, plaintiffs argue they did not have to procure an affidavit of merit to support those claims.

Under N.J.S.A. 2A:53A-27, a plaintiff who brings an action alleging an "act of malpractice or negligence by a licensed person in his profession or occupation" must provide an affidavit of merit to each defendant within the timeframe set out in the statute. Architects and engineers are both "licensed persons." N.J.S.A. 2A:53A-26. Therefore, to proceed on any claims of professional negligence against VLDG, RLE, and Mesko, plaintiffs were required to serve the appropriate affidavit of merit.

The complaint also alleged VLDG and RLE agreed to perform project management services on the renovation project. And since a project manager is not a licensed person under the statute, plaintiffs now argue that their claims against VLDG and RLE, alleging negligent performance of their project manager services, should survive the Rule 4:6-2 motion.

Under the well-established standard applicable to a consideration of a Rule 4:6-2 motion, if a cause of action can be gleaned from the pleadings, the claim survives the motion. See Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). We turn then to the complaint.

A review of the complaint's allegations reveals the services performed by VLDG and RLE as architect and structural engineer respectively, and managing the renovations were intertwined. The complaint described VLDG's work: "[VLDG] designed a vault . . . to be part of the foundation structure of the home in order to hold the pool itself"; "In order to design a vault that would hold the weight of the pool, [VLDG] collaborated with [RLE]." The factual allegations continued: "Plaintiffs contracted with VLDG . . . to design the renovations at the [p]roperty and for general management of the renovation project itself."

Further, plaintiffs' agreement with VLDG is titled "LETTER AGREEMENT for ARCHITECTURAL SERVICES," and it defined VLDG as an architect. While other circumstances may permit a person or entity to work in separate capacities as an architect and as a project manager, those circumstances were not evident here from the face of the complaint. The claims of negligence against VLDG were that its design for the pool was defective,

lacking the proper drainage system and waterproofing membrane. These are claims for which an affidavit of merit is necessary.

Plaintiffs did file an affidavit against VLDG, but after the expiration of the statutory deadline. Plaintiffs assert that extraordinary circumstances existed to allow the late filing and rely on Yagnik v. Premium Outlet Partners, LP, 467 N.J. Super. 91 (App. Div. 2021), to support their argument. We find Yagnik unavailing.

In Yagnik, one of the plaintiffs fell on a set of stairs under construction at an outlet mall. Id. at 97. The plaintiffs sued a number of defendants, including an engineering firm. Ibid. The engineering firm asserted it had minimal involvement with the construction of the stairs and provided a certification from its office director, stating defendant was only present on the construction site on five occasions. Id. at 102. After months of discussion between plaintiffs' counsel and the engineering firm, the plaintiffs filed a stipulation of dismissal without prejudice, voluntarily dismissing their claims against the defendant, with the ability to reinstate the claim if contradictory evidence regarding the defendant's responsibility was revealed during discovery. Ibid.

During the course of discovery, the plaintiffs learned the engineering firm had more involvement in the stairs' construction than originally represented. Id.

at 103. The plaintiffs then reinstated their complaint against the defendant engineering firm. The defendant moved to dismiss the complaint for plaintiffs' failure to serve a timely affidavit of merit. Id. at 104.

We found that extraordinary circumstances existed to allow plaintiffs to file a late affidavit of merit. Id. at 115. However, we noted that the extraordinary circumstances exception should be applied only "in narrow situations." Id. at 114. The plaintiffs were entitled to file a late affidavit because (1) counsel were "mutually focused on cooperatively negotiating a voluntary dismissal of the complaint;" (2) plaintiffs' counsel expressed concern during the negotiations about the timeliness of the affidavit of merit; (3) while negotiations were ongoing, the plaintiffs sought documents from the defendant to determine the defendant's possible liability; and (4) the defendant's certification professing a lack of involvement may "have reasonably caused [the] plaintiffs to misunderstand the firm's actual involvement with the project." Id. at 115-16.

The present circumstances differ from Yagnik. Plaintiffs alleged in the complaint that VLDG and RLE produced a deficient design and plan for the swimming pool. Defendants included an affirmative defense in their answers that plaintiffs required an affidavit of merit. There were no negotiations between the parties for a settlement of their claims or a dismissal. Although the parties

consented to mediation, there was no agreement to stay discovery. Plaintiffs have not demonstrated extraordinary circumstances to warrant a late filing of the affidavit of merit.

B.

Similarly, plaintiffs cannot escape the affidavit of merit requirement regarding RLE by stating, without further description, that RLE was hired as a structural engineer and to provide "project management services." The allegations against RLE were again for the deficient design and drainage system of the pool. The RLE contract set forth plaintiffs' costs for "the engineering fee/cost of preparing the structural drawings . . . ." In addition, RLE was to perform inspections throughout the construction process "to ensure reinforcing steel is being properly placed and any steel framing is being secured properly." These allegations and contractual obligations define RLE as an engineer. Therefore, plaintiffs needed an affidavit of merit to pursue their claims against RLE. No affidavit was ever served and any claims of negligence against RLE were properly dismissed.

C.

We also reject plaintiffs' assertion that because the court did not conduct a Ferreira conference, the time to file an affidavit was tolled. In filing its

complaint, plaintiffs did not designate the case as a professional liability matter. So, a Ferreira conference was not triggered. Nevertheless, our Court has stated that the lack of a Ferreira conference does not toll the time for a party to submit an affidavit of merit. See Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 426 (2010).

D.

Although the failure to file a timely affidavit of merit requires the dismissal of the negligence claims against VLDG and RLE, plaintiffs alleged additional causes of action against those defendants, including violations of the CFA and TCCWNA. Because those claims do not require an affidavit of merit but rather are grounded in fraud and misrepresentation, the court erred in dismissing them.

The CFA prohibits any person "in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid" from participating in an "unlawful practice." N.J.S.A. 56:8-2. An unlawful practice includes "unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of

any material fact with intent that others rely upon such concealment, suppression or omission." Ibid.

Plaintiffs allege in their complaint that defendants (1) misrepresented they "had the knowledge and abilities to properly construct an elevated pool over living space"; (2) concealed from plaintiffs "that a drain inlet was required for construction of the vault"; (3) "submitt[ed] fraudulent plans to the town . . . , thereby concealing from the local authority that [d]efendants were constructing an elevated swimming pool over living space"; and (4) "conceal[ed] from [p]laintiffs that the vault's membrane was perforated over 200 times to avoid repairing the damage."

These claims as pled do not require an affidavit. Plaintiffs must show defendants concealed information or made misrepresentations regarding the project and acted unconscionably—not that they deviated from the acceptable standard of care required of their profession. See Stoecker v. Echevarria, 408 N.J. Super. 597, 621-24 (App. Div. 2009) (holding the plaintiff's CFA claim failed because the plaintiff did not demonstrate the defendants' affirmative misrepresentation of a material fact or knowing failure to disclose a material fact with the intent that the plaintiff would rely upon it).

The TCCWNA protects consumers. The Supreme Court has held that a violation of the CFA is a violation of TCCWNA because it establishes a violation of a consumer's "clearly established legal right," as required by TCCWNA. N.J.S.A. 56:12-15. See Dugan v. TGI Fridays, Inc., 231 N.J. 24, 69-71 (2007) (stating that "courts assess whether the CFA or another consumer protection statute or regulation clearly prohibited the contractual provision or other practice that is the basis for the TCCWNA claim"); United Consumer Fin. Servs. Co. v. Carbo, 410 N.J. Super. 280, 306-07 (App. Div. 2009) (applying TCCWNA based on defendants' violation of a consumer law); Bosland v. Warnock Dodge, Inc., 396 N.J. Super. 267, 278-79 (App. Div. 2007) (holding that where a prima facie case was proven that defendant violated a regulation promulgated under the CFA, defendant also violated TCCWNA).

In their complaint, plaintiffs alleged defendants violated TCCWNA by making the same misrepresentations and concealments as described under the CFA claim. Plaintiffs do not need an affidavit of merit to support their claims under TCCWNA. Therefore, it was error to dismiss plaintiffs' CFA and TCCWNA claims against VLDG and RLE.

E.

We turn to plaintiffs' contentions regarding the dismissal of all claims against Mesko. Plaintiffs assert at the outset that because Mesko was in default for failure to answer the amended complaint, it could not file a Rule 4:6-2 motion. This argument lacks merit. The second amended complaint was filed on April 16, 2021. Mesko's answer was due on May 6. In lieu of answering, Mesko filed its motion to dismiss on July 26. Plaintiffs did not request entry of default until August 17, 2021. Therefore, Mesko was not in default and had standing to file the dismissal motion.

Since Mesko is an engineering firm, any claims of professional negligence cannot be sustained without an affidavit of merit. But plaintiffs contend they only alleged claims of fraud against Mesko and not claims that Mesko acted negligently in its capacity as an engineer.

Mesko was retained by another entity to prepare structural plans for the pool for submission to the municipality to obtain a construction permit. Plaintiffs contend Mesko misrepresented to the municipality what they were building, as the submitted plans were for an inground pool, not an elevated or rooftop pool.

Plaintiffs' claims against Mesko lie in fraudulent concealment and misrepresentation under the CFA and TCCWNA. Therefore, they did not need an affidavit of merit to prosecute those claims. The court erred in dismissing the CFA and TCCWNA claims against Mesko.

To be clear, plaintiffs cannot pursue any claims of professional negligence against defendants. The only surviving claims against these defendants are for violations of the CFA and TCCWNA.

We reverse in part the orders granting the dismissal of all claims against defendants and vacate the dismissal of the CFA and TCCWNA claims. Plaintiffs may pursue the discrete claims against VLDG, RLE, and Mesko as discussed.

As a result, we also reverse in part the orders denying reconsideration and vacate the dismissal of the CFA and TCCWNA claims. We point out for clarification that when considering the motions for reconsideration, the judge mistakenly reviewed them as final orders. Because the orders dismissed claims only against some of the named defendants, they were interlocutory in nature. See Silviera-Francisco v. Bd. of Educ., 224 N.J. 126, 140-41 (2016). Therefore, the appropriate standard for review of the interlocutory orders was under Rule 4:42-2. In considering an interlocutory order, a trial court may grant reconsideration at any time prior to entry of final judgment if warranted "in the

interest of justice." See Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). Since there is no indication the court intended to grant reconsideration under either Rule 4:49-2 or 4:42-2, it is an academic point but important to recognize the distinction for a trial court's review.

Reversed in part, vacated in part, and remanded to the trial court for further proceedings. We do not retain jurisdiction.