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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-2381-15T4

JONATHAN A. CARNERO,

Plaintiff-Appellant,

v.

WINSTON TRUJILLO,

Defendant-Respondent.

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Argued April 25, 2017 – Decided May 4, 2017

Before Judges Fisher and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3830-12.

Randi S. Greenberg argued the cause for appellant (The Simantov Law Firm, P.C., attorneys; Joseph M. Simantov, of counsel and on the brief).

Jill Roth argued the cause for respondent (Bright & Sponder, attorneys; Ms. Roth, of counsel and on the brief).

PER CURIAM

Plaintiff appeals Law Division orders denying his motion for leave to reopen and extend the discovery period and granting

defendant's motion for summary judgment. Based on our review of the record under the applicable law, we affirm.

I.

We limit our discussion of the facts to those supported by the record presented on appeal. On November 1, 2012, plaintiff filed a complaint alleging he suffered personal injuries in a November 2010 automobile accident caused by defendant's negligence. Plaintiff's claim is subject to the limitation on lawsuits under the Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-1.1 to -35. As a result, to recover noneconomic damages he is required to prove defendant's negligence caused him to sustain a permanent injury as defined in N.J.S.A. 39:6A-8(a).

In December 2014, plaintiff supplied answers to supplemental Form A interrogatories and responses to defendant's notice to produce documents. In reply to an interrogatory requesting the identities of plaintiff's expert witnesses, plaintiff stated he had "not yet retained expert witnesses" but reserved the right to do so. In response to another interrogatory, plaintiff identified Dr. Gautham Sehgal as his treating physician, and attached reports from medical care providers A.P. Diagnostic Imaging, Dr. Albert Akkerman, and Dr. Roman Kosiborod.

The initial discovery end date was June 17, 2015. In a May 8, 2015 order, the court extended the discovery end date to August 30, 2015, and directed that plaintiff file his expert reports by June 30, 2015, and defendant file his expert reports by July 30, 2015. Neither party requested any further extension of the discovery end date prior to its expiration on August 30, 2015.

On November 19, 2015, the parties appeared for non-binding arbitration. The arbitrator issued a no-cause award because plaintiff failed to present an expert report showing his alleged injuries were caused by the accident or were permanent. Plaintiff subsequently filed a request for a trial de novo. The court scheduled the matter for trial on February 22, 2016.

On November 20, 2015, defendant filed a motion for summary judgment. Defendant claimed he was entitled to summary judgment because discovery expired on August 30, 2015, and plaintiff failed to file an AICRA certification<sup>1</sup> and serve an expert report establishing his alleged injuries were caused by the accident and were permanent. Defendant asserted the evidence therefore showed plaintiff could not sustain his burden of proof under AICRA.

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<sup>1</sup> Within sixty days of the filing of defendant's answer, plaintiff was required to provide defendant with a certification from an appropriately licensed physician stating that the plaintiff suffered a permanent injury. N.J.S.A. 39:6A-8(a); DiProspero v. Penn, 183 N.J. 477, 488 (2005).

On December 9, 2015, plaintiff filed a letter brief in opposition to defendant's motion. Plaintiff's counsel asserted that on January 12, 2015, he served defendant's counsel by telefax and regular mail with a May 25, 2011 expert report from Dr. Marc Esposito, D.C., stating plaintiff's injuries were permanent and proximately caused by the accident.<sup>2</sup> Plaintiff therefore argued he presented evidence satisfying his burden of proof under AICRA, and that the issues of permanency and causation must be submitted to a jury.

On December 14, 2015, plaintiff filed a motion to reopen and extend discovery to permit his retention of a new expert. In his supporting certification, plaintiff's counsel asserted that in his preparation for trial, he discovered Esposito was "no longer in practice, [and] had his chiropractic license suspended (as he apparently was arrested for committing insurance fraud)." Counsel represented that his office was unable to contact Esposito, and Esposito "would not be able to testify at trial if he was located as his license has been suspended until 2016." Plaintiff's counsel claimed Esposito's unavailability and inability to testify

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<sup>2</sup> Annexed to counsel's letter brief is a telefax report which purports to confirm delivery of Esposito's four-page report to defendant's counsel, along with a cover letter dated January 12, 2015, enclosing the report and amending plaintiff's answers to interrogatories adding Esposito as an expert witness.

constituted exceptional circumstances justifying the reopening of the discovery period, and requested an extension of time for the retention of a new expert.

Defendant's counsel filed a letter brief in opposition to plaintiff's motion. Defendant's counsel disputed that plaintiff's counsel served Esposito's report on January 12, 2015, and denied receiving Esposito's report at any time prior to December 9, 2015, when plaintiff filed opposition to defendant's summary judgment motion. Defendant further asserted that Esposito pled guilty to insurance fraud in November 2012, and argued plaintiff failed to explain the three-year delay in obtaining a new expert witness. Defendant claimed plaintiff failed to exercise due diligence in monitoring the status and availability of his expert witness, and the failure did not constitute an exceptional circumstance permitting the reopening of the discovery period.

The court heard oral argument on the parties' motions and found plaintiff did not establish exceptional circumstances justifying a reopening and extension of the discovery period. The judge found it unnecessary to resolve the parties' dispute over whether Esposito's report was actually served in January 2015. The judge concluded that plaintiff's three-year delay in learning of Esposito's unavailability due to his criminal conviction resulted from a lack of diligence and not exceptional circumstances. The

judge also granted defendant's summary judgment motion because plaintiff's counsel conceded Esposito was unavailable and unable to testify and plaintiff therefore lacked evidence establishing the causation and permanency of his injuries. The court entered orders denying plaintiff's motion and granting defendant's motion. This appeal followed.

## II.

Plaintiff first contends the court erred in denying his motion to reopen and extend the discovery period to permit his retention of a new expert. We apply "an abuse of discretion standard to decisions made by [the] trial courts relating to matters of discovery." C.A. ex rel. Applegrad v. Bentolila, 219 N.J. 449, 459 (2014) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)); accord Bender v. Adelson, 187 N.J. 411, 428 (2006). We "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Ibid. (quoting Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div.) certif. denied, 185 N.J. 296 (2005)). "As it relates to extensions of time for discovery," we "likewise generally appl[y] a deferential standard in reviewing the decisions of trial courts." Pomerantz, supra, 207 N.J. at 371.

Discovery extensions are "governed by Rule 4:24-1." Tynes v. St. Peter's Univ. Med. Ctr., 408 N.J. Super. 159, 168 (App. Div.), certif. denied, 200 N.J. 502 (2009). Where, as here, the request for a discovery extension is made following arbitration and the setting of a trial date, an extension is granted only on a showing of exceptional circumstances. R. 4:24-1(c); Garden Howe Urban Renewal Assoc., LLC v. HACBM Architects Eng'rs Planners, LLC, 439 N.J. Super. 446, 460 (App. Div. 2015). To establish "exceptional circumstances" permitting an extension of the discovery period under Rule 4:24-1(c),

the moving party must satisfy four inquiries: (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.

[Ibid. (quoting Rivers, supra, 378 N.J. Super. at 79).]

Measured against this standard, we discern no abuse of discretion in the court's determination that plaintiff failed to establish exceptional circumstances warranting the requested discovery extension. The record supports the court's finding that plaintiff failed to demonstrate why, through the exercise of due

diligence, he did not and could not determine that a new expert was required prior to the expiration of the August 30, 2015 discovery deadline.

The evidence showed Esposito pled guilty to a criminal charge in 2012, long before plaintiff's complaint was dismissed and then reinstated in 2014. Esposito's license was suspended in 2014, prior to the filing of defendant's answer and plaintiff's putative service of Esposito's report in January 2015. As correctly noted by the court, plaintiff made no showing of any effort to determine Esposito's availability as a witness during the four years following the date of Esposito's 2011 report and prior to the end of the discovery period. Moreover, plaintiff's December 2014 answers to interrogatories stated he did not have any proposed experts, but he claims that three weeks later he amended his answers to add Esposito as an expert witness, and served Esposito's report. It may therefore be reasonably inferred that during the three-week period defendant made a decision to retain and utilize Esposito as an expert witness and did not make any effort to determine Esposito's availability or ability to testify.

Due diligence required, at a minimum, confirmation of Esposito's availability in January 2015, when according to plaintiff's allegations, he first amended his answers to interrogatories adding Esposito as an expert witness. Yet,



plaintiff presented no evidence showing he exercised any diligence to determine Esposito's availability and ability to testify at that time or any other time during the following eight months the discovery period remained open. Plaintiff failed to demonstrate that he could not have determined Esposito's unavailability through the exercise of due diligence during the discovery period. The retention of a new expert within the discovery period was within plaintiff's control, but he failed to take any action to determine if it was necessary, and failed to show he was prevented from ascertaining Esposito's availability prior to the discovery end date.

Based on the proofs presented, we are satisfied plaintiff failed to sustain his burden of demonstrating exceptional circumstances warranting the requested discovery extension. Ibid. The court did not abuse its discretion in determining plaintiff failed to exercise due diligence during the discovery period, and that there was no showing of exceptional circumstances permitting a reopening and extension of the discovery period. R. 4:24-1(c); see, e.g., Rivers, supra, 378 N.J. Super. at 79-81 (finding no abuse of discretion in denial of discovery extension "where the 'delay rests squarely on plaintiff's counsel's failure to retain an expert and pursue discovery in a timely manner'" (quoting Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 473-74

(App. Div.), rev'd on other grounds, 185 N.J. 290 (2005)); Huszar, supra, 375 N.J. Super. at 473 (finding no abuse of discretion in court's denial of request for discovery extension where plaintiff failed to explain reason for not obtaining expert witness during discovery period). We therefore affirm the court's order denying plaintiff's motion to reopen and extend the discovery period.

We next consider plaintiff's argument that the court erred by granting defendant's motion for summary judgment. We review a trial court's grant of summary judgment de novo. Cypress Point Condo. Ass'n v. Adria Towers, L.L.C., 226 N.J. 403, 414 (2016). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). We must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

Plaintiff argues that defendant's motion for summary judgment was based solely on the claim that plaintiff failed to supply an expert report on causation and permanency during the discovery period. Plaintiff contends the alleged undisputed material facts

supporting defendant's motion were not based on competent evidence, and plaintiff otherwise showed he served Esposito's report in January 2015. Plaintiff also argues defendant's summary judgment motion was not based on a claim that Esposito was precluded by either his criminal conviction or license suspension from testifying at the trial, and the court erroneously granted summary judgment based on a finding that Esposito was either ineligible or unavailable to testify.

"[A] motion for summary judgment must be accompanied by a statement that sets forth, in separately numbered paragraphs, 'a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted.'" Lyons v. Twp. of Wayne, 185 N.J. 426, 435 (2005) (quoting R. 4:46-2(a)). The moving party must first show "the absence of disputed, material facts, and failure to file the required statement alone warrants denial of the movant's motion." Ibid. The opposing party "then must file a responding statement either admitting or disputing each of the facts in the movant's statement." Ibid.; R. 4:46-2(b). "[S]ummary judgment should be granted only 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.'" Ibid. (quoting R. 4:46-2(c)).

Defendant's summary judgment motion was based on the contention that plaintiff failed to supply Esposito's report.<sup>3</sup> Although neither party submitted competent evidence supporting their opposing positions concerning plaintiff's claimed delivery of the report in January 2015,<sup>4</sup> we are convinced the court correctly determined it was unnecessary to address the dispute.

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<sup>3</sup> Defendant's summary judgment motion was also based on the claim that plaintiff failed to provide a certification as required under N.J.S.A. 39:6A-8(a). Defendant failed to support the assertion in an affidavit or with any citation to competent evidence in the discovery record, R. 4:46-2(c), the court did not rely upon the alleged failure as a basis for its grant of summary judgment, and neither party makes any argument addressing the issue on appeal. We therefore do not consider or decide the issue.

<sup>4</sup> Defendant's statement of material facts asserts that plaintiff never provided an expert's report. In plaintiff's opposition brief, he argues Esposito's report was served by telefax and regular mail on January 12, 2015, and attaches a telefax report he claims confirms defendant's receipt of the report. The factual allegations of counsel are unsupported by affidavits or any citation to the discovery record. See Celino v. Gen. Accident Ins., 211 N.J. Super. 538, 544 (App. Div. 1986) (finding attaching documents to a brief or a statement of material facts without an authenticating affidavit is insufficient to support a summary judgment motion). In any event, the arguments of counsel reflect a dispute concerning the delivery of Esposito's report during the discovery period, but neither party submitted an affidavit, certification, or citation to the record to support its position.

The dispute concerning whether Esposito's report was delivered to defendant's counsel became irrelevant because in plaintiff's counsel's certification supporting the motion for the discovery extension, he represented that Esposito was neither available nor able to testify on plaintiff's behalf. Thus, even if the report had been delivered as alleged, plaintiff did not have an expert witness on the issues of causation and permanency. In addition, it is undisputed that without Esposito's testimony, plaintiff lacked any competent evidence sufficient to satisfy his burden of proving his alleged injuries were caused by the accident and permanent.<sup>5</sup> N.J.S.A. 39:6A-8(a); see also Juarez v. J.A. Salerno & Sons, Inc., 185 N.J. 332, 334 (2005) (finding that to satisfy the N.J.S.A. 39:6A-8(a) threshold, the plaintiff must demonstrate "by objective credible evidence" he or she sustained a "permanent injury"). Confronted with the undisputed fact that plaintiff lacked sufficient evidence to sustain his burden under N.J.S.A. 39:6A-8(a), the court correctly determined that defendant was entitled to judgment as a matter of 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

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<sup>5</sup> Indeed, plaintiff's motion to extend discovery was founded on the contention that because Esposito was unavailable and unable to testify, it was essential that he obtain a new expert.