

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2166-13T1

CYNTHIA LIZZIE, HAMDY
SILIMAN AND MARTIN
GREENBLATT,

Plaintiffs-Appellants,

v.

FLETCHER CREAMER JR.,
FLETCHER CREAMER INC.,
MARK DOMINGUEZ, JOHN PAPANDREA,
MICHAEL WOLAN, CITY OF
PLAINFIELD, NEW JERSEY
AMERICAN WATER,

Defendants-Respondents.

Submitted February 25, 2015 – Decided April 1, 2015

Before Judges Kennedy and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Docket No. L-
0456-10.

Cynthia Lizzie, Hamdy Sliman and Martin
Greenblatt, appellants pro se.

Malapero Prisco Klauber & Licata, L.L.P.,
attorneys for respondents (Evi Kallfa, on
the brief).

PER CURIAM

Plaintiffs appeal from an order dated October 25, 2013, granting defendants Fletcher Creamer, Inc., and New Jersey American Water summary judgment.¹ Plaintiffs also appeal the denial of two motions for reconsideration precluding their use of various documents. We affirm.

I

Plaintiffs were in the business of selling carpets and area rugs, which were stored in the basement of a mosque located in Plainfield. American Water Company hired Fletcher Creamer, Inc., to maintain its water lines located in Plainfield. In their complaint, plaintiffs allege that, on October 4, 2008, a temporary water main running along the curb of the mosque "burst either due to improper installation or the failure to properly check it," causing water to flood the basement of the mosque and damage their merchandise. Plaintiffs sought damages for defendants' alleged negligence and bad faith for failing to compensate plaintiffs for their losses.²

¹ Summary judgment was entered on May 13, 2011, dismissing plaintiffs' claims against the individual defendants. On August 9, 2011, the trial court dismissed plaintiffs' claims against the City of Plainfield. The dismissal of these claims is not the subject of this appeal.

² Plaintiffs' claim for bad faith was dismissed and is not the subject of this appeal.

During discovery plaintiffs served an expert's report by engineer Leonard Goldblatt.³ The day before the trial was to commence on August 9, 2011, defendants filed a motion in limine seeking, among other things, to preclude Goldblatt from testifying at trial on the basis his expert's report contained only net opinions. After hearing argument on the motion the day of trial, the court granted defendants' motion. Because plaintiffs' allegations were unsupportable without expert testimony, the trial court granted defendants' oral motion to dismiss the complaint.

Plaintiffs appealed and we determined that making a motion for summary judgment returnable the morning of trial not only "violated court rule, but unfairly deprived plaintiffs of the opportunity to more thoughtfully respond to [the defendants'] motions in limine." Lizzie v. Creamer, No. A-0478-11T4 (App. Div. April 18, 2013) (slip op. at 14). On April 18, 2013, we reversed the trial court and remanded the matter for the reinstatement of the complaint and further proceedings. Id. at 13.

On remand, defendants filed a new motion for summary judgment, which was heard on June 21, 2013. The trial court adjourned the summary judgment motion and entered an order

³ A copy of Goldblatt's report is not in the record.

providing plaintiffs thirty days to serve defendants with a liability expert's report. The court thereafter extended to August 29, 2013, the date by when all of plaintiffs' experts' reports were to be served.⁴

On August 9, 2013, the court entered an order precluding plaintiffs from using a particular document, and on August 23, 2013, the court entered an order quashing a subpoena plaintiffs had served upon the City of Plainfield and New Jersey American Water.⁵

Plaintiffs did not serve a revised report from Goldblatt, but they did serve a report authored by engineer Steve Weinstein. We do not have a full copy of Weinstein's report, but it is undisputed that he did not have enough information to say who was at fault for negligently causing the flood in the basement of the mosque.

Plaintiffs filed a motion for reconsideration of the August 9, 2013 and August 23, 2013 orders. On October 25, 2013, the court heard and granted defendants' motion for summary judgment, as well as plaintiffs' motions for reconsideration. In denying plaintiffs' motions for reconsideration, the court found – and

⁴ A copy of the order extending the date by when plaintiffs' experts' reports were due was not provided.

⁵ Not only were the August 9 and August 23, 2013 orders not provided but the trial court's reasons for denying these motions were also not in the record.

plaintiffs conceded during oral argument – that discovery had closed in April 2011 and that, but for the June 21, 2013 order giving plaintiffs an additional thirty days to provide another liability expert's report, a deadline that was subsequently extended to August 29, 2013, plaintiffs were never granted leave to reopen discovery. In addition, the court determined that plaintiffs failed to meet the standard for reconsideration. See R. 4:49-2; Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). The court found plaintiffs failed to show that the court's reasons for denying their motions were either palpably incorrect, irrational, or that it had failed to consider or appreciate the significance of probative, competent evidence. See id. at 384.

The court granted defendants' motion for summary judgment because Goldblatt's report contained net opinions and Weinstein's report did not implicate defendants and, thus, absent testimony from an expert setting forth how defendants were negligent, plaintiffs were not going to succeed in sustaining their cause of action at trial.

II

On appeal, plaintiffs raise the following points for our consideration.

POINT I: THE LOWER COURT ABUSED ITS DISCRETION BY DISMISSING THE COMPLAINT ON PROCEDURAL GROUNDS.

POINT II: THE LOWER COURT VIOLATED PLAINTIFF'S DUE PROCESS BY DEPRIVING PLAINTIFF'S OPPORTUNITY FOR A TRIAL ON THE MERITS.

POINT III: THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY DISMISSING THE COMPLAINT BY ITS FAILURE TO COMPLY WITH RULE: 37(b)(2).

POINT IV: THE LOWER COURT ABUSED ITS DISCRETION BY PRECLUDING PLAINTIFF'S CONSTITUTIONAL RIGHTS REGARDING JURY TRIAL AND ERRED IN ITS FAILURE TO CONSIDER ARTICLE 48 ACCESS TO THE COURTS.

POINT V: THE LOWER COURT ABUSED ITS DISCRETION IN ITS DISMISSAL BY BARRING THE FACT ISSUES IN THIS MATTER FROM A FACT FINDER.

POINT VI: THE LOWER COURT ABUSED ITS DISCRETION BY DENYING A REHEARING OF JUDGE CAULFIELD'S RULING BARRING DOCUMENTS FOR A FACT FINDER TO INFER CAUSATION.

POINT VII: THE LOWER COURT ERRED IN ITS DISMISSAL OF THE COMPLAINT AS THE APPELLATE DIVISION REMANDED THE MATTER TO BE TRIED ON THE MERITS.

POINT VIII: THE LOWER COURT ERRED IN ITS DISMISSAL OF THE COMPLAINT AS THE COURT RULES CLEARLY EXPRESSES THAT COURTS MAY RELAX ITS RULE IN THE INTEREST OF JUSTICE.

POINT IX: THE LOWER COURT ERRED IN BARRING CRUCIAL EVIDENCE FROM BEING USED AT TRIAL.

POINT X: THE LOWER COURT ERRED IN FAILING TO ALLOW ADDITIONAL DISCOVERY BY WAY OF SUBPOENAS.

POINT XI: THE LOWER COURT ERRED IN ITS FAILURE TO CONSIDER THE RES IPSA LOQUITUR RULE.

POINT XII: THE LOWER COURT ABUSED ITS DISCRETION IN ITS DISMISSAL OF THE COMPLAINT AS PLAINTIFFS FAILED TO PROVIDE AN EXPERT WITNESS REPORT, THEREBY PRECLUDING FACT ISSUES TO BE TRIED BY A JURY.

After carefully reviewing the record and briefs, we conclude that all of these arguments are without sufficient merit to warrant discussion in a written opinion, see 2:11-3(e)(1)(E), and affirm substantially for the reasons stated by Judge Mark Ciarrocca in his October 25, 2013 oral opinion. We add only the following comments.

We review a motion granting summary judgment de novo, using the same standard used by the trial court to determine whether to grant or deny summary judgment. Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). We must resolve, based on the competent evidential materials submitted by the parties, whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2(c). Here, there were no material issues of fact in dispute and defendants' motion for summary judgment was properly granted.

"In general, expert testimony is required when 'a subject

is so esoteric that jurors of common judgment and experience cannot form a valid conclusion.'" Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993) (quoting Wyatt ex rel. Caldwell v. Wyatt, 217 N.J. Super. 580, 591 (App. Div. 1987)); accord Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982); see N.J.R.E. 702. Here, expert evidence was needed to show defendants were negligent and that such negligence proximately caused plaintiffs' damages. See Ford Motor Credit Co., LLC v. Mendola, 427 N.J. Super. 226, 236-37 (App. Div. 2012); Fanning v. Montclair, 81 N.J. Super. 481, 486-87 (App. Div. 1963).

Despite being given ample opportunity, plaintiffs were unable to come forward with a liability expert's report identifying who were culpable for the flooding. Without an expert's report setting forth that defendants were negligent and that their negligence proximately caused plaintiffs damages, plaintiffs were not going to make out a prima facie case at trial. Accordingly, the trial court properly determined that summary judgment was warranted.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION