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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4848-12T3

KIMBERLY PHILLIPS and TIMOTHY PHILLIPS,

Plaintiffs-Appellants,

v.

JAMES M. WEICHERT,

Defendant-Respondent.

Submitted October 1, 2014 – Decided May 15, 2015

Before Judges Alvarez and Maven.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-3576-11.

Thomas E. Tucker, attorney for appellants.

Law Offices of William E. Staehle, attorneys for respondent (William E. Staehle, on the brief).

PER CURIAM

On December 7, 2012, a Law Division judge denied plaintiffs Kimberly Phillips (Kimberly) and Timothy Phillips's Rule 4:9-1 motion to amend their complaint to add a defendant, Weichert Company. On April 8, 2013, after telephonic oral argument, the judge also denied reconsideration of that decision. We now reverse.

I

Kimberly alleged she was injured when she tripped on the staircase at her workplace, a commercial office building. At the time of the incident, she was employed as a "quality control/audit manager" for Weichert Insurance Company. The complaint, filed July 29, 2011, sought damages for personal injuries and only named as defendant the record owner of the premises, James M. Weichert. The complaint did, however, also name "JOHN DOES I-X, fictitious names representing unidentified Weichert companies which own, lease or have an interest in the Property."

The initial discovery end date was November 9, 2012. Weichert moved in October 2012 to extend the timeframe, the application was granted, and the judge set a new discovery end date of January 15, 2013.

Plaintiffs' proposed amendment to the complaint would have added Weichert Company as an additional defendant. In December 2011, plaintiffs were provided with a photocopy of the building lease, which named Weichert as the landlord and Weichert Company as the tenant. Plaintiffs asserted they did not file for amendment at that time because they wanted to continue to explore in discovery the manner in which the building was operated and maintained.

Plaintiffs' counsel received the workmen's compensation file regarding the incident, as well as Kimberly's personnel file, in May and June of 2012. That spring, Weichert's attorney had offered to consent to an amendment of the complaint to name Weichert Company as defendant if plaintiffs' counsel would agree to dismiss Weichert individually and with prejudice. At that juncture, plaintiffs' counsel declined the offer because of the possibility that Weichert had been personally involved in certain renovations to the building staircase which resulted in the allegedly defective condition.

In October 2012, Weichert supplied certified answers to interrogatories in which he denied any personal knowledge of the premises, the condition of the premises, and the accident. This information was confirmed when plaintiffs subsequently deposed Weichert Company's operations manager, Richard Ronchetta, who verified that Weichert Company, as the tenant, was solely responsible for building maintenance.

In November 2012, plaintiffs deposed Christopher Oehrly, the director of Weichert Insurance Agency, Kimberly's employer, regarding the incident. He testified that after the accident, he would have contacted Ronchetta to make any necessary repairs to the vinyl material covering the stair tread on which plaintiff tripped.

In their November 2012 motion to amend, plaintiffs alleged no prejudice would flow to Weichert Company because it had knowledge of the claim from the time Kimberly fell. Plaintiffs also stated in their application that the discovery period had not yet expired.

The court denied plaintiffs' request for oral argument on the motion to amend and decided it on the papers. On the form of order that plaintiffs' attorney submitted with the application, the court crossed out some language, noted that the motion was opposed, and hand wrote the following:

> Application is denied. While motions to amend are to be liberally granted the information was in plaintiffs' possession for more than [one] year. This court extended discovery [and] set an arbitration date for [January 18, 2013]. Plaintiff now misrepresents defendant's position regarding maintenance responsibilities. This motion should have been made months ago. This is what occurs when discovery does not proceed expeditiously.

In their motion for reconsideration, plaintiffs reiterated their prior arguments and advised the court that denial of the request to amend would effectively terminate the litigation.

During telephonic oral argument on the reconsideration motion, Weichert's counsel disagreed with plaintiffs' counsel that the amendment to the complaint would "relate back" to the original filing date if an appropriate motion was made to

substitute a John Doe defendant. Weichert's attorney argued that if reconsideration was granted, he would make an "inevitable motion to dismiss on the statute of limitations. . . . I don't wish to argue that motion now, but that's going to be the [] next argument." From that premise, he contended that the amendment was not sustainable as a matter of law and that the motion should be denied on that basis alone.

The judge found his original decision was neither palpably incorrect, nor rendered on an irrational basis, nor failed to consider the facts. The judge also determined that plaintiffs presented no new facts on the application. See R. 4:49-2; Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). He further found, as a matter of law, that the amendment was not sustainable because of the statute of limitations.

The judge's initial grounds for denying the motion to amend, when joined with his comments in denying the motion for reconsideration, speak to his concern regarding undue delay in the proceedings. He was also troubled that plaintiffs' counsel failed to timely file for amendment immediately upon learning the identity of the actual entity responsible for maintenance and repairs to the premises, despite counsel's explanation for the delay.

II

It is well-established that motions for leave to amend are ordinarily left to the sound discretion of the trial court. Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 484 (App. Div.), certif. denied, 212 N.J. 198 (2012). Where an amendment to the complaint, like the original cause of action, is so meritless that a motion to dismiss would have to be granted, however, no purpose is served by granting the application. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006).

Nonetheless, Notte specifically states that "statutes of limitations, unlike statutes of repose, . . . 'are not self-executing. Such statutes are based on the goals of achieving security and stability in human affairs and ensuring that cases are not tried on the basis of stale evidence.'" Id. at 500 (quoting Zaccardi v. Becker, 88 N.J. 245, 256 (1982)). "Therefore, until adjudicated time-barred, a stale claim filed after the expiration of the applicable statute of limitations is nonetheless valid." Ibid. Without comment on the merits of plaintiffs' assertion that their inclusion of defendants "JOHN DOES I-X, fictitious names representing unidentified Weichert companies which own, lease or have an interest in the Property[,]" allows the relation back, we agree that pursuant to

Notte, the statute of limitations issue does not warrant denial of the motion to amend as a matter of law at this juncture.

As Notte reiterates, requests to amend pleadings should be denied if the party opposing the amendment is prejudiced. 185 N.J. at 495. The proposed defendant is not prejudiced here, as it was on notice of the incident since the day it occurred. In fact, the Weichert Company representative in charge of maintenance was notified of a problem with the stair tread immediately after the accident. Even the judge acknowledged when he denied the motion for reconsideration that no prejudice would result to Weichert Company if the amendment was granted. Additionally, two months of discovery remained at the time the motion was filed.

We find no prejudice would result from the amendment. Since the question of whether the amendment would be futile has not yet been addressed and the claim at present cannot be treated as time-barred, we reverse the denial of plaintiffs' application to amend the pleadings. The discretion to grant the amendment was not exercised in accord with the principles enunciated in Notte.

The same abuse-of-discretion standard governs our review of the denial of the motion for reconsideration. See Dover-Chester Assocs. v. Randolph Twp., 419 N.J. Super. 184, 195-96 (App.

Div.), certif. denied, 208 N.J. 338 (2011). Because the denial of the motion to amend was not grounded in accord with Notte, the motion for reconsideration should have also been granted.

Reversed.