

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS**

TOWNSHIP OF PARSIPPANY-TROY
HILLS,

Plaintiff,

vs.

THOMAS CONTROLS, INC.,

Defendant/Third-Party Plaintiff,

vs.

KEYSTONE ENGINEERING
GROUP, ET AL.,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MORRIS COUNTY

DOCKET NO. MRS-L-1530-22

CIVIL ACTION - CBLP

OPINION

Argued: October 20, 2023

Decided: October 23, 2023

Mark D'Angiolillo, Esq. of Riker Danzig LLP, attorneys for the Plaintiff.

Thomas DeNoia, Esq. of DeNoia, Tambasco, & Germann, LLC, attorneys for the Defendant/Third-Party Plaintiff.

Katherine A. Mastrobuoni, Esq. of Freeman Mathis & Gary, LLP, attorneys for the Third-Party Defendants.

I. BACKGROUND INFORMATION

This matter comes before the Court by way of a motion to dismiss the Third-Party Complaint for failure to state a claim for which relief can be granted. The underlying dispute arises from a breach of contract and negligence action brought by the Township of Parsippany-Troy Hills

(“Plaintiff”) against Thomas Controls, Inc. (“TCI”) in connection with construction improvements to be made to Plaintiff’s wastewater treatment plan (“WWTP”). The Keystone Parties (“Keystone”) separately contracted with Plaintiff to serve as its engineer for the WWTP project. TCI filed a Counterclaim against Plaintiff alleging, among others, breach of contract, unjust enrichment, and breach of duty of good faith and fair dealing. Additionally, TCI filed a Third-Party Complaint against Keystone alleging negligence, delay, and professional malpractice. Keystone argues that since TCI failed to produce the required Affidavit of Merit, the Third-Party Complaint must be dismissed with prejudice.

I. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted is governed by R. 4:6-2(e) of the New Jersey Court Rules. The rule “permits litigants, prior to the filing of a responsive pleading, to file a motion to dismiss an opponent's complaint, counterclaim, cross-claim, or third-party complaint” Malik v. Ruttenberg, 398 N.J. Super. 489, 493 (App. Div. 2008).

The proper analytical approach to such motions requires the motion judge to (1) accept as true all factual assertions in the complaint, (2) accord to the nonmoving party every reasonable inference from those facts, and (3) examine the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim.” Id. at 494 (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989)).

The motion to dismiss should be approached with great caution and should only be granted in the rarest of instances. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). The allegations are to be viewed “with great liberality and without concern for the plaintiff's ability to

prove the facts alleged in the complaint.” Ibid. The plaintiff's obligation on a motion to dismiss is “not to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action.” Ibid. (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472, (App. Div. 2001)).

II. ANALYSIS

Keystone submits that when asserting claims for damages arising from an alleged act of negligence or professional malpractice against a licensed person in his profession or occupation, the plaintiff must provide the defendant with an affidavit of an appropriately licensed individual that such claims have merit. N.J.S.A. 2A:53A-27, et seq. Keystone contends that the Affidavit of Merit Statute (“AOM Statute”) precludes TCI’s claims. N.J.S.A. 2A: 53A-27. Keystone asserts that an engineer is included within the definition of a “licensed person”, N.J.S.A. 2A:53A-26, and that New Jersey courts have held that the AOM Statute applies to all actions based on professional malpractice. Ryan v. Renny, 203 N.J. 37, 50-51 (2010).

Further, Keystone submits the New Jersey courts have held that the AOM Statute applies to both counterclaims and third-party complaints alleging negligence and professional malpractice claims. Keystone states that the New Jersey Appellate Court has held that a defendant’s counterclaim for professional malpractice is not a defensive pleading but an action for damages based on an alleged act of malpractice or negligence within the meaning of the AOM Statute “and, thus, the counterclaimant/defendant has the same obligation to file an affidavit of merit as a plaintiff who asserts a malpractice claim in a complaint.” Charles A. Manganaro Consulting Eng’rs, Inc. v. Carneys Point Twp. Sewerage Auth., 344 N.J. Super. 343, 347 (App. Div. 2001). Keystone cites to Nagim v. New Jersey Transit, where the court found that the AOM Statute

applies to third party complaints “if the underlying factual allegations of the claim require proof of a deviation from the professional standard of care for the specific person.” 369 N.J. Super. 103, 116 (Law. Div. 2003) (quoting Couri v. Gardner, 173 N.J. 328, 341(2002)). Thus, the Nagim court held that the AOM Statute applies to the filing of a third-party complaint when the cause of action pled requires proof of malpractice or professional negligence and as such, the third-party plaintiff must file a timely Affidavit of Merit. Id. at 115.

Keystone argues that New Jersey Courts have held that monetary damages are included within a claim for property damage pursuant to the AOM Statute and that property damages include damage to both real and personal property. Cornblatt v. Barow, 303 N.J. Super. 81, 86 (App. Div. 1997), rev'd on other grounds, 153 N.J. 218 (1998). Keystone submits that the Cornblatt court stated that “malpractice or negligence committed by architects, engineers, or attorneys may very well result in damage to real and personal property. Personal property embraces everything that may be tangible or intangible such as chose in action. The right or claim to ‘money damage. . . is a property right. . . beyond question.” Id.

Keystone states that Defendant’s Third-Party Complaint alleges affirmative claims of negligence and malpractice against Keystone and seeks an unspecified sum of compensatory, incidental, consequential, and delay damages. Keystone contends that since the Third-Party Complaint asserts direct affirmative claims that require proof of malpractice and professional negligence, the AOM Statute applies. Keystone also contends that since Defendant is seeking an unspecified sum of monetary damages, it constitutes property damages within the meaning of the AOM Statute. As such, Keystone argues that Defendant was statutorily required to provide the Keystone Parties with an Affidavit of Merit supporting its claims. Keystone argues that since

Defendant failed to comply with the AOM Statute, the Third-Party Complaint must be dismissed with prejudice pursuant to R. 4:6-2(e).

Keystone argues that “TCI’s failure to timely provide an affidavit of merit goes to the heart of the cause of action and thus, requires dismissal of the Third-Party Complaint with prejudice.” Keystone maintains that the Third-Party Complaint failed to comply with the AOM Statute when it did not provide any Affidavit of Merit in the 120-day period. Additionally, Keystone contends that Defendant has failed to substantially comply or acknowledge its violation or provide an extraordinary circumstance. Keystone thus argues that since Defendant’s failure to provide the affidavit of merit is statutorily deemed a failure to state a cause of action, their Third-Party Complaint must be dismissed with prejudice against the Keystone Parties. R. 4:6-2(e).

Defendant TCI responds to Keystone’s Motion to Dismiss and argues that it should be denied for failure to comply with the prerequisites contained in the April 20, 2023, Case Management Order. Defendant asserts that the Case Management Order included a prerequisite to the filing of any motion and required the party seeking to file the Motion to have a conference call with all counsel and the Court to discuss the motion and obtain consent to file. Defendant contends that since Keystone failed to initiate the conference or seek the Court’s consent to file, the Motion is barred based upon the terms of the Case Management Order.

Defendant contends that Keystone is aware of this requirement and has previously ignored it in connection with a prior discovery motion. Defendant maintains that Keystone intentionally ignored the requirement to avoid putting Defendant TCI on notice that the Affidavit of Merit had not been filed. Defendant TCI thus contends that since Keystone failed to comply with the Case Management Order, the Motion to Dismiss should be summarily denied and dismissed. Defendant

also argues that it has substantially complied with the AOM Statute which would preclude the refiling of a motion to dismiss by the Keystone Parties.

Keystone refutes TCI's assertion that their Motion to Dismiss was filed in violation of the Case Management Order. Keystone contends that at the Conference, TCI's counsel had the opportunity to discuss any issues regarding the Affidavit of Merit, but that Third Party Defendant was not required to address the Affidavit of Merit. Keystone also argues that they had no obligation to put their adversaries on notice of state statutes, court rules, procedural requirements, or otherwise. Keystone submits that "the failure of a court to hold a Ferreira Conference does not toll or have any impact on the time limits prescribed in the Affidavit of Merit Statute." Paragon Contrs. v. Peachtree Condo Ass'n., 202 N.J. 415, 425 (2010).

Keystone also argues that while the Case Management Order requires the parties to confer before any motions are filed, counsel interprets the Order's directives to relate to discovery motions only. Keystone further contends that their motion was properly and timely filed. Additionally, Keystone refutes TCI's contention that it intentionally did not seek a conference and argues that Keystone waited a month to file the instant Motion after the 120-day statutory time period to give TCI the full benefit of time. As such, Keystone contends that no prior conference was needed since the instant motion is a dispositive motion, not a discovery or procedural motion.

TCI submits that the AOM Statute was "enacted as part of a Tort reform measure which requires Plaintiff's seeking damages as a result of professional negligence to make a threshold showing that their claims are valid, thereby permitting identification and dismissal of meritless lawsuit at an early state of litigation before large sums are spent on defense." See In re Petition of Hall, 147 N.J. 379, 391(1997); See also Galik v. Clara Maass Medical Center, 167 N.J. 341 (2001);

Fink v. Thompson, 167 N.J. 551, 559 (2001). TCI also asserts that courts have stated that the purpose of the AOM Statute “was not to provide a sword to Defendants to overcome otherwise valid claims on purely procedural deficiencies.” Ferreira, 178 N.J. at 144.

Moreover, TCI contends that they meet the requirements of the doctrine of substantial compliance. TCI submits that the five factors that must be proven to illustrate substantial compliance include (1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner’s claims; and (5) a reasonable explanation as to why there was no strict compliance with the statute. TCI also submits that the Ferreira Court found that where an Affidavit of Merit is filed out of time but before a motion to dismiss, substantial compliance will be found. Id. at 154.

TCI maintains that it had an Affidavit of Merit prior to the expiration of the 120-day statutory period and prior to the filing of the Third-Party Complaint against the Keystone Parties. TCI contends that “it was mistakenly believed that the Affidavit of Merit had been filed and served contemporaneously with the third-party Complaint” but upon receiving the Keystone Parties’ Motion to Dismiss, TCI filed the Affidavit of Merit with the Court on or about July 27, 2023. TCI argues that assuming that the Keystone Parties’ Motion to Dismiss is dismissed, then TCI will have filled the Affidavit of Merit in compliance with the AOM Statute and the Keystone Parties will be barred from filing a subsequent motion.

Furthermore, TCI argues that the dismissal of Keystone’s Motion to Dismiss is the fair and equitable result because Keystone intentionally ignored the Case Management Order requirement to not put TCI on notice that the Affidavit of Merit had not been filed. TCI contends that “Keystone

therefore bided their time awaiting the expiration of the 120-day period and then filed a Motion without the required conference call intentionally attempting to bar TCI's claim on a procedural technicality." TCI also argues all five Ferreira factors are met because (1) there is no prejudice to Keystone since the delay in filing the Affidavit of Merit was by days, (2) substantial steps were taken to comply with the statute, (3) there was general compliance with the purpose of the statute, (4) Keystone had reasonable notice of the nature of Plaintiff's Claim, and (5) there was a reasonable explanation, clerical error of a staff member, as to why there was no strict compliance with the statute. Thus, TCI argues that Keystone's Motion to Dismiss should be denied.

Keystone argues that TCI's mistake and failure to timely serve the Affidavit of Merit do not constitute exceptional circumstances or substantial compliance necessary to defeat the instant Motion to Dismiss with prejudice. Keystone argues that the fact that the First Affidavit was signed in October 2022 is irrelevant since TCI failed to serve Keystone until July 27, 2023, after the instant Motion was filed. Additionally, Keystone contends that the First Affidavit obtained opinions as to Keystone Engineering Group, Inc. only and not against the individually named defendants. Keystone contends that while the Second Affidavit obtained opinions as to the individually named defendants, it did not do so until after the expiration of the 120-day time period and Keystone was only served on August 4, 2023, after the instant Motion to Dismiss was filed.

Further, Keystone contends that serving an Affidavit of Merit after the 120-day time period requires dismissal with prejudice. Keystone argues that "attorney inadvertence or counsel's mistaken belief that the Affidavit was previously served do not constitute exceptional circumstances required by the Court to permit a late Affidavit or defeat the instant motion." Keystone contends that before the court can determine substantial compliance with the AOM Statute, the deficient party must show that exceptional circumstances prevented the timely

compliance. Keystone contends that TCI has not offered any exceptional circumstances that would prevent a dismissal of the Third-Party Complaint with prejudice and that TCI ignored the necessary requirements of exceptional circumstances.

Keystone also refutes TCI's argument that it substantially complied with the AOM Statute because Mr. Renda signed the Affidavit before the deadline expired and instead argues that "the date that Mr. Renda executed the First Affidavit is irrelevant, as the Statute require that the same be served before expiration of the 120-day deadline." Keystone thus maintains that serving the Affidavit of Merit late regardless of when it was executed, does not rise to the level of substantial compliance. Finally, Keystone states that Mr. DeNoia's Certification does not address TCI's failure to include the opinions of the individually named defendants.

Alternatively, Keystone contends that should the Court decide to consider TCI's late service of Affidavit, they seek dismissal of the Third-Party Complaint with prejudice as to the individually named third-party defendants, William Bleiler, P.E. and Dan Smith, P.E. Keystone maintains that since the First Affidavit of Merit only addresses allegation against the Keystone Engineering Group and the Second Affidavit addressing the individually named third-party defendants was only served after the 120-day time period, the Second Affidavit should be stricken and the Third Party Complaint must be dismissed with prejudice as to William Bleiler, P.E. and Dan Smith, P.E.

The Court finds that Keystone did not violate the directives of the Case Management Order since Paragraph nine of the Case Management Order refers to non-dispositive motions only.

Further, the Court finds that TCI failed to timely serve the Affidavit of Merit pursuant to N.J.S.A. 2A:53A-27. Unlike the plaintiffs in Ferreira, who also did not timely submit the affidavit

of merit but did so prior to the defendant's motion to dismiss, TCI submitted the Affidavit of Merit to Keystone only after Keystone filed the instant motion to dismiss. 178 N.J. at 147. The Supreme Court stated that "if defense counsel files a motion to dismiss after the 120-day deadline and before plaintiff has forwarded the affidavit, the plaintiff should expect that the complaint will be dismissed with prejudice provided the doctrines of substantial compliance and extraordinary circumstances do not apply." Id. at 154. Thus, TCI failed to comply with the statute.

Moreover, the Court finds that TCI's actions did not meet the requirements of substantial compliance. The doctrine of substantial compliance is invoked to prevent technical defects from defeating a valid claim. Id. at 151. Further, the Court has explained that the misfiling of the Affidavit of Merit does not constitute an extraordinary circumstance. See Palanque v. Lambert-Woolley, 168 N.J. 398, 405 (2001) (finding substantial compliance doctrine not satisfied where plaintiff had expert's report in hand before filing suit but failed to provide defendant with affidavit of merit or expert's report within 120 days after filing of answer). Additionally, attorney inadvertence is not a circumstance entitling plaintiff to a remedy of dismissal of a complaint without prejudice. Ferreira, 178 N.J. at 152. TCI's mistaken belief that it had filed and served the Affidavit of Merit to Keystone is not sufficient to establish substantial compliance.

Finally, during oral argument, TCI raised the issue that the AOM statute applies only to Count I. However, a reading of the allegations contained in Count II against Keystone demonstrate that the allegations relate to Keystone's allegedly negligent acts that resulted in the delay in the completion of the project. Thus, Count II of the Complaint would also be subject to the AOM Statute.

III. CONCLUSION

Accordingly, Keystone's Motion to Dismiss with prejudice is granted.