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Although it is posted on the internet, this opinion is binding only on the
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-1685-14T3

JOSE M. RESUA and CHERYL RESUA,

Plaintiffs-Appellants,

v.

CRISTIN R. HACHIKIAN, BRENDA L.
HACHIKIAN, and NEW JERSEY
MANUFACTURERS INSURANCE COMPANY,

Defendants-Respondents.

Argued September 20, 2016 – Decided March 9, 2017

Before Judges Fisher, Ostrer and Leone.

On appeal from interlocutory orders of the
Superior Court of New Jersey, Law Division,
Hudson County, Docket No. L-388-13.

Vincent J. D'Elia argued the cause for
appellants (Vincent J. D'Elia, attorney; Mr.
D'Elia and Michael G. Cassidy, on the briefs).

Eric H. Bennett argued the cause for
respondents Cristin R. Hachikian and Brenda
L. Hachikian (Law Office of Eric H. Bennett,
attorneys; Richard S. Greenhaus, of counsel
and on the brief).

PER CURIAM

Plaintiffs Jose and Cheryl Resua appeal from interlocutory orders denying discovery end date extensions to allow late service of expert reports. They also appeal the subsequent summary judgment dismissal of their complaint. We affirm.

Plaintiffs filed their auto negligence complaint in January 2013. Defendant Cristin R. Hachikian was driving under the influence of intoxicating liquors when she rear-ended the vehicle plaintiffs occupied.¹ The principal issue was plaintiffs' damages, particularly whether plaintiffs could vault the limitation-on-lawsuit threshold. See N.J.S.A. 39:6A-8(a). Both plaintiffs alleged various soft-tissue back, neck and shoulder injuries.

The initial discovery end date (DED) was January 6, 2014. Defendants served expert reports in November and December 2013. Although plaintiffs disclosed treatment records, they did not serve a report of an expert opining that the accident caused permanent injuries. In December 2013, with defendants' consent, plaintiffs secured a DED extension to March 7, 2014. On March 7, 2014, plaintiffs filed an unopposed motion for a second extension. Plaintiffs' counsel certified that he had been out of the office many days in the prior three months due to illness. The court set

¹ She was later convicted of violating N.J.S.A. 39:4-50.

a third DED of June 6, 2014, and specified that all expert reports were due thirty days prior. Plaintiffs did not comply.

On August 8, 2014, defendants filed a motion for summary judgment. Two days earlier, non-binding arbitration produced a \$90,000 award for plaintiffs, which defendants rejected, seeking a trial de novo. On August 20, 2014, plaintiffs' counsel served an August 12, 2014 report that opined plaintiff Jose Resua's permanent injuries were caused by the collision. And, apparently a few days later, counsel served an August 26, 2014 report regarding plaintiff Cheryl Resua.

On September 9, 2014, plaintiffs then filed a cross-motion seeking an extension of the DED and an adjournment or denial without prejudice of the summary judgment motion. In support, plaintiffs submitted certifications of plaintiffs' counsel and his physician. Counsel described his prolonged battle against a rare and serious disease, aplastic anemia, and how it reduced his energy and often made him incapable of working. He stated he had "not been able to work many days during 2013 and 2014." His physician provided additional details of his diagnosis in 2004, a relapse in 2008, and the disabling effect of his illness. Defendants did not oppose the cross-motion.

The presiding judge denied the discovery extension in a September 19, 2014 order and set a trial date for December 9,

2014. In a written statement of reasons, the judge stated she was "very familiar with and sympathetic to" counsel's "chronic health problems." But, the court held that his "initial diagnosis in 2004 and his relapse in 2008" did not constitute exceptional circumstances justifying the failure to meet the June 2014 DED. The court noted that the completion of arbitration heightened plaintiffs' burden to justify an extension. The court stated the parties could consent to further discovery, but the court would not enforce any agreements between counsel.

Plaintiffs sought reconsideration in October 2014 and submitted an additional certification of counsel and his physician. Counsel focused on the impact of his illness on his ability to work in 2014. He noted that twice in 2014, he was unable to work for three-week periods. The second one, in March, was followed by another period of illness that caused him "to miss many days . . . through the end of April." Defendants opposed the reconsideration motion. In an October 24, 2014 order, the presiding judge denied the motion, reiterating that plaintiffs had not demonstrated exceptional circumstances.

A different judge heard the motion for summary judgment. Plaintiffs' counsel argued that the court's discovery extension denials did not expressly bar admissibility of the opinions in the expert reports. Consequently, plaintiffs had presented sufficient

evidence on permanency and causality to defeat summary judgment. Counsel also argued that permanency and causality could be gleaned from the medical records, without the expert reports.

The judge was not persuaded. He held that: the medical records alone did not suffice to establish permanency; the prior discovery extension denial barred the expert reports; and, without the expert's opinion, plaintiffs could not vault the limitation-on-lawsuit threshold.

This appeal followed. Plaintiffs contend the court erred in denying the discovery extensions. They also argue that notwithstanding the discovery extension denial, the summary judgment judge should have imposed a discovery sanction short of excluding the expert report and that, even without the reports, plaintiffs' medical records created a genuine issue of fact that precluded summary judgment.

We review the trial court's discovery decisions for an abuse of discretion. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). In particular, "[a]s it relates to extensions of time for discovery, appellate courts . . . have likewise generally applied a deferential standard in reviewing the decisions of trial courts." Ibid. (deferring to trial court's decision denying the plaintiff's motion for an extension of time). We are not free to substitute our judgment for the trial court.

A party seeking to extend discovery, if unable to secure his adversary's consent, must seek relief by motion returnable before the end of the discovery period. R. 4:24-1(c). If an arbitration or trial date has been set, a party must demonstrate "exceptional circumstances." See R. 4:24-1(c) ("No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown."); Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 396-97 (2005) (affirming denial of motion to extend discovery deadline made after arbitration had concluded and a trial date had been set); Tynes ex rel. Harris v. St. Peter's Univ. Med. Ctr., 408 N.J. Super. 159, 168-69 (App. Div.), certif. denied, 200 N.J. 502 (2009).

To establish exceptional circumstances, a movant must demonstrate:

(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.

[Rivers v. LSC P'ship, 378 N.J. Super. 68, 79 (App. Div. 2005).]

A movant may not rest on generalizations. "A precise explanation that details the cause of delay and what actions were taken during

the elapsed time is a necessary part of proving . . . exceptional circumstances as required by Rule 4:24-1(c)[.]" Bender v. Adelson, 187 N.J. 411, 429 (2006).

In particular, while an attorney's or an attorney's family member's "sudden health problem" may present exceptional circumstances, see O'Donnell v. Ahmed, 363 N.J. Super. 44, 51 (Law Div. 2003), the movant must demonstrate how that personal crisis interfered with meeting discovery deadlines. Rivers, supra, 378 N.J. Super. at 81. For example, we have held that the one-month terminal illness and death of a counsel's mother at the end of the discovery period did not provide a valid explanation for lack of diligence during the preceding year. Ibid.

We do not depreciate the seriousness of plaintiffs' counsel's chronic illness and its impact on his ability to function. Counsel states that he was out of work for March and most of April. However, neither he nor his physician describe his health status during May and June 2014, when he was obliged to serve expert reports or seek another extension of discovery. Nor does counsel specifically address his inaction in July and August, prior to the arbitration and service of the summary judgment motion. Counsel does not discuss why the expert reports were not prepared until late August 2014, particularly inasmuch as the expert last treated plaintiffs in 2013. The record does not reflect when counsel

asked the expert to prepare the reports. In short, plaintiffs failed to present the kind of "precise explanation" demanded.

Plaintiffs also misplace reliance on decisions in which we have found exceptional circumstances. In Tucci v. Tropicana Casino & Resort, Inc., 364 N.J. Super. 48, 52 (App. Div. 2003), the plaintiffs' delay was partly due to the defense's late submission of discovery. Furthermore, Tucci did not deal with a report served outside an extended DED. Rather, it addressed a report served after a specific deadline for doing so, where additional discovery was contemplated thereafter, including depositions and rebuttal expert reports. Id. at 51-54. Similarly, Ponden v. Ponden, 374 N.J. Super. 1 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005), is inapposite because there was no arbitration or trial date set in that case. Indeed, we emphasized that "the absence of an arbitration or trial date at the time of the trial judge's ruling is of critical significance in a court's exercise of its discretion to extend discovery." Id. at 9. In sum, plaintiffs have not provided grounds for disturbing the trial court's denial of discovery extensions.

Turning to the grant of summary judgment, we apply the same standard as the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). We "consider whether the competent evidential materials presented, when viewed in the light most

favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

To vault the limitation-on-lawsuit threshold, plaintiffs were obliged to prove that the collision caused permanent injury. N.J.S.A. 39:6A-8(a). The medical records alone do not suffice. Plaintiffs needed an expert's certification. See Aqha v. Feiner, 198 N.J. 50, 60 (2009).

Notably, defendants timely sought disclosure of plaintiffs' expert's opinion by way of an interrogatory, and plaintiffs initially deferred response to a later date. Under Rule 4:17-7, amended answers to interrogatories shall be served no later than twenty days before the DED. Absent a certification that "information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence" before the DED, "the late amendment shall be disregarded by the court and adverse parties." Ibid.

Plaintiffs provide no such submissions. Accordingly, under the rule governing amendments to interrogatories, plaintiffs' late-served expert reports were to be disregarded. Thus, it was unnecessary for the court to expressly bar the admissibility of the opinions set forth in the late-served expert reports when it

denied the DED extension. The opinions were to be disregarded by dint of Rule 4:17-7. See also Ponden, supra, 374 N.J. Super. at 8-9 (discussing amendment to Rule 4:17-7 as part of the "Best Practices" reform that also modified Rule 4:24-1 regarding discovery extensions). In light of the absence of any expert certification that plaintiffs were permanently injured from the collision, summary judgment was properly granted.

To the extent not addressed, plaintiffs' remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION