

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
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-4965-15T3

VERONICA BARLEY,

Plaintiff-Respondent,

and

GLEN BEST,

Plaintiff,

v.

ARNELL D. BARLEY,

Defendant-Appellant,

and

DARRELL R. ANDERSON, SHOHN W.
BINGHAM and SHARON C. THOMAS,

Defendants.

Argued February 8, 2017 — Decided October 20, 2017

Before Judges Simonelli, Carroll and Gooden
Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Middlesex County, Docket
No. L-6976-15.

Glenn A. Montgomery argued the cause for
appellant (Montgomery Chapin & Fetten, PC,

attorneys; Mr. Montgomery and Michael D. Noblett, on the briefs).

Cory J. Rothbort argued the cause for respondent (Sellar Richardson, PC, attorneys; John M. Kearney, of counsel; Mr. Rothbort, on the brief).

The opinion of the court was delivered by

SIMONELLI, J.S.C.

By leave granted, defendant Arnell D. Barley appeals from the March 29, 2016 Law Division order, which dismissed her counterclaim with prejudice based on the two year statute of limitations (SOL), N.J.S.A. 2A:14-2(a). Defendant also appeals from the May 13, 2016 order, which denied her motion for reconsideration. For the following reasons, we reverse and remand for further proceedings.

The facts are straightforward. Defendant and plaintiff Veronica Barley are stepsisters. According to plaintiff, on April 5, 2013, she and defendant had a verbal dispute that turned into a physical altercation, during which defendant scratched her arms and tried to run her over with a car, causing her to fall and sustain injuries. According to defendant, plaintiff was the aggressor and caused her injuries that required medical treatment.

On April 6, 2015, plaintiff filed a complaint against defendant, seeking damages for the injuries sustained on April 5,

2013.¹ Because April 5, 2015 was a Sunday, the complaint was timely filed on Monday, April 6, 2015. See R. 1:3-1. In her first responsive pleading, defendant asserted a counterclaim, seeking damages for injuries sustained as a result of the same incident.

Plaintiff filed a motion to dismiss the counterclaim pursuant to Rule 4:6-2(e) based on the SOL. The motion judge granted the motion, and later denied defendant's motion for reconsideration. The judge acknowledged that in Molnar v. Hedden, 138 N.J. 96 (1994), our Supreme Court left open the question of whether a counterclaim filed after the SOL expired could relate back to a timely filed claim by an opposing party. However, the judge concluded that the relation-back doctrine under Rule 4:9-3 and equitable tolling did not apply to permit the untimely counterclaim. This appeal followed.

Our review of a trial court's decision on a Rule 4:6-2(e) motion to dismiss is plenary and we owe no deference to the trial judge's conclusions. Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div.), certif. denied, 208 N.J. 366 (2011). We also owe no deference to a trial court's

¹ Plaintiff also asserted claims against other defendants for alleged injuries she sustained in an unrelated motor vehicle accident. The trial court severed plaintiff's claims against defendant from the claims against the other defendants.

legal conclusions, and review issues of law de novo. Mountain Hill, LLC v. Twp. Comm. of Middletown, 403 N.J. Super. 146, 193 (App. Div. 2008), certif. denied, 199 N.J. 129 (2009).

Defendant's contentions on appeal focus on principles of equity and fairness. Citing Molnar, supra, defendant argues that if equitable considerations exist, as they do here, courts should use them to determine whether the purpose of the SOL -- to protect against the litigation of stale claims, stimulating diligent prosecution of claims, penalizing dilatoriness, and serving as a measure of repose -- is served by its application. Defendant also argues that barring a germane counterclaim undermines the principal consideration behind SOLs of fairness to the defendant.

Defendant posits it is inequitable and unfair to bar a germane counterclaim in an initial responsive pleading that arises out of the same facts and circumstances of the complaint, where, such as here, the plaintiff files a complaint on the last day of the SOL. Defendant also argues that barring her counterclaim serves no purpose of the SOL, as the claims asserted therein do not promote any measure of repose and are not stale because the same facts are required to support the affirmative relief sought by both parties.

In Molnar v. Hedden, 260 N.J. Super. 133, 136 (App. Div. 1992), the defendant had filed a responsive pleading and later filed a motion for leave to amend to assert a counterclaim arising

out of the same transaction as pleaded in the complaint after the SOL had expired. Id. at 140. Viewing the matter under the Rule 4:9-3 relation-back lens, we held that the plaintiff's action was still pending when the motion was filed and that

application of our well-settled and liberal procedural jurisprudence dictates the conclusion that a counterclaim arising out of the same transaction as pleaded by the complaint and therefore meeting the test of R. 4:9-3 -- that is to say, a litigation component embraced by the entire controversy doctrine -- is eligible for the relation-back principle of the rule and consequently for protection from the limitations bar.

[Ibid.]

We then discussed tolling as an alternative for excepting a transactionally-related counterclaim from the SOL bar. Id. at 145. Citing 6 Charles A. Wright, Arthur R. Miller & Mary Kane Federal Practice and Procedure § 1419 at 152 (1990), we stated: "In analyzing the cognate federal rules, Professors Wright, Miller and Kane note that the majority of federal courts have taken the view that 'the institution of plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim.'" Id. at 144-45. We were "persuaded that the federal rationale of tolling in respect of compulsory counterclaims applies fully to our definition of a required

component of the controversy." Id. at 145. We subscribed to the view stated in 6 Wright, supra, § 1419 at 152-53 that:

This approach precludes plaintiff, when the claim and counterclaim are measured by the same period, from delaying the institution of the action until the statute has almost run on defendant's counterclaim so that it would be barred by the time defendant advanced it. Nor is plaintiff apt to be prejudiced by the tolling of the statute, since he presumably has notice at the time he commences his action of any counterclaim arising out of the same transaction as his suit. Moreover, the necessarily close relationship between the timely claim and the untimely counterclaim should insure that the latter is not 'stale' in the sense of evidence and witnesses no longer being available; they should be as accessible for adjudicating the counterclaim as they were for the main claim.

[Ibid. (emphasis added).]

Lastly, we noted the tolling rationale, not Rule 4:9-3, will save a counterclaim asserted in a first responsive pleading from the SOL bar, stating:

But it is also possible that a counterclaim might be sought to be asserted after the running of the [SOL] by way of a first responsive pleading where no prior answer was filed. In that case, the responsive pleading, not constituting an amended pleading, would not be technically subject to R. 4:9-3. But the counterclaim therein asserted would nevertheless relate back to the date of the filing of the complaint under a tolling rationale.

[Id. at 146 (emphasis added).]

While not binding, Comment 4 to Rule 4:7-1 expresses a similar rationale:

Although [Rule 4:7-1] does not expressly so state, ordinarily a germane counterclaim will not be barred by the statute of limitations if the complaint itself is timely. A germane counterclaim is conceptually akin to an amended pleading that states a claim or defense arising out of the same conduct, transaction or occurrence as the original claim, and R. 4:9-3 expressly provides for relation back in that situation. The only difference is the identity of the party raising the germane claim, and it would seem to make little functional difference whether a party amends his own pleading to add a germane claim or if the adverse party responds with a germane claim. The policy of the [SOL] is no more offended in one case than the other.

[Pressler & Verniero, Current N.J. Court Rules, comment 4 on R. 4:7-1 (2018).]

The Court reversed our decision in Molnar on other grounds. The Court found the relation-back doctrine of Rule 4:9-3 was inapplicable because by the time the defendant sought to file his counterclaim, the SOL had run and the plaintiff's claims had been disposed of. Molnar, supra, 138 N.J. at 103-04. The Court did not rule on "whether [the] counterclaim, whether considered germane or new, pressed after the [SOL] expired but while plaintiff's claim was still 'alive' could be saved by virtue of the relation-back doctrine." Id. at 105.

In addition, the Court did not determine whether the plaintiff's suit tolled the defendant's SOL, stating:

The reasons for finding such a tolling is to prevent a plaintiff from waiting until shortly before the statute of limitations has expired to file to prevent a defendant from asserting a cause of action. That circumstance is not present in this case. Nothing in the record suggests that plaintiff delayed filing, and defendant had time within which to file a counterclaim before the running of the statute of limitations. Cases that toll the statute of limitations, thereby allowing the defendant to assert a counterclaim after the statute of limitations would normally have run, do so because of the inherent inconsistency in permitting plaintiffs to amend complaints after the statute of limitations has expired but refusing defendants similar opportunities. Here, plaintiff, having accepted \$15,000 in settlement of her claim, could not be heard thereafter to amend her claim or to press a new claim. Therefore, denying defendant an opportunity to pursue his late counterclaim on a 'tolling' theory does not create the inconsistency that otherwise might justify a tolling of the statute. The facts of this case do not implicate the tolling question.

[Ibid. (emphasis added).]

The facts absent in Molnar are present here. Plaintiff's timely-filed complaint was pending when defendant filed her first responsive pleading asserting a germane counterclaim, and plaintiff delayed filing her complaint until the last day of the SOL, leaving defendant with no time within which to file a counterclaim before the running of the SOL. Under these

circumstances, justice requires that defendant's germane counterclaim be saved from the SOL under the relation-back doctrine of Rule 4:9-3 or the tolling rationale.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION