

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3180-08T1

ESTATE OF LOIS MANCINI
and GEORGE MANCINI,

Plaintiffs-Appellants,

v.

AMERICAN INTERNATIONAL
GROUP, INC., t/a AIG;
AIG TECHNICAL SERVICES,
INC.,

Defendants,

and

MCALLISTER COMPANY
t/a MCALLISTER FUELS,
MCALLISTER FUELS,

Defendants-Respondents,

and

DEMAIO'S and LEXINGTON INSURANCE
COMPANY,

Defendants/Third-Party-
Plaintiffs-Respondents,

and

AIG TECHNICAL SERVICES, INC.,

Defendant/Third-Party Plaintiff,

v.

KROLL ASSOCIATES, INC.

and KROLL ENVIRONMENTAL
ENTERPRISES, INC.,

Third-Party Defendants/
Respondents.

Argued January 5, 2010 -Decided March 30, 2010
Before Judges Grall and Messano.

On appeal from the Superior Court of New
Jersey, Law Division, Burlington County,
Docket No. L-2228-03.

Louis Giansante argued the cause for
appellants (Giansante & Cobb, LLC,
attorneys; Carol Rogers Cobb, of counsel;
Ms. Rogers and Mr. Giansante, on the brief).

Peter E. Mueller argued the cause for
respondent Lexington Insurance (Harwood
Lloyd, LLC, attorneys; Mr. Mueller, of
counsel and on the brief).

Iram P. Valentin argued the cause for
respondents McAllister Company, t/a
McAllister Fuels (Kaufman Dolowich Voluck &
Gonzo, LLP, attorneys; John R. Gonzo, of
counsel, Mr. Valentin and Charles William
White, on the brief).

Craig J. Huber argued the cause for
respondent DeMaio's Inc. (Archer & Greiner,
P.C., attorneys; Mr. Huber, on the brief).

Andrew J. Perel argued the cause for
respondents Kroll Associates, Inc. and Kroll
Environmental Enterprises, Inc. (Steptoe &
Johnson, LLP attorneys; Mr. Perel, on the
brief).

PER CURIAM

Plaintiffs, the Estate of Lois Mancini and her surviving husband, George J. Mancini, appeal from the December 15, 2008 order that denied their motion to extend discovery, and a series of subsequent orders, entered on January 23, 2009, that granted defendants summary judgment and dismissed plaintiffs' complaint with prejudice. We have considered the arguments raised on appeal in light of the record and applicable legal standards. We affirm.

We review the facts in a light most favorable to plaintiffs. See R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).¹ Plaintiffs owned a home located on Tarnsfield Road in Mount Holly. From the date they purchased the property until June 1996, the home's heating system was serviced by defendant McAllister Company, t/a McAllister Fuels (McAllister). Plaintiffs' service contract with McAllister provided a "Tank Protection Plan" that included a policy of insurance issued by American International Group, Inc., t/a AIG (AIG). In the winter of 1995, plaintiffs' heating system developed problems and McAllister diagnosed those to be, in part, the result of a leak in the outdoor, underground fuel oil tank. A claim was made with AIG, which in turn appointed a

¹ Since we have not been provided with much of the discovery record, we recite the facts as essentially contained in plaintiffs' pleadings.

related company, defendant AIG Technical Services, Inc. (Technical), to investigate the problem and remediate same in accordance with environmental regulations.

Defendant DeMaio's Inc. (DeMaio) was retained to conduct an investigation of the spill and remediate the site, which they completed in August 1996. At no time did any of the defendants indicate to plaintiffs that the leak posed a health risk. The New Jersey Department of Environmental Protection, however, concluded that the site was not properly remediated, ultimately leading in 2002 to the retention of another contractor, Environmental Management Services, Inc. (EMS), to complete the job.

EMS concluded that the problem was indeed more severe than DeMaio had indicated. Complete remediation would require the excavation of a significantly greater amount of soil from the Mancini property, and EMS believed some contaminants migrated to the soil below the slab upon which the home was built. EMS recommended that the Mancinis leave their home while remediation continued.

Lois Mancini, in the interim, developed myelofibrosis, a form of cancer. Plaintiffs commenced suit in 2003 alleging that her condition was caused or exacerbated by the negligence of defendants. On September 12, 2004, Lois Mancini died from her

illness; an amended complaint was filed substituting her estate as plaintiff and adding a survivorship and wrongful death claim. The matter was case managed by a Law Division judge.²

The procedural history that transpired was detailed at length in our prior opinion, Estate of Mancini v. Lexington Insurance Company et al., No. A-6149-04 (App. Div. November 21, 2006); we need not recite it again. It suffices to say that we reversed the Law Division's dismissal of the complaint that was predicated on the conclusion that plaintiffs had not complied with a discovery order by supplying an adequate expert report on the issue of causation. Id. (slip op. at 9-10). We remanded the matter to the trial court. Id. (slip op. at 10).

The first case management order that followed set a new discovery schedule that required plaintiffs to submit their expert reports by July 13, 2007 and fixed the discovery end date as September 30, 2007. Plaintiffs requested extensions of time to produce the report of their expert, Elissa Ann Favata, M.D., a specialist in occupational health. By consent order dated

² Although the exact circumstances remain unclear from the present record, defendant Lexington Insurance Company (Lexington) answered plaintiffs' amended complaint on behalf of itself and Technical. The pleading noted that "[AIG] [wa]s no longer a party" based upon a prior consent order that is not in the record. Lexington asserted a third-party complaint against Kroll Associates, Inc. (Kroll) seeking contribution and indemnification. Kroll's alleged involvement in the factual circumstances surrounding plaintiffs' claim is unclear.

November 21, the deadline to produce Favata's report was extended to December 15.

Favata's report, dated December 14, was served upon defendants. Favata noted that soil sampled from the site revealed the presence of benzene and other volatile organic compounds. Favata's ultimate opinion provided

[B]ased on my review of the exposure data and medical records of Ms. Lois Mancini, the interview with Mr. George Mancini regarding Ms. Mancini's environmental and medical history, and review of the scientific/medical literature, and also based on a reasonable degree of medical certainty, there is a causal association between Ms. Lois Mancini's chronic residential exposure to benzene . . . and her development of myelofibrosis . . . which was the cause of her death.

Defendants produced responsive expert reports in April 2008. A report from Panos Georgopoulos, Ph.D. and Paul Liroy, Ph.D., detailed a computer model they developed to measure the upper limits of airborne benzene concentrations caused by the fuel tank leak at the Mancini home. Their report concluded that the airborne toxicity levels at the property were actually lower than those reported by the Environmental Protection Agency and the National Air Toxic Assessment for the surrounding area. Bernard D. Goldstein, M.D., opined in his report that a causal relation between Lois Mancini's disease and "exposure to fuel oil d[id] not remotely approach the level of reasonable medical

probability." Goldstein based his conclusion upon the fact that Lois Mancini's "level of benzene exposure was far too low . . . [and] the natural progression of [her] disease . . . [wa]s such that it very probably began prior to any exposure to fuel oil from a leaking underground storage tank."

On June 27, a trial date of November 17 was set. On July 18, DeMaio obtained a court order compelling the deposition of Favata on August 14, which was one of only two dates that Favata would agree to sit for depositions, and the only date before discovery ended. That date, however, was cancelled due to a defense attorney's medical emergency. However, before the date of the scheduled deposition, Favata indicated to plaintiffs' counsel that she was unwilling to be deposed. In a September 3 letter to the judge, plaintiffs' counsel indicated that "professional differences with our expert have made it impossible for [her] to continue as the plaintiffs' expert." Counsel did not explain the nature of those differences, nor did she indicate when she first became aware of Favata's reluctance to be deposed.

On September 15, the last day of the discovery period, plaintiffs moved for an extension. After reiterating the prior procedural history leading to the first appeal, counsel certified that "[a]fter months of interviews," Favata was

selected as their expert. Counsel continued, "Shortly before Dr. Favata was . . . to be deposed, professional differences between plaintiffs' counsel and Dr. Favata began." Alleging complete surprise, counsel argued "these differences have made it impossible for Dr. Favata to continue as the plaintiffs' expert." Defendants opposed the motion and oral argument was conducted on October 10 before Judge Karen L. Suter, who was now case-managing the litigation.

Plaintiffs' counsel indicated that she and her partner attempted to resolve the differences with Favata after August 14. The judge invited counsel to submit any documents for review in camera if she believed they were privileged. Counsel responded that the only document was a letter in which Favata returned the check for the prepayment of her appearance at the August 14 deposition, though counsel did not provide the date of that correspondence. Counsel represented that all other communications were "done through conversations." When asked what had occurred since the cancellation of the August deposition, plaintiffs' counsel responded, "[W]e have been interviewing people."

Judge Suter noted that "all [she] knew" from plaintiffs' motion was that "professional differences" arose and a new expert had to be retained. She observed that Favata's report

was served in December 2007, that defendants had spent a significant amount of money, \$35,000, to obtain their reports, and that plaintiffs' reason to extend discovery was "clearly . . . inadequate." The judge found that plaintiff failed to explain why Favata was "refusing to testify," noting there were no "documents that [she] could review in camera." She further noted that plaintiffs failed to indicate that counsel had even consulted with Favata after defendants' expert reports were served "to make sure that things were still copesetic." In light of the previous dismissal based upon the inadequacy of a prior expert's report, Judge Sutter observed that "the issue should have be[en] particularly important" After thoroughly analyzing plaintiffs' request in light of the relevant case law, the judge concluded no exceptional circumstances existed and denied plaintiffs' motion to extend discovery.

Later that same day, plaintiffs' counsel sent a letter to the judge and defense counsel. She indicated that upon returning to her office, and after discussions with her partner, she discovered "two letters exchanged in anticipation of Dr. Favata's deposition on August 14 between Dr. Favata and [counsel's] partner." Counsel noted that "[i]t [wa]s clear from the[] documents that the issues were first raised prior to Dr.

Favata's deposition[,] but that "plaintiffs continued to negotiate with Dr. Favata for a number of days to convince her that she could attend her deposition on the 14th." Counsel further indicated that she believed "with the adjournment of the deposition . . . there was still a possibility of avoiding" what actually occurred, but she discovered "the matter was unsalvageable [in] early September." Counsel offered to furnish the letters for the judge's in camera review.

Judge Suter prepared and entered an order on October 14 requiring plaintiffs' counsel to submit the documents for in camera review. On December 15, the judge placed her findings on the record. Noting there was no request by defendants to "release the letters," Judge Suter determined that after review of the letters, "[t]here's nothing . . . that change[d] or alter[ed] [her] decision" The judge further observed that one trial date had passed, and "a second trial date [was] approach[ing]," and plaintiff had "not provided any additional information on the status of an expert." Judge Suter entered a second order denying plaintiffs' motion to extend discovery. The January 5, 2009 trial date was adjourned to permit further motions to be filed.

On January 23, 2009, the judge granted summary judgment to all defendants and third-party defendant Kroll because plaintiff lacked an expert witness as to causation. This appeal followed.

DeMaio then moved before us to supplement the record to include the two letters that plaintiffs supplied to Judge Suter, and that she reviewed in camera.³ Plaintiffs opposed the motion; counsel certified that Favata did not raise any concerns when supplied with the defense experts' reports. Counsel claimed Favata expressed "concerns regarding her testimony" on August 7, 2008 for the first time. Counsel claimed that Favata "could no longer support her opinion," despite attempts to persuade her otherwise. We denied DeMaio's motion, thus, the documents reviewed by the motion judge are not part of the appellate record.

Plaintiffs argue that they demonstrated "exceptional circumstances" in support of their motion to extend discovery, and that Judge Suter abused her discretion in denying their request. Alternatively, they argue that pursuant to Rule 1:1-2, the rules governing discovery should be relaxed "to avoid an injustice." Defendants argue that the judge properly exercised her discretion in denying any further extension of discovery

³ The motion also sought our determination as to whether the two letters were privileged.

because plaintiffs failed to demonstrate exceptional circumstances.

We begin by noting the limited scope of our review. A decision seeking extension of the discovery period is committed to the motion judge's sound discretion. Bender v. Adelson, 187 N.J. 411, 428 (2006); Rivers v. LSC Partnership, 378 N.J. Super. 68, 80 (App. Div.), certif. denied, 185 N.J. 296 (2005). We generally will not disturb her decision unless it reflects a clearly mistaken exercise of discretion or "a mistaken understanding of the applicable law." Rivers, supra, 378 N.J. Super. at 80 (citation omitted).

Rule 4:24-1(c) provides that "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." "The exceptional circumstances standard . . . is designed to deal with the problems created when requests for discovery are presented out of time, creating the possibility of delay." Ibid. (citing Montiel v. Ingersall, 347 N.J. Super. 246, 249 (Law Div. 2001)). There is no dispute in this case that when plaintiffs sought an extension of discovery in September 2008, a trial date had been fixed since June. Judge Suter clearly understood that she needed to analyze plaintiffs' request under the "exceptional circumstances" standard and she did so.

The issue, therefore, is whether Judge Suter mistakenly exercised her discretion or misunderstood the exceptional circumstances standard when applying the undisputed facts and procedural history to the analysis. We conclude that Judge Suter did not.

It is not necessary to review the specific facts found in those reported cases interpreting the "exceptional circumstances" requirement contained in Rule 4:24-1(c). It suffices to say that when a party seeks a discovery extension after a trial date has been fixed, at a minimum, it must provide sufficient "factual detail" as to why an extension is required. O'Donnell v. Ahmed, 363 N.J. Super. 44, 51 (Law Div. 2003). "Failure to provide such detail should always be fatal." Ibid.

Providing the necessary detail permits the reviewing judge to consider the factors that would support the request for an extension at such a late date. In Vitti v. Brown, 359 N.J. Super. 40, 51 (Law Div. 2003), the court identified four such factors, including "why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time"; whether "the additional discovery . . . is essential"; "some explanation for counsel's failure to request an extension of the time for discovery within the original discovery period"; and "some showing that the circumstances presented were clearly

beyond the control of the attorney and litigant seeking the extension of time." "[A]ssuming the movant fails to address any one of those issues, it would appear appropriate to deny the request for additional time." Id. at 52. We have specifically approved application of the Vitti factors to resolve disputes regarding the exceptional circumstances standard. Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 473 (App. Div.), remanded on other grounds, 185 N.J. 290 (2005).

Judge Suter applied the Vitti factors when she denied plaintiffs' request in October. She noted that plaintiffs had only indicated that there existed "professional differences" between counsel and Favata. Judge Suter knew Favata was "refusing to testify," but she did not know "why." Addressing plaintiffs' counsel's diligence, Judge Suter noted that after receipt of the defense experts' reports, there was "plenty of time to sit down and talk to [the] expert and make sure [the] expert would testify[,]" but that had not occurred. While she recognized that Favata's testimony was essential to plaintiffs' case, Judge Suter noted there was "no explanation" why the extension could not have been sought during the discovery period. A lack of explanation as to why Favata would not testify kept Judge Suter from reaching "a firm conclusion that [the problem] was beyond the attorney's control." We can find

no principled reason to question Judge Suter's reasoning or disturb her conclusion.

Plaintiffs specifically opposed our consideration of the documents that were subsequently submitted and which Judge Suter reviewed in camera prior to her December order. They are not part of the appellate record, so we do not know their contents. We do know, however, that upon her review of those two letters, Judge Suter's opinion did not change because she concluded that "[u]ltimately it was plaintiffs' job to know whether [their] expert would testify about [her] report." We will not second-guess Judge Suter's conclusion in light of plaintiffs' opposition to our review of the documents.

Plaintiffs' alternative argument, i.e., the exceptional circumstances standard should be relaxed pursuant to Rule 1:1-2, is without sufficient merit to warrant extensive discussion. See R. 2:11-3(e)(1)(E). Regarding a discovery dispute of this nature, the Court has cautioned that relaxation "should be sparingly resorted to" Bender, supra, 187 N.J. at 431 (quotation omitted). We only note that plaintiffs have known since the original complaint was filed in 2003 that specific causation was the critical component of their claim; that any expert opinion on the issue would necessarily have to be supported by the factual circumstances presented,

environmentally and medically; and that expert testimony was a prerequisite to their proof. "We find no legitimate reason to second-guess the motion judge and subject defendants to further costs and unnecessarily prolong this litigation by further extending the discovery period." Rivers, supra, 378 N.J. Super. at 82-83.

Lastly, we note that "[o]n appeal, plaintiff[s] do[] not challenge the substantive ruling regarding the necessity of expert reports to prove [their] causes of action." Id. at 81 n. 4. Therefore, the orders granting defendants summary judgment were properly entered.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION