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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4115-10T2

STEPHANIE MILLIAN,

Plaintiff-Appellant,

v.

ORGANON USA INC., ORGANON
PHARMACEUTICALS USA INC., and
ORGANON INTERNATIONAL INC.,

Defendants-Respondents.

Submitted November 15, 2011 - Decided August 1, 2012

Before Judges Carchman and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2848-09.

Nicholas R. Farnolo, Hunter J. Shkolnik and Michael L. Ihrig (Rheingold, Valet, Rheingold, Shkolnik & McCartney, L.L.P.), attorneys for appellant (Mr. Farnolo, Mr. Shkolnik and Mr. Ihrig, on the briefs).

Reed Smith, L.L.P., and Michael T. Scott of the Pennsylvania bar, admitted pro hac vice, attorneys for respondents (Melissa A. Geist, Daniel K. Winters, Tracy G. Weiss and Mr. Scott, on the brief).

PER CURIAM

In this product liability action, plaintiff Stephanie Millian, a Virginia resident, appeals from the March 15, 2011 Law Division order that granted summary judgment to defendants Organon USA, Inc., Organon Pharmaceuticals USA, Inc., and Organon International, Inc. We agree with the trial court that plaintiff knew, or by the exercise of reasonable diligence and intelligence should have discovered, more than two years before she filed her complaint, that she had a basis for an actionable claim against defendants. We further agree that a hearing to determine whether New Jersey's "discovery rule" tolled the State's two-year statute of limitations was unnecessary. Accordingly, we affirm the order dismissing the complaint because plaintiff did not file it within the two-year statute of limitations.

I.

We derive the facts from the summary judgment record. Organon USA, Inc. is a New Jersey corporation and shares principal offices with the other Organon defendants in Roseland, New Jersey and Oss, The Netherlands.[1] Organon USA "manufactures and markets prescription medicines[,]" including NuvaRing®, a

[1] Organon Pharmaceuticals USA, Inc., and Organon International, Inc., are incorporated under the laws of Delaware. The Organon defendants were purchased by Shering-Plough Corp. in 2007, and then by Merck & Co. in 2009.

contraceptive device that is inserted vaginally and releases low doses of estrogen and progestin.[2] The following risks and possible side effects of NuvaRing® are described in a product package insert:

> What are the possible risks and side effects of NuvaRing®?
>
> ▪ Blood clots
>
> The hormones in NuvaRing® may cause changes in your blood clotting system which may allow your blood to clot more easily. If blood clots form in your legs, they can travel to the lungs and cause a sudden blockage of a vessel carrying blood to the lungs. Rarely, clots occur in the blood vessels of the eye and may cause blindness, double vision, or other vision problems. The risk of getting blood clots may be greater with the type of progestin in NuvaRing® than with some other progestins in certain low-dose birth control pills.
>
> . . . .
>
> **Call your healthcare provider right away if you get any of the symptoms listed below. They may be signs of a serious problem:**
>
> - sharp chest pain, coughing blood, or sudden shortness of breath (possible clot in the lung)
>
> - pain in the calf (back of lower leg; possible clot in the leg)
>
> - crushing chest pain or heaviness in the chest (possible heart attack)[.]

[2] The summary judgment motion record is unclear as to whether Organon USA manufactured NuvaRing® in New Jersey.

After obtaining a prescription for NuvaRing® from a Virginia doctor, plaintiff used the product from September 2004 until she was hospitalized in November 2005. On November 17, 2005, while watching a movie with coworkers in Washington, D.C.,[3] she experienced shortness of breath. Later that night, she experienced considerable swelling in one of her legs. The following day she was admitted to Virginia Hospital Center in Arlington and diagnosed with a deep vein thrombosis (blood clot) in her left leg that caused a pulmonary embolism (blockage of a blood vessel). Plaintiff remained hospitalized through December 13, 2005.

According to her answers to requests for admissions, plaintiff had no recollection of being warned before she began using NuvaRing® that it could increase the risk of deep vein thromboses or pulmonary embolisms. During her deposition she testified that she may have seen the package insert sometime during her hospitalization. In response to other requests for admissions, plaintiff admitted that: during her hospitalization, her treating physicians told her NuvaRing® was the primary cause of her blood clot; on November 21, 2005, she called the doctor who had prescribed NuvaRing® for her and told him that she had

[3] Plaintiff worked in Washington, D.C. during the time that she used NuvaRing®.

developed a blood clot that she believed was caused by the contraceptive; and, more than two years before she filed her complaint, she believed that NuvaRing® had caused her "injury." She also acknowledged during her deposition that some time during her hospitalization she came into possession of a printed document that contained notes made by her and her mother. The document included a telephone number for NuvaRing®, contained the Organon logo, and included beneath the NuvaRing® phone number and Organon logo the phrase, "Manufactured for Organon USA Inc."

Plaintiff's mother also learned from her daughter's doctors that they considered NuvaRing® to be a contributory cause of plaintiff's clot and embolism. While plaintiff was in the hospital, her mother telephoned "the company" and spoke to a woman named Monette "to find out whether there was . . . a side effect[,] . . . whether they had a lot of such cases and . . . to see what they had to say about it." Plaintiff's mother told Monette about her daughter's diagnosis.

Plaintiff filed her complaint on December 27, 2007, two years and two weeks after her discharge from Virginia Hospital Center. She did not retain counsel sooner because she "didn't even know that was an option . . . . [She] didn't think about it. [She] didn't know [she] could." After reading an article

about others who had similar or worse results from using NuvaRing®, she contacted a law firm that was mentioned in the article. The law firm filed a lawsuit on her behalf.

Defendants filed an answer on January 18, 2007, and pled, among other defenses, that plaintiff's claims were barred by the applicable statute or statutes of limitations. Following discovery, defendants moved for summary judgment, contending that: (1) under New Jersey's choice-of-law principles, the Virginia two-year statute of limitations applied to plaintiff's claims; (2) plaintiff's claims were barred by Virginia's statute of limitations; and (3) plaintiff's claims were also barred by New Jersey's statute of limitations. The trial court heard oral argument on March 11, 2011, and issued a written opinion on March 15. The court entered a confirming order the same day granting defendants' summary judgment motion.

In its opinion, the trial court initially determined that a conflict exists between the New Jersey and Virginia statutes of limitation, N.J.S.A. 2A:14-2 and Va. Code Ann. § 8.01-243, because even though both statutes bar claims filed more than two years after the accrual of a cause of action, New Jersey has a "discovery rule" but Virginia has no such rule. The court next determined that under the "most significant relationship" test enunciated in P.V. ex rel T.V. v. Camp Jaycee, 197 N.J. 132,

135-36 (2008), the Virginia statute of limitations applied to the case and barred plaintiff's claim.

Notwithstanding its determination that plaintiff's claim was barred by the Virginia statute of limitations, the court also analyzed the issue under New Jersey's statute of limitations. The court found that plaintiff "was aware of facts that should have alerted her to the possibilities that Organon may have caused or contributed to her injuries and that Organon's conduct may have been lacking in due care." Noting that "[b]y her own admission, [plaintiff] left the hospital in Virginia with the knowledge that NuvaRing® contributed to her injuries[,]" the court concluded that the facts known to plaintiff "would have alerted a reasonable person exercising ordinary diligence to the possibility of a lawsuit[.]"

Lastly, the court concluded that a Lopez[4] hearing was unnecessary because there were no material facts in dispute.

II.

Plaintiff raises the following issues in this appeal:

> 1. Whether the court committed harmful error in granting summary judgment dismissing the complaint?

[4] Lopez v. Swyer, 62 N.J. 267, 272 (1973) (requiring a hearing when "a plaintiff claims a right to relief from the bar of the statute of limitations by virtue of the so-called 'discovery' rule").

2. Whether the court committed harmful error and misapplied the law in determining which state's law applies to the issue of the statute of limitations?

3. Whether the court committed harmful error in refusing to hold a hearing pursuant to Lopez v. Swyer, 62 N.J. 267 (1973), and thereby resolving material issues of fact which precluded rendering of summary judgment?

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). See also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529-30 (1995). When reviewing an order granting summary judgment, we "'employ the same standard [of review] that governs the trial court.'" Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (quoting Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004)). Thus, we must determine whether there was a genuine issue of material fact, and if not, whether the trial court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Legal conclusions are subject to de novo review. Henry, supra, 204 N.J. at 330.

We first address plaintiff's third point, namely that the trial court erred by failing to conduct a Lopez hearing. The relevant New Jersey statute of limitations provides that "[e]very action at law for an injury to the person caused by the wrongful act, neglect or [fault] of any person within this State shall be commenced within two years next after the cause of any such action shall have accrued . . . ." N.J.S.A. 2A:14-2(a). Generally, a cause of action accrues for purposes of the statute of limitations "when any wrongful act or omission resulting in an injury, however slight, for which the law provides a remedy, occurs." Beauchamp v. Amedio, 164 N.J. 111, 116 (2000). In typical cases "of tortious conduct resulting in injury, the date of accrual will be the date of the incident on which the negligent act or omission took place." Id. at 117.

> The only exception to that well established notion of accrual is the case where the victim either is unaware that he has been injured or, although aware of an injury, does not know that a third party is responsible. Lamb v. Global Landfill Reclaiming, 111 N.J. 134, 144-45 (1988) (recognizing applicability of discovery rule); Ayers v. Jackson Twp., 106 N.J. 557, 582 (1987) (noting that discovery rule "tolls the statute until the victim discovers both the injury and the facts suggesting that a third party may be responsible[]"); Lopez[, supra, 62 N.J. at 274] ("[I]t seems inequitable that an injured person, unaware that he has a cause of action, should be denied his day in court

> solely because of his ignorance, if he is otherwise blameless[]").
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> [Beauchamp, supra, 164 N.J. at 117]

The statute of limitations may be tolled if the discovery rule applies. "The discovery rule is essentially a rule of equity . . . [that has] develop[ed] as a means of mitigating the often harsh and unjust results which flow from a rigid and automatic adherence to a strict rule of law." Lopez, supra, 62 N.J. at 273-74. First announced in Fernandi v. Strully, 35 N.J. 434, 450 (1961), a medical malpractice action where, in the course of an operation, a wingnut had been negligently left in the plaintiff's abdomen, "subsequent decisions have gone much further and have acknowledged the relevance of the doctrine whenever equity and justice have seemed to call for its application." Lopez, supra, 62 N.J. at 273. "[T]he discovery rule balances the need to protect injured persons unaware that they have a cause of action against the injustice of compelling a defendant to defend against a stale claim." Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012).

When "the relationship between plaintiff's injury and defendant's fault is not self-evident, it must be shown that a reasonable person, in plaintiff's circumstances, would have been aware of such fault in order to bar her from invoking the

discovery rule." Id. at 192. As the Supreme Court explained in Kendall:

> To be sure, legal and medical certainty are not required for a claim to accrue. See Lapka v. Porter Hayden Co., 162 N.J. 545, 555-56 (2000). Thus, a plaintiff need not be informed by an attorney that a viable cause of action exists, Burd v. New Jersey Telephone Company, 76 N.J. 284, 291 (1978), nor does a plaintiff need to understand the legal significance of the facts. See Lynch [v. Rubacky, 85 N.J. 65, 73 (1981)]. Likewise, a plaintiff may not delay his filing until he obtains an expert to support his cause of action. Brizak v. Needle, 239 N.J. Super. 415, 429 (App. Div.), certif. denied, 122 N.J. 164 (1990). In cases in which fault is not self-evident at the time of injury, a plaintiff need only have "reasonable medical information" that connects an injury with fault to be considered to have the requisite knowledge for the claim to accrue. Vispisiano v. Ashland Chem. Co., 107 N.J. 416, 435 (1987). Temporal proximity of injury with exposure may be sufficient medical information; however, it is not dispositive. Compare Burd, supra, 76 N.J. at 292-93 with Vispisiano, supra, 107 N.J. at 436.
>
> [Kendall, supra, 209 N.J. at 193-94.]

A plaintiff who invokes the discovery rule is not always entitled to a hearing. "A Lopez hearing is only required when the facts concerning the date of the discovery are in dispute." Henry, supra, 204 N.J. at 336 n.6 (citing Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 274 (App. Div. 1997), certif. denied, 153 N.J. 402 (1998)). Thus, in cases where there is no

dispute about when plaintiff learned of the relationship between her injuries and defendant's fault, and plaintiff's credibility is not an issue, a Lopez hearing is unnecessary.

In the case before us, plaintiff was aware when she was discharged from the hospital that NuvaRing® was the primary cause of the blood clot and embolism for which she had been hospitalized and treated. Her mother had contacted "the company" about NuvaRing®, and plaintiff had notes on a document that indicated "the company" was Organon USA, Inc. In short, plaintiff had reasonable medical information that connected her injuries with the fault of defendants. Consequently, she had the requisite knowledge for her cause of action to accrue.

Plaintiff argues that she "expressly denied realizing that she could file a law suit until December 2007, when she read an article indicating that NuvaRing® litigation was occurring." She also argues that her credibility concerning her being "unaware she could bring a suit" required a Lopez hearing. Her argument overlooks the principle that "[t]he standard for making the discovery determination is essentially 'an objective one.'" Henry, supra, 204 N.J. at 337 (quoting Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005)). The issue is not whether plaintiff subjectively believed that she could file an action against the defendants; the issue is whether a

"'reasonable person' could . . . have previously discovered a basis for a cause of action with the exercise of 'ordinary diligence' . . . ." Id. at 336 (quoting Savage v. Old Bridge-Sayreville Med. Group, 134 N.J. 241, 248 (1993)). The trial court correctly determined that a reasonable person, possessing plaintiff's knowledge, could have discovered a basis for a cause of action with the exercise of ordinary diligence and filed such action within the statute of limitations.

In view of our conclusion that the trial court did not err by deciding that a Lopez hearing was unnecessary, and that the two-year statute of limitations barred plaintiff's claim, we also reject plaintiff's argument in her first point that the trial court erred by granting defendants' summary judgment motion.

Lastly, in view of our conclusion that plaintiff's claim was barred by both the New Jersey and Virginia statutes of limitation, we need not address plaintiff's arguments in her second point that the trial court misapplied the law in determining that the Virginia statute of limitations should apply to plaintiff's claim.

Affirmed.