JUDITH SHARPE and ROBIN SHARPE, wife and husband, Plaintiffs-Appellants,

v.

JOSEPH ADAMO and PAULA ADAMO, husband and wife and COLONIAL LANDSCAPING, INC., Defendants-Respondents.

Docket No. A-2142-08T3.

Superior Court of New Jersey, Appellate Division.

Argued November 4, 2009.
Decided April 20, 2010.

Warren S. Robins argued the cause for appellants (Hartman & Winnicki, attorneys; Mr. Robins, on the brief).

William J. Rada argued the cause for respondents Joseph Adamo and Paula Adamo (**Methfessel** & **Werbel**, attorneys; Mr. Rada, on the brief).

Evert W. Van Kampen argued the cause for respondent Colonial Landscaping, Inc. (Law Offices of Baumann & Lynes, attorneys; Mr. Van Kampen, on the brief).

Before Judges Wefing, Grall and Messano.

PER CURIAM.

Plaintiffs Robin and Judith Sharpe commenced this litigation to recover damages for injuries sustained as a consequence of Judith's slip and fall on snow-covered ice on the front lawn of the residence of defendants Joseph and Paula Adamo. Defendant Colonial Landscaping, Inc. (Colonial) was retained by the Adamos to do work in their backyard, which plaintiffs alleged caused the icy condition. Plaintiffs appeal from the grant of summary judgment in favor of the Adamos and from the denial of their request for additional time to present an expert report relevant to their claims against Colonial. We affirm.

I

The facts relevant to the grant of summary judgment are not in dispute. Plaintiffs and the Adamos live on the same street and a few doors away from one another. In June or July 2004, Mrs. Adamo asked Mrs. Sharpe if she would walk her dog during the day and Mrs. Sharpe agreed to do her that favor. There was no compensation involved.

In the beginning, Mrs. Sharpe walked the dog in the Adamos' backyard. She altered that practice in the fall of that year, because the Adamos' backyard became wet and muddy.

The Adamos attributed the muddy condition in their backyard to work done by Colonial. In September 2004, Colonial started a significant project in the Adamos' backyard, which included building tiered patio areas, a waterfall and pond and an area suitable for playing horseshoes or bocci ball. During the project the Adamos noticed that the backyard became muddy and that there were areas in which water pooled on occasion and sometimes froze. In addition, the Adamos' next-door neighbor had complained to them about flooding in her backyard. According to Mr. Adamo, Colonial's work caused their french drains to malfunction.

In November 2004, before the project was completed, Colonial left the job. The work remained incomplete on the day of Mrs. Sharpe's accident. There was no work done on the lawn adjacent to the driveway, but Mrs. Sharpe had seen that the "piece of land to the left of the driveway was muddy" and "occasionally" seen water "running down the driveway."

Mrs. Sharpe fell on January 18, 2005. There were four to six inches of snow on the ground, but the driveway and sidewalk were cleared. As she had since the Adamos directed her to enter the house through the garage because of the muddy conditions in the backyard, Mrs. Sharpe walked up the driveway, entered the Adamos' home through the garage and took the dog outside the same way. The dog went toward the snow on the lawn to the left of the driveway, and Mrs. Sharpe who had the dog on a leash,

followed. As she took her first step on the lawn, she felt hard ice under the snow. After taking about three steps, she fell and was injured.

Judge LaConte considered those undisputed facts in the light most favorable to plaintiffs. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In assessing the Adamos' entitlement to judgment as a matter of law, the judge applied the traditional common law approach — under which the duty owed to Mrs. Sharpe would depend upon her status as a business invitee or a social guest. He also applied the general standard of reasonable care — under which "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution" are considered to determine the duty owed. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433, 439 (1993).

In the absence of any precedent in this State addressing snow and ice on lawns, Judge LaConte looked to cases decided by courts of other states. In Gilligan v. Villanova Univ., 584 A.2d 1005, 1006 (Pa. Super. Ct. 1991), the court considered a landowner's liability for slippery conditions in a grassy area between a sidewalk and a stadium on a college campus. The court concluded that Pennsylvania's hills and ridges doctrine, which defines a landowner's duty to clear snow and ice accumulated on a sidewalk due to irregularities in the surface, had no application to the lawn. Id. at 1007. Reasoning that the fall occurred in a "grassy area not intended to be traversed by pedestrians," the court concluded that application of the rule would make a landowner "responsible for clearing snow and ice from the entire property in order to avoid liability." Id. at 1007. The court held that "imposition [of such a duty] would be impracticable and absurd." Ibid.[1]

Judge LaConte concluded that regardless of Mrs. Sharpe's status as a social guest or a business invitee, the Adamos, who had cleared their sidewalk and driveway of ice and snow, did not owe Mrs. Sharpe a duty to clear their lawn to provide a path for her to walk their dog. He further concluded that imposition of that duty would not be consistent with "basic fairness under all of the circumstances [in this case and] in light of considerations of public policy." Hopkins, supra, 132 N.J. at 439.

We affirm the grant of summary judgment substantially for the reasons stated by Judge LaConte and add only a brief explanation for our decision. "Under the common law of premises liability, a landowner owes increasing care depending on whether the visitor is a trespasser, licensee or social guest, or business invitee." Sussman v. Mermer, 373 N.J. Super. 501, 504 (App. Div. 2004) (citing Parks v. Rogers, 176 N.J. 491, 497 (2003)). In recent decisions, the Supreme Court has looked primarily to these common law rules to resolve questions of premises liability. See, e.g., Parks, supra, 176 N.J. at 4975-01. Under that approach, "[f]oreseeability is one constant that plays a significant role in fixing a landowner's duty." Vega v. Piedilato, 154 N.J. 496, 501 (1998).

With respect to a social guest, "[a] landowner is not required to provide greater safety on his premises . . . than he would for himself. For example, the landowner does not have a duty to scour the premises to discover latent defects." Parks, supra, 176 N.J. at 497-98. Under this standard, "[t]he landowner is not the measure of whether a known condition of the property is dangerous. The inquiry is an objective one, whether the landowner should realize the condition posed an unreasonable risk of harm." Id. at 499.

The most reasonable of landowners should not be expected to realize that ice on a snow-covered lawn adjacent to a cleared driveway poses an unreasonable risk of harm to a person walking a dog. In that circumstance, the selection of a path across a snow-covered lawn is not sufficiently foreseeable to impose that duty.

A landowner's duty to a business invitee is more onerous. "The duty owed to a business visitor encompasses the duty to conduct a reasonable inspection to discover latent dangerous conditions as well as to guard against any dangerous conditions. . . that the owner either knows about or should have discovered." Id. at 497 n.3 (internal quotations omitted) (emphasis added); see Hopkins, supra, 132 N.J. at 434. The scope of a reasonable inspection depends, among other things, upon what the business invitee would be expected to do on the property — i.e., foreseeability. Hopkins, supra, 132 N.J. at 444-45; see Vega, supra, 154 N.J. at 501.

In Hopkins, the Court discussed the inspection that is reasonable for a real estate broker conducting an open house and noted that the inspection should take account of "features that a prospective purchaser would routinely examine during a `walk through' of the premises." Id. at 444-45. In our view, the remote prospect of Mrs. Sharpe opting to walk the dog on a lawn covered with four to six inches of snow, rather than on the cleared driveway and sidewalk, put the lawn outside the scope of a "reasonable inspection" for latent icing conditions posing a danger.

Finally, considering Mrs. Sharpe's relationship with the Adamos, the unlikelihood that ice beneath the snow on the lawn would

pose a risk to Mrs. Sharpe given the availability of a cleared driveway and sidewalk for walking the dog, and the burdensome nature of a duty to inspect lawns for ice concealed by snow, we conclude that imposition of that duty would be inconsistent with "basic fairness" and "considerations of public policy." Hopkins, supra, 132 N.J. at 439.

Accordingly, a grant of summary judgment in the Adamos' favor is appropriate. Under any relevant legal standard, they are entitled to judgment as a matter of law. Brill, supra, 142 N.J. at 540.

II

We turn to consider plaintiffs' objections to rulings on their motions to extend discovery relevant to their claims against Colonial. Those rulings were not made by Judge LaConte. This court "generally defer[s] to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div.), certif. denied, 185 N.J. 296 (2005).

Plaintiffs' initial complaint, filed on December 1, 2006, did not name Colonial as a defendant but included a count alleging negligence by an unidentified John Doe who performed work at the residence contributing to the unsafe condition of the lawn. When the Adamos complied with an order of August 28, 2007 compelling them to produce documents, plaintiffs were able to identify Colonial as the contractors. Later, at a deposition of the Adamos conducted on November 20, 2007, plaintiffs learned that the Adamos believed Colonial's work damaged their french drains. At that point, the discovery end date, initially set for November 4, 2007, had been extended until January 1, 2008 in accordance with Rule 4:24-1(c).

By order of December 21, 2007, plaintiffs were granted leave to file an amended complaint substituting Colonial for a John Doe defendant contractor. The order also extended the discovery period for about ninety days, from January 1, 2008 until April 5, 2008.

On March 12, 2008, plaintiffs moved for an additional extension of discovery and a case management conference. In support of their application, plaintiffs asserted that they had granted Colonial an extension of time to answer that complaint served on January 25, 2008 and that Mrs. Sharpe had "recently under[gone] additional surgery," which had delayed her compliance with the Adamos' request for an independent medical examination. By order of April 1, 2008, the trial court extended the discovery period until May 31, 2008, provided that no further discovery would be permitted absent a showing of exceptional circumstances and denied the request for a case management conference.

Discovery proceeded. Although Colonial filed its answer to the amended complaint on April 8, 2008 and Colonial's answers to interrogatories are dated March 31, 2008, according to plaintiffs' counsel the answers were not served until after June 3, 2008.

Plaintiffs first retained their engineering expert "in the beginning of May." It was not until May 1, 2008 that plaintiffs served their first notice of intent to depose Colonial on May 21, 2008. On May 30, 2008, counsel for plaintiffs wrote Colonial's attorney confirming Colonial's cancellation of the deposition, identifying plaintiffs' engineering expert and advising that Mrs. Sharpe's MRIs were available for inspection.

Although the extended discovery period was to expire on May 31, 2008, the record on appeal indicates that plaintiffs' first request for permission to have their expert inspect the Adamos' property was made by facsimile on May 30, 2008. On June 3, the Adamos opposed that request because the discovery period had expired; they also objected to the late filing of plaintiffs' expert reports.

By letter of June 6, 2008, plaintiffs' attorney again requested a case management conference. The attorney explained that the attorneys for the Adamos and Colonial had no objection and described the discovery not yet completed — Colonial's deposition and the "serving of reports by [p]laintiff's [sic] engineering expert and medical expert." The court denied the request on the ground that arbitration had been scheduled.

On July 2, 2008, more than a month after expiration of the extended discovery period and after arbitration had been scheduled, plaintiffs again moved to extend discovery and first objected to the adequacy of Colonial's response to interrogatories.

In support of the July 2 motion, plaintiffs asserted that that they had diligently prosecuted the case. They claimed: "Exceptional circumstance exist . . . because of the fact that [d]efendant Colonial was not added as a [d]efendant until the beginning of this year, did not file an Answer to the Amended Complaint until April of this year and has not complied with discovery requests."

The judge denied the application on the ground that given plaintiffs' failure to resort to motion practice at an earlier date they failed to show exceptional circumstances. The judge referred to the April 1, 2008 order in which he had stated that no additional extensions would be granted absent exceptional circumstances.

Colonial filed a motion for summary judgment, and plaintiffs filed a cross-motion seeking denial of Colonial's motion without prejudice and an extension of discovery. By order of October 24, 2008, that motion was denied and is not challenged on appeal. The judge explained that plaintiffs had failed to demonstrate exceptional circumstances, explaining "why[,] after 509 days of discovery which ended on 5/31/08 and [three] discovery extensions and a trial date of 12/1/08 pending, paper discovery remains incomplete."

Judge LaConte entered summary judgment in favor of Colonial on November 14, 2008. He determined that without an expert report that would permit a jury to find Colonial negligent, Colonial was entitled to judgment as a matter of law.

A

Relying upon Rule 4:24-1(b), which applies to extensions of discovery granted upon the filing of a pleading joining a new party, plaintiffs argue that the trial court abused its discretion in not extending the discovery beyond May 31, 2008. When a new party is added, Rule 4:24-1(b) provides for an extension of sixty days, which may be "reduced or enlarged by the court for good cause shown." On December 21, 2007, when Colonial was added, the discovery end date was January 1, 2008 and the period was extended for ninety days, until April 5, 2008.

It was by subsequent order of April 1, 2008, entered on plaintiffs' March 12, 2008 motion, that the period was extended until May 31, 2008. At that point in time, Rule 4:24-1(b) did not apply. Accordingly, we reject plaintiffs' argument that the court erred in applying Rule 4:24-1(b) in fixing the May 31, 2008 date.

Plaintiffs' March 12 motion to extend the time for discovery beyond April 5, 2008 is governed by Rule 4:24-1(c). The standard is good cause, and the standards that guide the trial court's exercise of discretion pursuant to that rule are set forth as follows in Leitner v. Toms River Reg'l Schs., 392 N.J. Super. 80, 87-88 (App. Div. 2007):

> [F]or an extension of discovery in the absence of a fixed arbitration or trial date, there are a number of factors which a trial court should consider. They include, but are not limited to, the following:
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> (1) the movant's reasons for the requested extension of discovery;
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> (2) the movant's diligence in earlier pursuing discovery;
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> (3) the type and nature of the case, including any unique factual issues which may give rise to discovery problems;
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> (4) any prejudice which would inure to the individual movant if an extension is denied;
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> (5) whether granting the application would be consistent with the goals and aims of "Best Practices";
>
> (6) the age of the case and whether an arbitration date or trial date has been established;
>
> (7) the type and extent of discovery that remains to be completed;
>
> (8) any prejudice which may inure to the non-moving party if an extension is granted; and
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> (9) what motions have been heard and decided by the court to date.

Considering these factors and the vagueness of plaintiffs' assertion of reasons for seeking an extension, we cannot conclude that an order granting an additional fifty-six days for discovery was an abuse of the court's discretion. Without question, the movant must provide the information that permits a judge to make the relevant findings. See Bender v. Adelson, 187 N.J. 411, 429 (2006) (discussing the need for the movant to provide facts supporting an extension requiring a showing of exceptional circumstances). Plaintiffs provided too little in the way of specifics about what needed to be done to permit us to conclude that the fifty-six-day period granted was so unreasonably short as to amount to an abuse of discretion.

Plaintiffs raise a second challenge to the order of April, 1 and the trial court's response to their letter of June 6. They contend that the court abused its discretion by not scheduling a case management conference. Pursuant to Rule 4:5B-2, a case management conference may be conducted on a party's request "if it appears that such a conference will assist discovery. . ., or otherwise promote the orderly and expeditious progress of the case." In Ferreira v. Rancocas Orthopedic Assocs., the Supreme Court noted "that case management conferences should be held when `something can be gained from it.'" 178 N.J. 144, 155 (2003) (quoting 2 New Jersey Practice, Court Rules Annotated, Comment on R. 4:5B-2 (John H. Klock) (5th ed. Supp. 2003-2004)). Again, given the content of the certification submitted in support of the April 1 request and the June 6 letter, we cannot conclude that the court abused its discretion. The question is not whether we would have taken a different course but whether the course selected was inconsistent with the controlling legal principles.

B

Plaintiffs also challenge the July 23, 2008 order, which was entered on their July 2, 2008 motion. They argue that the court abused its discretion in denying an extension of discovery. At that point, plaintiffs were required to demonstrate "exceptional circumstances" warranting the requested relief. R. 4:24-1(c). The exceptional circumstances standard applied because arbitration had been scheduled. R. 4:24-1(c); O'Donnell v. Ahmed, 363 N.J. Super. 44, 50 (App. Div. 2003).[2]

In Rivers, we held that there are four inquiries, identified in Vitti v. Brown, that a moving party must satisfy in order to make a showing of exceptional circumstances:

> In order to extend discovery based upon "exceptional circumstances," the moving party must satisfy four inquiries: (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.
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> [Rivers, supra, 378 N.J. Super. at 79 (citing Vitti v. Brown, 359 N.J. Super. 40, 51 (Law Div. 2003)).]

We have considered the facts asserted in support of plaintiffs' July 2, 2008 motion and find no abuse of discretion. While the second factor was satisfied, because there is no question that an expert report was essential to support plaintiffs' claim against the defendant landscaper, reasons for failure to provide that report within time, essential to the first factor, were not established. Plaintiffs asserted but did not explain why preparation of the expert's report on the landscaper's work had to await identification of Colonial or a deposition of Colonial's representatives. Moreover, the proofs essential to establish the third and fourth of the Vitti factors were also lacking. As the trial court found, to the extent that plaintiffs deemed information from Colonial critical, they could have filed a motion to compel Colonial's compliance long before July 2, 2008; indeed, plaintiffs could have sought an extension for discovery based upon Colonial's delay prior to the May 31, 2008 discovery end date. Thus, only the second of the four factors in Vitti, necessity, was established.

As we noted in Rivers, "where the `delay rests squarely on plaintiff's counsel's failure to retain an expert and pursue discovery in a timely manner,' and the Vitti factors are not present, there are no exceptional circumstances to warrant an extension." 378 N.J. Super. at 79 (quoting Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 473-74 (App. Div.), certif. granted and remanded on other grounds, 185 N.J. 290 (2005)). Plaintiffs did not retain an expert until May, scheduled Colonial's deposition for May 21, 2008, asked to inspect the Colonial's property on May 30, 2008, and raised its first objection to Colonial's response to discovery requests more than a month after the discovery period expired. Those facts support a determination that plaintiffs' counsel contributed to the delay and that extension of the May 31, 2008 deadline was not justified by exceptional circumstances.

"[I]n common parlance, [exceptional circumstances] denotes something unusual or remarkable." Vitti, supra, 359 N.J. Super. at 50 (quoting Flagg v. Twp. of Hazlet, 321 N.J. Super. 256, 260 (App. Div. 1999)). In our view, the trial court did not abuse its discretion by overlooking anything "unusual or remarkable" in this case.

Affirmed.

[1] The judge also relied on an unpublished decision of the Delaware Superior Court, in which the judge rejected a claim based upon failure to clear a lawn of snow on the ground that there is no precedent for imposition of a duty to clear a path over a grassy lawn. Booker v. White Oak Condo.

Ass'n, 2007 Del. Super. LEXIS 268 (Del. Super. Ct. Aug. 28, 2007).

[2] In their reply brief, plaintiffs rely on a case decided after they filed their opening brief. Tynes v. St. Peter's Univ. Med. Ctr., 408 N.J. Super. 159, 168 (App. Div.), certif. denied, 200 N.J. 502 (2009). Tynes holds that the trial court may not, by force of a discovery order, dictate application of the exceptional circumstances standard before an arbitration date is scheduled. Id. at 168-69. In this case, the trial court's April 1 order included a provision attempting to apply the exceptional circumstances standard to future application without regard to the scheduling of an arbitration date. Nonetheless, when the July 3 motion was filed, an arbitration date had been scheduled. Accordingly, Tynes has no relevance here.