Implications Of Trenk Dipasquale V. Industrial Urban

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New Jersey's Affidavit of Merit Statute, N.J.S.A. 2A:53A-27, et seq., was designed "to weed out frivolous lawsuits at an early stage and to allow meritorious cases to go forward by requiring a plaintiff in a malpractice case to make a threshold showing that the claims asserted are meritorious." N.H. Ins. Co. v. Diller, 678 F. Supp. 2d 288, 307 (D.N.J. 2009), citing Galik v. Clara Maass Med Ctr., 167 N.J. 341 (2001).

Pursuant to the statute, a plaintiff in a professional negligence action against certain enumerated professionals, including attorneys and insurance producers, is required to "within 60 days following the date of the filing of the answer to the complaint by defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices." See N.J.S.A. 2A:53A-27.

Unlike cases involving medical malpractice, see Buck v. Henry, 207 N.J. 377, 389 (2011) ("the

challenging expert who executes an affidavit of merit in a medical malpractice case, generally, should 'be equivalently-qualified to the defendant' physician'"), legal malpractice cases have not stressed specialization by an affiant drafting affidavits of merit against other attorneys. New Jersey courts have routinely interpreted the statute as allowing general practitioners latitude in serving as an appropriate affiant in legal malpractice cases. See e.g. the unpublished opinion Davis v. Ellis (N.J. Super. Ct. App. Div. Jan. 31, 2014) (where the court held that certification in matrimonial law was not the sole demonstration of the expertise required by the statute).

The recent unpublished opinion in Trenk Dipasquale Della Fera & Sodono PC v. Industrial Urban Corp., Docket. No. ESX-L-1657-15 (Feb. 19, 2016, Mitterhoff, J.S.C.), may open the door to greater scrutiny of the qualifications of attorney affiants in New Jersey legal malpractice cases.

In Trenk, the plaintiff law firm was retained by the defendants to provide legal services in connection with various lawsuits brought by Valley National Bank arising out of a series of complex loan transactions. The retainer agreement between them provided that the law firm would attempt to negotiate a favorable settlement with Valley National and, if unsuccessful, render legal advice to the clients about their other options, including filing for Chapter 11 reorganization. After a period of time, the clients became dissatisfied with the progress of the negotiations with Valley National and indicated to the law firm that they wanted to consider filing for reorganization. Thereafter, the clients ceased paying the firm's legal fees and declined the invitation to resolve the dispute through fee arbitration. In response, the firm filed a lawsuit for its fees against the clients and the clients counterclaimed including allegations of gross negligence and legal malpractice. These counts were premised on the clients' allegation that the firm erred in advising them that they qualified for reorganization under Chapter 11 of the United States Bankruptcy Code.

The clients timely filed an affidavit of merit in support of their legal malpractice counterclaim as required by N.J.S.A. 2A:53A-27. The affidavit was authored by attorney Andrew M. Epstein, who had substantial experience in the areas of legal ethics and commercial litigation. Epstein attested in the affidavit that if the allegations in the counterclaim were proven true, it was his opinion that there existed a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work of the plaintiff law firm fell outside acceptable professional or occupational standards.

Through a Ferreira conference, the law firm challenged the sufficiency of Epstein's affidavit. The firm argued that the affidavit was deficient because Epstein was not a bankruptcy practitioner. The court agreed with the firm and directed the clients to submit a new affidavit of merit from an attorney who practiced bankruptcy law. Instead of retaining a bankruptcy attorney, the clients stood by their position that Epstein was qualified and that his affidavit complied with N.J.S.A. 2A:53A-27. Upon the expiration of the deadline for the furnishing of an affidavit of merit, the firm filed a motion to dismiss the legal malpractice counterclaim with prejudice for failure to comply with N.J.S.A. 2A:53A-27.

At oral argument, counsel for the clients disclosed that they had been speaking to a bankruptcy attorney for four weeks, who still could not give an opinion whether or not reorganization was

the appropriate advice. The court no doubt interpreted this statement as an acknowledgment that the clients were unsuccessful in obtaining an affidavit of merit from a bankruptcy attorney.

In arriving at its decision, the court noted that questions regarding the necessary qualifications for an affiant of a legal malpractice claim arising from a specific field of law had not been conclusively settled in New Jersey. The court's research revealed only one case in which the specific issue of whether an attorney who did not practice in the same legal specialty as the defendant could attest to the merit of a legal malpractice action was considered. That case is Manger v. Veisblatt, 2011 N.J. Super. Unpub. (Law Div. 2011), in which the court held that when there is an overlap between two legal specialties, and the allegations in the complaint allege a deviation in that area of overlap, the fact that the affiant and the defendant attorney did not practice in the same field of law does not necessarily render the affidavit of merit deficient.

Taking the Manger decision into account, Judge Mitterhoff found that where, however, the allegations of the complaint do not fall within the area of overlap between legal specialties of the affiant and the defendant attorney, a different outcome must follow. This conclusion is consistent with the rationale in Davis v. Ellis, supra, wherein the Appellate Division, despite reversing the lower court on the decision that the affiant be a certified matrimonial attorney, still required plaintiff on remand to submit to the trial court an affidavit of merit which complied with the statute within 60 days, indicating that an affidavit by a general litigation attorney was not sufficient and that the affiant had to specialize in matrimonial law.

In Trenk, the allegations in the counterclaim explicitly stated that the plaintiff law firm breached the standard of care applicable to practitioners in the field of bankruptcy. Thus, unlike Manger, the allegations in the counterclaim in Trenk did not allege that the plaintiff law firm simply failed to fulfill a general duty that applies to all attorneys. To the contrary, the clients alleged that the law firm deviated from the professional standard of care applicable to bankruptcy attorneys, and bankruptcy is a practice area in which the Trenk firm provided legal services.

That being said, Judge Mitterhoff clearly articulated that, in cases involving an allegation of legal malpractice, whether the affiant must practice in the same specialty as the defendant attorney must be decided on a case-by-case basis. That determination requires an examination of whether the allegations in the complaint involve an area of overlap between the practices of the affiant and the defendant, or whether the allegations arise from the defendant's deviation from accepted standards of care that apply to the particular specialty practiced by the defendant attorney. The statute itself recognizes that the affiant must practice in the same field or specialty. See N.J.S.A. 2A:53A-27 (the person executing the affidavit must be board certified or have devoted five years of his or her practice to the general area or specialty involved in the action.)

As such, the court in Trenk found that affiant Epstein was unqualified to speak to the standard of care applicable to bankruptcy attorneys and that his affidavit of merit was deficient. As part of the rationale for its decision, the court specifically noted the fact that the clients were unable to obtain an affidavit of merit from an actual bankruptcy attorney, which undermined the validity of their legal malpractice claim.

Accordingly, while still open to challenge on appeal, Trenk represents another instance where a

trial court has questioned whether the particularity of the affiant is required for a valid affidavit of merit in a legal malpractice context. Thus, in the legal malpractice context, the evaluation of the affiant's specific qualifications may be warranted where the underlying subject matter involves an area of law that is beyond the bailiwick of a general practitioner. The affidavit should be thoroughly evaluated, compared with the language of the statute and any deficiencies should be addressed with the court during the often-scheduled Ferreira conference. If no conference is held, and the affidavit is deficient, then dispositive motion practice may be warranted.

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