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Alert

The New Jersey Supreme Court Decides That The Failure To Hold A Ferreira Conference Does Not Toll The Statutory Period For Filing An Affidavit Of Merit

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On June 28, 2010, the New Jersey Supreme Court clarified whether the failure to hold an Affidavit of Merit conference pursuant to Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003), tolls the statutory period for filing an affidavit of merit pursuant to N.J.S.A. 2A:53A-26 to -29.

In Paragon Contractors, Inc. v. Peachtree Condominium Association, __ N.J. __ (June 28, 2010), the Supreme Court held that the failure to hold a Ferreira conference does not toll the period set forth in the Affidavit of Merit statute. However, due to a split of authority in the Appellate Division prior to rendering this decision, the Supreme Court refused to apply it in Paragon.

In Paragon, plaintiff Paragon Contractors, Inc. ("Paragon") filed an action against Peachtree Condominium Association ("Peachtree") seeking payment for construction work performed. Peachtree answered and filed a third-party complaint against Key Engineers, Inc. ("Key"), an engineering company hired to inspect and supervise the plaintiff's work. Peachtree did not identify in its Case Information Statement that the third-party complaint was a professional malpractice claim. Key's answer raised the Affidavit of Merit as an affirmative defense, but the construction case track assignment did not change. Key's counsel forwarded a Certification of Good Cause to Change Track Assignment, requesting that the case be moved to the professional liability track. After the statutory period to submit an affidavit of merit had passed and prior to the court scheduling a Ferreira conference, Key moved to dismiss based on Peachtree's failure to serve an affidavit of merit as set forth in the statute. Peachtree did file an affidavit of merit before the motion return date, but after the statutory period.

The trial court found that the failure to hold a Ferreira conference did not toll the statutory period. The Appellate Division affirmed. Paragon Contractors, Inc. v. Peachtree Condominium Association, 406 N.J. Super. 568, 581 (App. Div. 2009). At the time of the Appellate Division's decision, another panel on the Appellate Division had already held that the failure to conduct a Ferreira conference may

constitute a defense to an otherwise valid dismissal under the statute. Saunders ex rel. Saunders v. Capital Health Sys., 398 N.J. Super. 500, 510-11 (App. Div. 2008).

Because of the apparent lack of unanimity in the Appellate Division, the Supreme Court stated that "[i]n the context of this case, however, the confusion we have recognized constitutes an extraordinary circumstance that may have caused counsel to slumber when he should have acted." The Court added that "lawyers and litigants should understand that, going forward, reliance on the scheduling of a Ferreira conference to avoid the strictures of the Affidavit of Merit statute is entirely unwarranted and will not serve to toll the statutory time frames. Indeed, it is only the confusion over the role of the Ferreira conference — which now has been addressed and clarified — that warrants relief in this case."

The Paragon ruling makes it clear that going forward, the Ferreira conference does not toll the statutory period in cases under the purview of the Affidavit of Merit statute. The impact of the Court's decision on pending trial and appellate cases is unknown. We believe a fact sensitive analysis will likely be necessary to determine if a non-compliant party deserves leniency.