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The Fictitious Party Rule Is a Prodigious Tool for Effective Pleading

What N.J. litigators need to know about John Doe

By Mark Materna

The state of New Jersey employs strict parameters to protect a diligent plaintiff, who is aware of a cause of action against a defendant but does not know the defendant's name, at the point at which the statute of limitations is about to run. Recent litigation suggests that courts are more closely examining this rule's provisions. Thus, it is important to review this rule's intricacies to avoid pitfalls associated with overlooking its strict requirements.

Generally, R. 4:26-4 permits a plaintiff to designate a fictitious party as someone responsible for his or her injury. A plaintiff invoking fictitious-party practice must satisfy R. 4:26-4, which generally requires:

(1) The plaintiff must not know the identity of the defendant said to be named fictitiously;

(2) the fictitiously-named defendant must be described with appropriate detail sufficient to allow identification; and

(3) a party seeking to amend a complaint to identify a defendant previously named fictitiously must provide proof of how it learned of the defendant's identity.

In addition, although not expressly stated, the rule is unavailable to a party who does not act diligently in identifying the defendant. *Matynska v. Fried*, 175 N.J. 51, 53 (2002).

Describing the fictitiously named defendant with sufficient detail

If the plaintiff fails to provide a "concise designation" of the fictitious party, the plaintiff cannot avail himself of the protections of this rule. *Cruz v. City of Camden*, 898 F. Supp. 1100, 1109 (D.N.J. 1995). Indeed, there is much case law that addresses whether the general description of the offending actor's position and alleged wrongful acts were pleaded with sufficient specificity. The court in *Greczyn v. Colgate-Palmolive*, 183 N.J. 5 (2005), held that the plaintiff satisfied the rule by identifying the defendant as the person who designed a certain staircase. In *Cruz*, the court concluded that a fictitious-party designation must at least include the rank of the defendant-officer involved and the wrongful acts that the officer performed. And in *Lawrence v. Bauer Publ'g & Printing*, 78 N.J. 371, 376 (1979), it was held that fictitiously naming the composer and writer of an allegedly defamatory article did not encompass the source of information used by writer. All these cases support the general principle that the plaintiff, at a minimum, must include a general description of the offending actor's position and the alleged wrongful acts that were committed.

Nevertheless, plaintiffs may be tempted to cast as broad a net as possible in their fictitious-party pleading. For example, a typical complaint may describe so-called "John Doe" defendant(s) as follows:

> John Doe 1-10 are fictitious parties, the proper identity of which is unknown to the plaintiffs at this time … [t]he acts of negligence as set forth in the First and Second Counts of this complaint were contributed to, caused by, or abetted by the fictitious unknown entities and unknown parties as set forth aforesaid.

Even if read indulgently, this description of the John Doe defendants fails to meet the minimum standard of describing the offending actor's position and the wrongful acts that were

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done. This type of pleading is especially egregious if an amended complaint is filed and the John Doe pleading remains unchanged in light of significant progression through discovery. Counsel should be vigilant in ensuring that such pleading, at the very least, includes a general description of the offending actor's position and the alleged wrongful acts that were performed.

Exercising due diligence in identifying a party as a defendant

Since the due diligence standard is not expressly stated in R. 4:26-4, its unwritten provisions are typically the most hotly contested. As a starting point, the plaintiff must provide the court with an affidavit (i.e., a prima facie showing of diligence) stating the manner in which it learned the defendant's identity.

Additionally, it is well established that constructive notice and subsequent failure to act in a reasonable time can serve as grounds to find a lack of due diligence and deny a plaintiff's motion to amend a complaint. See *Younger v. Kracke*, 236 N.J. Super. 595 (Law Div. 1989) (barring plaintiff from amending the complaint to substitute the name of a defendant driver in a three-car accident when the driver's name was on the police report). Other forms of constructive notice include being informed of a party's identity in interrogatories, and where the plaintiff served a notice of claim on the defendant sought to be substituted for a fictitious party. Failing to do so may result in a court's finding that a plaintiff slept on his rights and failed to satisfy this threshold requirement.

In this context, it is important to analyze a plaintiff's actual or constructive knowledge before and after the filing of the original and any amended complaint(s). First, counsel for a defendant sought to be substituted for a fictitious party should carefully examine what information was available to the plaintiff before the original complaint was filed. For example, in a products liability or personal injury action, a review of any and all incident reports may reveal that the plaintiff knew or should have known of the offending actor's position and the wrongful acts that were committed. Once the complaint has been filed, careful examination of discovery exchanged by the parties to date, including answers to interrogatories and deposition transcripts, may further aid in this analysis.

Finally, ask whether the plaintiff sought to amend the complaint "reasonably soon" after the fictitiously-named defendant's true identity was first named in a pleading. Once the fictitious defendant is identified by name, the plaintiff must act promptly to amend the complaint. *Johnston v. Muhlenberg Reg'l Med Ctr*., 326 N.J. Super. 203 (App. Div. 1999). Though there is no stringent timeline, in *Johnston*, the court found that a four-month delay in moving to amend the complaint after learning of the fictitiously-named defendant's real identity was not diligent.

The auxiliary and often misunderstood prejudice standard

Frequently, an inordinate amount of time is spent discussing the prejudice standard, which overlooks the fact that a showing of prejudice to the defendant is not a requirement, but rather an auxiliary piece of the puzzle. After all, plaintiffs cannot avail themselves of the protections of R. 4:26-4 without first satisfying the aforementioned due diligence standard. The following analysis is most complex in situations when a plaintiff seeks to amend a complaint and name a third-party defendant as a direct defendant.

From a plaintiff's perspective, it may be tempting to assert the blanket assumption that individual defendants may be named after the period of limitations has expired so long as there is no showing of prejudice to them by reason of the late joinder. However, case law suggests that "such a broad proposition is not substantiated by any case decided by this court or the Supreme Court." *Marion v. Borough of Manasquan*, 231 N.J. Super. 320, 335 (App. Div. 1989). Rather, it is appropriate to employ more specific arguments.

In this vein, the debate usually surrounds *Claypotch v. Heller*, 360 N.J. Super. 472 (App. Div. 2003). When analogizing facts to *Claypotch*, plaintiffs typically contend that a third-party defendant was not prejudiced because it was already a party to the case, had notice of the plaintiff's allegations and was aware of its potential liability. Barring certain differences discussed below, these arguments usually prevail.

Third-party defendants faced with the prospect of being named as direct defendants would be keen to distinguish *Claypotch* on two grounds, if possible. First, it is important to highlight that although the policy of repose is not implicated where a party was a previously named third-party defendant, this rationale assumes that, at the very least, the previously named third-party defendant was properly named fictitiously before the statute of limitations had expired. In *Claypotch*, the third-party defendant was named fictitiously as "manufacturers, distributors, designers, repairers and sellers" of a punch press. Yet, if the third-party defendant was never pleaded with sufficient detail, there is a viable argument that the plaintiff never met the threshold requirement discussed above and, therefore, cannot avail himself of the protections of R. 4:26-4.

Second, a third-party defendant should emphasize the discovery completed to date and its precarious position of attempting to defend the matter as a direct defendant without the benefits afforded to a party that was timely and properly named. In *Claypotch*, the third-party defendant was originally named before the statute of limitations had run and was afforded many of the same benefits as a direct defendant. While it is true that parties may be re-deposed and discovery materials exchanged to date must be provided to the new party, the costs and time associated with such additional discovery could be significant. Moreover, a third-party defendant may argue that it is essentially being penalized for plaintiff's lack of diligence.

The provisions outlined under R. 4:26-4 are designed to protect plaintiffs who are aware of a cause of action against a defendant but do not know the defendant's name at the point when the statute of limitations is about to run. While courts differ on how stringently these provisions are applied in practice, an acute understanding of the rule and its application are indispensable for any attorney wishing to take a step toward more effective pleading practice. ■