

**APPELLATE DIVISION HOLDS THAT PLAINTIFF’S LACK OF DUE DILIGENCE BARS REPLACING ‘JOHN DOE’ DEFENDANT WITH ACTUAL PARTY**

The Appellate Division has held in Andreoli v. State Insulation Corp. et. al. (2011 WL 4577646) that a plaintiff could not replace a “John Doe” defendant with an actual party due to a lack of due diligence in identifying that party.

In this matter, plaintiff filed an asbestos-related wrongful death and survivorship action. By way of background, plaintiff died from mesothelioma on July 22, 2006. His estate filed its first complaint on March 1, 2007. In that complaint, plaintiff alleged that he was exposed to asbestos while working at a Hess-related facility. At that time, Hess was not named as a defendant. However, plaintiff did allege that the fictitiously named defendants “negligently mined, milled, manufactured, distributed and/or conspired to distribute the aforesaid fibers, dust, particles and products to the plaintiff’s employer without warning of the potential dangers.”

On November 26, 2008, plaintiff amended his complaint to reflect that he had been employed by a Hess-related entity for a brief period of time. By motion filed on May 28, 2010, plaintiff’s counsel sought permission to file a third amended complaint to identify Hess as one of the “John Doe” defendants. A copy of this motion was not provided to Hess. On July 19, 2010, the trial court granted plaintiff’s motion to name Hess as a defendant.

In lieu of an answer, Hess filed a motion to be dismissed in October 2010 on the basis that the statute of limitations had expired. In opposition to this motion, plaintiff’s counsel argued that it was learned during a March 2009 deposition that Hess was a viable defendant. Hess argued that as early as the filing of the initial complaint, plaintiff was aware that Hess was a viable defendant, but elected not to name the company as a defendant. The trial court found that plaintiff had complied with the fictitious pleading rule and denied Hess’ motion.

The Appellate Division noted that to utilize the fictitious party rule, the plaintiff must: (1) not know the identity of the defendant said to be named fictitiously; (2) describe the fictitiously named defendant with appropriate detail sufficient to allow identification; (3) provide proof of how it learned the defendant's identity; and (4) act diligently in identifying the defendant. The court noted that "a showing of diligence is a threshold requirement for resort to fictitious-party practice." Additionally, the court noted that in limited circumstances, prejudice to a defendant may be considered in evaluating whether a plaintiff has acted diligently.

In reviewing this matter, the court first found that the plaintiff's fictitious pleading could not be fairly construed to encompass a premises defendant (Hess) within a group of fictitiously named asbestos suppliers or installers. Additionally, the court found that the plaintiff failed to provide an affidavit regarding how he obtained information about the identity of Hess. Overall, according to the court, the record lacked evidence that plaintiff exercised due diligence in indentifying Hess. Accordingly, the trial court's ruling was reversed and the matter remanded so that Hess could be dismissed from the matter with prejudice.