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Plaintiff(s) MICHAEL LUSAS vs. OC HOTELS & PROPERTY MANAGEMENT, INC., et al Defendant(s) and OC HOTELS & PROPERTY MANAGEMENT, INC., et al Defendants/Third Party Plaintiffs vs. CITY OF OCEAN CITY, PERNA FINNIGAN, ABC, INC. (fictitious yet unknown entities) Third Party Defendants	SUPERIOR COURT OF NEW JERSEY CAPE MAY COUNTY LAW DIVISION DOCKET NO. CPM-L-55-17 CIVIL ACTION ORDER

THIS MATTER having been brought before the Court by Birchmeier & Powell LLC attorneys for defendants; **AND GOOD CAUSE** having been shown;

IT IS on this 28th day of November 2017, **ORDERED** that third party defendant, City of Ocean City's Motion For Summary judgment is **GRANTED** dismissing any and all claims with prejudice.

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties within seven days.

J. Christopher Gibson, J.S.C.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

CASE: Michael Lusas v. OC Hotels & Property Management, Inc.

DOCKET NO.: CPM-L-55-17

NATURE OF APPLICATION: THIRD PARTY DEFENDANT THE CITY OF OCEAN CITY'S MOTION FOR SUMMARY JUDGMENT

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The complaint in this matter was filed on February 7, 2017. Discovery ends on February 5, 2018. There are three hundred (300) days of discovery. There have been no extensions of discovery. Neither arbitration nor trial is scheduled.

This matter arises out of a slip and fall on ice, which occurred on January 18, 2016, in Ocean City, while Plaintiff was making a delivery for his employer, Sherwin Williams.

Third Party Defendant, the City of Ocean City ("Ocean City"), now moves for summary judgment with prejudice, as it is a public entity governed by the New Jersey Tort Claims Act, N.J.S.A. § 59:1 et seq.

This Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid. (internal citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid. (internal citations omitted); see also Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (requiring opposition to a motion for summary judgment to have "competent evidential material beyond mere speculation and fanciful arguments").

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the

> mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such order as may be appropriate.

See also Brill, 142 N.J. at 529 (holding that the burden shifts to the non-movant to "come forward with evidence that creates a genuine issue as to any material fact challenged" after the movant has provided sufficient evidence for summary judgment). In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a

rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

A motion for summary judgment is inappropriate prior to the completion of discovery. See Lederman v. Prudential Life Ins., 358 N.J. Super. 324, 337 (App. Div.), certif. denied, 188 N.J. 353 (2006); Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) ("Ordinarily summary judgment dismissing the complaint should not be granted until the plaintiff has had a reasonable opportunity for discovery."). Also, summary judgment is inappropriate when "critical facts are peculiarly within the defendants' knowledge." Valentzas v. Colgate-Palmolive Co., 74 N.J. 189, 193 (1988), citing Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981). However, summary judgment may still be granted if, as a matter of law, further discovery will not rescue and maintain the action. The Appellate Division in Auster, 153 N.J. Super. at 56, supra, held:

> Plaintiff has an obligation to demonstrate to some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action. Here, there was no attempt by plaintiffs to avail themselves of the opportunity to engage in discovery until after the Complaint was in jeopardy of being dismissed and they have failed and continue to fail to demonstrate how further discovery might rescue it.

See also Tisby v. Camden County Corr. Facility, 448 N.J. Super. 241, 247 (App. Div. 2017) (requiring the party objecting to a motion for summary

judgment as premature only if the party can "demonstrate with some particularity [that] the likelihood of further discovery will supply the missing elements of the cause of action").

MOVANT'S POSITION

Ocean City argument that Defendants/Third Party Plaintiffs, OC Hotels & Property Management, Inc. ("OC Hotels") and Magton, Inc. T/A Impala Island Inn ("Impala"), failed to comply with the notice provisions of N.J.S.A. § 59:8-1 concerning the time for presentation of a claim.

Ocean City asserts that as a public entity, it is entitled to the protections and immunities under the New Jersey Tort Claims Act. Ocean City asserts that OC Hotels and Impala failed to serve a Tort Claims Notice upon Ocean City. Ocean City cites the Supreme Court of New Jersey in Jones v. Morey's Pier, Inc. noted that "when a defendant does not serve a timely notice of claim on a public entity pursuant to *N.J.S.A.* 59:8-8 and is not granted leave to file a late notice of claim under *N.J.S.A.* 59:8-9, the Tort Claims Act bars that defendant's cross-claim or third-party claim for contribution and common-law indemnification against the public entity." Jones v. Morey's Pier, Inc., 230 N.J. 142, 157-58 (N.J. 2017). Based on the failure of OC Hotels and Impala's failure to comply with the notice of claim provisions, Ocean City argues that it is entitled to summary judgment as a matter of law.

OPPOSITION

In opposition to Ocean City's Motion for Summary Judgment, OC Hotels and Impala first argue that Ocean City's Motion is premature, as the discovery period remains open. OC Hotels and Impala assert that the discovery end date in the instant matter is February 5, 2018, nearly four months away. They argue that no depositions have been taken, Plaintiff has not been scheduled for an independent medical examination, and written discovery remains incomplete. OC Hotels and Impala argue accordingly that this matter is not ripe for summary judgment.

Second, OC Hotels and Impala assert that their claims for contribution and common-law indemnification are not barred due to failure to serve notice of the claim. They note several Appellate and Law Division cases, which they assert stand for the proposition that a defendant's claims for contribution and indemnification are beyond the reach of N.J.S.A. § 59-8:8. See S.P. v. Collier High School, 319 N.J. Super. 452, 475 (App. Div. 1999); Ezzi v. DeLaurentis, 172 N.J. Super. 592, 600 (Law Div. 1980); Market v. Dkog, 129 N.J. Super. 85, 88 (App. Div. 1980).

OC Hotels and Impala argue that Ocean City is asking this Court to retroactively apply the holding from Jones, supra, to the current matter at hand. OC Hotels and Impala argue that Jones was decided on July 12, 2017, and therefore, at the time Defendants filed their Third-Party Complaint, they were compliant with New Jersey law pursuant to the above cited Appellate Division cases, and served to put Ocean City on notice of the claim. They

further assert that there was nothing in Justice Patterson's opinion that the holding in Jones would retroactively apply to claims or cross-claims asserted against a public entity for contribution or common-law indemnification. OC Hotels and Impala assert they would be severely prejudiced for the Court to retroactively apply a holding that was not in place until after the filing and service of their Complaint.

OC Hotels and Impala further argue that Ocean City would not be prejudiced at this point by the lack of notice as they have been on notice for quite some time now, and have already begun to prepare their defense. They note that Ocean City has already identified in their Answers to Interrogatories the contractor and subcontractor who worked on the public works project that caused the water to spill into the gutters which flowed up the apron of the driveway of the Impala Inn.

Third, OC Hotels and Impala assert they are entitled to an allocation of fault under the Comparative Negligence Act and Joint Tortfeasors Contribution law. They assert that even if their claims for contribution and common-law indemnification are in fact barred by N.J.S.A. §59:8-8, they are still entitled to seek an allocation of fault as to Ocean City. OC Hotels and Impala note that our Supreme Court reasoned in Jones that when application of N.J.S.A. § 59:8-8 results in the dismissal of a defendant's cross-claim or third party complaint against a public entity, it may deprive a defendant of its right to pursue a claim against a joint tortfeasor before the defendant is even aware that the claim exists. See Jones, supra. OC Hotels and Impala

also assert that the Appellate Division in S.P. noted that a defendant "may not even learn that he has a potential contribution claim within this period, since the plaintiff may not file suit until well after the 90-day period..." S.P., 319 N.J. Super. at 475.

OC Hotels and Impala assert that Plaintiff's accident occurred on January 18, 2016, and he did not file his Complaint until February 7, 2017, well after the ninety-day period required by N.J.S.A. § 59:8-8. They further argue that New Jersey Courts have held that even if claims against a defendant are dismissed by virtue of a statute, apportionment of fault to that defendant is required by the Comparative Negligence Act and the Joint Tortfeasors Contribution Law. See Town of Kearny v. Brandt, 214 N.J. 76, 103 (N.J. 2013); Brodsky v. Grinnell Haulers, 181 N.J. 102, 116-18 (N.J. 2004); Burt v. W. Jersey Health Sys., 339 N.J. Super. 296, 304-05 (App. Div. 2011). OC Hotels and Impala argue therefore, even if their third party claims against Ocean City are dismissed through application of N.J.S.A. § 59:8-8, OC Hotels and Impala are still entitled to an allocation of fault under the Comparative Negligence Act and the Joint Tortfeasors Law.

DISCUSSION

Third Party Defendant, the City of Ocean City, is entitled to summary judgment.

R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid. (internal citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid. (internal citations omitted); see also Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (requiring opposition to a motion for summary judgment to have "competent evidential material beyond mere speculation and fanciful arguments").

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present

> by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such order as may be appropriate.

See also Brill, 142 N.J. at 529 (holding that the burden shifts to the non-movant to "come forward with evidence that creates a genuine issue as to any material fact challenged" after the movant has provided sufficient evidence for summary judgment). In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

A motion for summary judgment is inappropriate prior to the completion of discovery. See Lederman v. Prudential Life Ins., 358 N.J. Super. 324, 337 (App. Div.), certif. denied, 188 N.J. 353 (2006); Wellington v.

Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) ("Ordinarily summary judgment dismissing the complaint should not be granted until the plaintiff has had a reasonable opportunity for discovery."). Also, summary judgment is inappropriate when "critical facts are peculiarly within the defendants' knowledge." Valentzas v. Colgate-Palmolive Co., 74 N.J. 189, 193 (1988), citing Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981). However, summary judgment may still be granted if, as a matter of law, further discovery will not rescue and maintain the action. The Appellate Division in Auster, 153 N.J. Super. at 56, supra, held:

> Plaintiff has an obligation to demonstrate to some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action. Here, there was no attempt by plaintiffs to avail themselves of the opportunity to engage in discovery until after the Complaint was in jeopardy of being dismissed and they have failed and continue to fail to demonstrate how further discovery might rescue it.

See also Tisby v. Camden County Corr. Facility, 448 N.J. Super. 241, 247 (App. Div. 2017) (requiring the party objecting to a motion for summary judgment as premature only if the party can "demonstrate with some particularity [that] the likelihood of further discovery will supply the missing elements of the cause of action").

N.J.S.A. § 59:8-8 provides, in pertinent part,

> Time for presentation of claims. A claim relating to a cause of action for death or for injury or damage to person or to property

> shall be presented as provided in this chapter not later than the 90th day after accrual of the cause of action. After the expiration of six months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if: (a) The claimant failed to file the claim with the public entity within 90 days of accrual of the claim except as otherwise provided in N.J.S.A. § 59:8-9...

N.J.S.A. § 59:8-8. In Cuciak v. Prison Health Care Services, the United States District Court for the District of New Jersey held that the plaintiff's tort claims against one of the defendants, a public employee, must be dismissed as to that defendant, as the plaintiff failed to timely file a Notice of Claim before filing tort claims against a "public entity or public employee" in accordance with the New Jersey Tort Claims Act. Cuciak v. Prison Health Care Serv., 2006 U.S. Dist. LEXIS 46611, slip op. at *9 (D.N.J. July 10, 2006).

The District Court found that the definition of a public employee in the Tort Claims Act applied to the defendant, and as a public employee the requirements of the Act applied to suits filed against him. Ibid. Additionally, in Serrano v. Gibson, where plaintiffs who were injured in an automobile accident involving a municipal snowplow operated by a municipal employee that occurred before 1994 amendments to N.J.S.A. § 59:8-8 filed suit against the municipal employee within the two-year statute of limitations, but after expiration of the 90-day notice requirement in § 59:8-8, the 1994 amendments did not apply retroactively to preclude a claim against a public employee that had accrued prior to June 23, 1994. Serrano v. Gibson, 304 N.J. Super. 314 (App. Div. 1997).

Additionally, in Hackensack University Medical Center v. Rossi, the Law Division in Passaic County held that the defendant/third party plaintiff failed to comply with the notice provisions of the Tort Claims Act prior to the filing of her third-party complaint in April 1996. There, the defendant filed her notice of claim together with the third-party complaint, and the Law Division held that filing together was not a substitute for the notice required by the statute. Hackensack Univ. Med. Ctr. V. Rossi, 338 N.J. Super. 139, 144-45 (N.J. Super. 1998).

Our Supreme Court in Jones v. Morey's Pier, Inc., concluded that the plaintiff's failure to serve a notice of claim resulted in their claims being barred under the plain language of N.J.S.A § 59:8-8. The Court stated that the statute is clear: it governs indemnification and contribution claims brought by defendants, as it governs direct claims asserted by plaintiffs, and did not distinguish between a plaintiff's claim and a defendant's cross-claim or third party claim against a public entity. Jones v. Morey's Pier, Inc., 230 N.J. 142, 157 (2017).

The Court noted in previously published opinions, trial courts have construed the statute to bar all claims, including contribution and condemnation claims, if the claimant failed to serve a Tort Claims Act notice within the ninety-day period. Ibid.; see Estate of Kingan v. Estate of Hurston, 139 N.J. Super. 383, 384-85 (Law Div. 1976) (holding that "[t]here is no sense in the Legislature carefully prescribing that a notice be given to governmental agencies if the courts can emasculate the statute's intent by

judicial construction" and dismissing third-party claims against public entity given claimant's failure to serve notice of claim under N.J.S.A. § 59:8-8); Cancel v. Watson, 131 N.J. Super. 320, 322 (Law Div. 1974) (barring third-party contribution and indemnification claims against municipality based on noncompliance with terms of N.J.S.A. § 59:8-8). The Court held that when party does not serve a timely notice of claim on a public entity pursuant to N.J.S.A. § 59:8-8, is not granted leave to file a late notice of claim under N.J.S.A. § 59:8-9, the Tort Claims Act bars that party's cross-claim or third-party claim, and common-law indemnification against the public entity.

Ocean City is a public entity under N.J.S.A. § 59:8-2. Similar to the third party defendant in Hackensack, supra, and the defendant in Jones, OC Hotels and Impala's failure to serve a Notice of Claim pursuant to the Tort Claims Act, N.J.S.A. § 59:8-8(a) bars their Third-Party Complaint as it was outside the ninety days allowed by statute. Plaintiff's claim accrued on January 18, 2016, and he filed his Complaint on February 7, 2017. OC Hotels and Impala filed an Amended Answer to Plaintiff's Complaint and Third Party Complaint against Ocean City, and Co-Third Party Defnedant, Perna & Finnigan. Therefore, Plaintiff and OC Hotels and Impala Inn failed to file a notice of claim within ninety days of the accrual of the claim, and did not obtain permission to file a late notice of claim as provided in N.J.S.A. § 59:8-9, supported by affidavits showing sufficient reasons constituting extraordinary circumstances, for his failure to file a Notice of Claim within the ninety days prescribed by N.J.S.A. § 59:8-8.

Additionally, while a motion for summary judgment is usually inappropriate prior to the completion of the discovery period, summary judgment may still be granted if, as a matter of law, further discovery will not rescue and maintain the action. See Auster, 153 N.J. Super. at 56, supra. Further discovery here will not rescue and maintain the action. Per N.J.S.A. § 59:8-9, OC Hotels and Impala have not applied to this Court to file a late Notice of Claim,

Therefore, Plaintiff's and OC Hotels and Impala Inn's claims against Ocean City are barred by the Tort Claims Act, N.J.S.A. § 59:8-8, and Ocean City's Motion for summary judgment is granted.

CONCLUSION

The motion is opposed.

Third Party Defendant, the City of Ocean City's Motion for Summary Judgment with prejudice is granted as it is a public entity governed by the New Jersey Tort Claims Act, N.J.S.A. § 59:1 et seq.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

November 28, 2017

J. Christopher Gibson, J.S.C.