

## PREPARED BY THE COURT

TRISH KOCHMER,

Plaintiff,

v.

MARCUS DOLCE, DANA DOLCE and the  
CITY OF NORTH WILDWOOD,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
CIVIL DIVISION - LAW  
CAPE MAY COUNTY

CPM-L-257-20

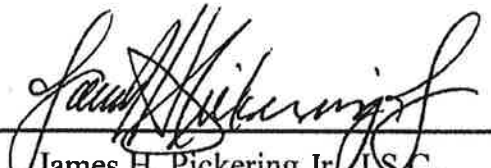
Civil Action

**ORDER**

**THIS MATTER** having come before the Court by way of Defendant, City of North Wildwood's Motion to Dismiss for Failure to State a Claim, and the Court having considered the papers and arguments of the parties and for good cause shown:

**IT IS ON THIS 11<sup>th</sup> DAY OF SEPTEMBER, 2020 ORDERED** that:

1. Defendant City of North Wildwood's Motion to Dismiss Plaintiff's Complaint for failure to state a claim is GRANTED.

  
James H. Pickering Jr., J.S.C.

☐ Opposed  
☒ Unopposed



**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE  
COMMITTEE ON OPINIONS**

JAMES H. PICKERING, JR., J.S.C.

9 North Main Street  
Cape May Court House, NJ 08210  
609-402-0100 ext. 47730

**MEMORANDUM OF DECISION  
PURSUANT TO RULE 1:6-2(f)**

**CASE:** TRISH KOCHMER v. MARCUS DOLCE, et al.  
**DOCKET #:** CPM-L-257-20  
**RETURN DATE:** September 11, 2020  
**MOTION:** Dismiss for Failure to State a Claim  
**MOVANT:** Erin R. Thompson, Esq.—Defendant—City of North Wildwood  
**PAPERS REVIEWED:** Notice of Motion, Certification of Counsel for Defendant

Defendant, City of North Wildwood (“Defendant”), brings this Motion to Dismiss for failure to state a claim. Defendant asserts that Plaintiff failed to comply with the Tort Claims Notice Act. This matter arises out of a trip and fall occurring on August 9, 2018. Plaintiff filed the Complaint on July 8, 2020. Plaintiff consented and signed a Stipulation Extending Time for the City of North Wildwood to file an Answer on or about August 10, 2020. This Motion was filed on August 13, 2020.

The trip and fall in question occurred on pavement adjacent to 211 West Walnut Avenue in the City of North Wildwood, New Jersey. Plaintiff alleges that Defendant is responsible for the maintenance and improvements of all pavements and walkways situated at or connected to 211 W. Walnut Avenue, Wildwood, New Jersey 08260 including the pavements and walkways behind

said property running along West Anglesea Drive. Defendant contends that it was never served with a Tort Claims Notice by the Plaintiff and therefore should be dismissed with prejudice.

### **Dismissal for Failure to State a Claim**

Rule 4:6-2(e) specifically limits a trial court to consider only the complaint under review when determining whether it fails to state a claim upon which relief can be granted. The court must apply the following familiar standards to an application to dismiss a Complaint pursuant to R. 4:6-2(e):

[O]ur inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. The essential test is simply whether a cause of action is 'suggested' by the facts.

In exercising this important function, "a reviewing court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Moreover, "the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint[,] rather, "plaintiffs are entitled to every reasonable inference of fact." As we have stressed, "[t]he examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach."

Green v. Morgan Properties, 215 N.J. 431, 451-52 (2013) (citations omitted).

The issue is simply "whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). In deciding a motion pursuant to Rule 4:6-2(e), "[t]he motion judge must accept as true all factual assertions in the complaint . . . [and] accord to the non-moving party every reasonable inference from those facts." Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008). The judge must examine the complaint "'in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Green supra. 215 N.J.

at 452 (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989)); Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 349 (App. Div.), certif. denied, 188 N.J. 353 (2006). "The standard traditionally utilized by courts to determine whether to dismiss a pleading for failure to state a claim on which relief may be granted is a generous one" for plaintiffs. Id. On a motion to dismiss for failure to state a claim under Rule 4:6-2(e), the court must only consider "the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (internal quotation marks omitted). "The court may not consider anything other than whether the complaint states a cognizable cause of action." Ibid. The court must "accept as true the facts alleged in the complaint," Darakjian v. Hanna, 366 N.J. Super. 238, 242 (App. Div. 2004), and "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary," Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002); Printing Mart-Morristown, supra, 116 N.J. at 746 (internal quotation marks omitted). The examination of the complaint should be one "that is at once painstaking and undertaken with a generous and hospitable approach." Ibid. The party opposing the motion is "entitled to every reasonable inference of fact." Ibid.

Though the court must take "a generous and hospitable approach" in making that determination whether to dismiss a complaint in accordance with R. 4:6-2(e), "[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one." Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 286 (App. Div. 2014) (alteration in original) (first quoting Green, supra, 215 N.J. at 452, then quoting Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div.), certif. denied, 208 N.J. 368 (2011)).

The trial court has been instructed by the Supreme Court that Motions to dismiss should rarely be granted, and an order granting a motion to dismiss under Rule 4:6-2(e) should usually be without prejudice, so that the plaintiff may have an opportunity to re-plead, if he can do so, to state a viable cause of action. Nostrame v. Santiago 213 N.J. 109, 128 (2013); Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009); Printing Mart-Morristown, *supra*, 116 N.J. at 771-72. However, such a motion "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." Edwards v. Prudential Prop. and Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003).

However, when a complaint fails to make "the necessary factual allegations and claims for relief[.]" the pleading must be deemed inadequate. Miltz v. Borroughs-Shelving, 203 N.J. Super. 451, 458 (App. Div. 1985). The resulting motion to dismiss for failure to state a claim "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiff[s] claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003).

### **Claims Against Public Entities**

N.J.S.A. 59:8-3 prohibits an action against a public entity or public employee unless the claim upon which it is based is presented in accordance with the statute. N.J.S.A. 59:8-4 requires that:

A claim shall be presented by the claimant or by a person acting on his behalf and shall include:

- a. The name and post office address of the claimant;
- b. The post-office address to which the person presenting the claim desires notices to be sent;

- c. The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;
- d. A general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim;
- e. The name or names of the public entity, employee or employees causing the injury, damage or loss, if known; and
- f. The amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

A claim for injury or damage shall be presented no later than ninety days after accrual of the cause of action. N.J.S.A. 59:8-8. "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." Ibid. The claimant is barred from recovering from the public entity if he fails to file a claim with the public entity within ninety days of the accrual of the claim except as otherwise provided in N.J.S.A. 59:8-9. Ibid. If a claimant fails to file a notice of a claim within ninety days, a judge, in his discretion, may permit a filing of notice at any time within one year after the accrual of the claim so long as the public entity has not been prejudiced thereby. N.J.S.A. 59:8-9. For no reason may a claim be filed against a public entity later than two years from the time of accrual of the claim. Ibid.

A claim is to be presented to a local public entity by delivery or certified mail. N.J.S.A. 59:8-10. The claim is deemed to be presented in compliance with N.J.S.A. 59:8-10 so long as it is actually received by the public entity within ninety days of the accrual of the claim. Ibid. Oral notice is insufficient and notice of claims must be given in writing. Anks v. Borough of Palisades Park, 139 N.J. Super 342 (App. Div. 1976).

## Conclusion

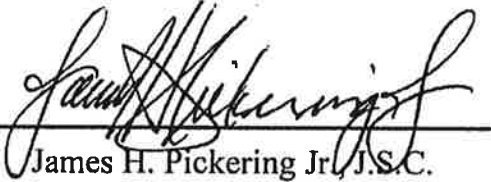
In this matter, Plaintiff failed to serve the City of North Wildwood with notice of the claim within the ninety-day requirement for notice. There is not any evidence that Plaintiff ever

served Defendant with a Tort Claim Notice. Plaintiff has further failed to request leave of the court to file notice within one year of the accrual of the claim. The incident in question occurred on or about August 9, 2018. The complaint was not filed until July 8, 2020.

This Motion is not opposed by Plaintiff.

The court finds that Plaintiff failed to comply with N.J.S.A. 59:8 when she failed to file notice of the claim within ninety-days of the incident. Plaintiff has further failed to present to the court reason for the delay in filing notice or a request for late notice. Therefore, the Defendant's Motion to Dismiss the Claim with Prejudice as to it is GRANTED.

An appropriate order has been entered. Conformed copies accompany this Memorandum of Decision. A copy of the order and a copy of this Memorandum of Decision shall be served on all counsel of record within the next seven (7) days.



James H. Pickering Jr., J.S.C.

Date: September 11, 2020