SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2725-22

NAILAH TAYLOR,

Plaintiff-Respondent,

v.

TOWN OF MORRISTOWN, THE RESIDENT CENTER WITH MANAHAN VILLAGE, and MORRISTOWN HOUSING AUTHORITY,

Defendants-Appellants.

Submitted September 18, 2023 – Decided October 4, 2023

Before Judges Natali and Puglisi.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1533-22.

DeCotiis, FitzPatrick, Cole & Giblin, LLP, attorneys for appellants (Amy E. Shotmeyer, of counsel; William E. Antonides, III, on the briefs).

Advokat & Rosenberg, attorneys for respondent (Jeffrey M. Advokat, on the brief).

PER CURIAM

On leave granted, defendant Morristown Housing Authority (MHA) appeals a February 17, 2023 Law Division order denying its motion to dismiss plaintiff Nailah Taylor's negligence complaint and a March 31, 2023, order denying reconsideration. Because plaintiff failed to file a timely notice of claim under the New Jersey Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to -12-3, or seek leave of court to file a late notice, we reverse both orders with direction to the court to dismiss plaintiff's complaint as to MHA.

I.

On August 31, 2022, plaintiff filed a complaint alleging she was injured on September 11, 2020 when she slipped and fell on a "curb adjacent to 23 Clyde Potts Drive, in Manahan Village, Town of Morristown." She further alleged the curb was "owned, operated, or maintained by" defendant Town of Morristown and John Does A-Z. Plaintiff amended her complaint to join MHA as a defendant on September 22, 2022.

MHA moved to dismiss under Rule 4:6-2(e) based on the TCA. It specifically claimed plaintiff failed to "(1) [provide] any notice of claim pursuant to N.J.S.A. 59:8-3 and -8(a);" or "(2) . . . seek leave to file a late notice of claim pursuant to N.J.S.A. 59:8-9." MHA also argued plaintiff failed to file

her complaint within the two-year statute of limitations pursuant to N.J.S.A. 59:8-8(b) and -9. In its application, MHA noted the court's authority to convert the motion to one for summary judgment, applying the standard set forth in Rule 4:46-2(c). It also provided an undisputed statement of material facts, within which it asserted plaintiff never filed a notice of claim as required by the TCA.

In support of its argument plaintiff failed to comply with the TCA's notice requirements, MHA contended plaintiff was aware no later than May 2021 that MHA was potentially a responsible party. On this point, it highlighted a May 24, 2021 letter from Morristown's insurer, Garden State Municipal Joint Insurance Fund, to plaintiff's counsel which advised the property at issue was "owned by the Morristown Housing Authority."

Plaintiff conceded she did not provide any notice of her claim to MHA until she filed her amended complaint on September 22, 2022, more than one year after the May 2021 letter, and more than two years after the September 2020 incident. Plaintiff explained her lack of diligence by claiming the May 2021 letter was not reliable because it was uncertified and contained factual errors, such as referring to Howell Township at one point instead of Morristown. Instead, plaintiff argues, she immediately amended her complaint to join MHA once she received the certification of Morristown's tax assessor from

Morristown's counsel. The certification indicated that MHA, not Morristown, owned the property at issue.

Morristown separately moved to dismiss under Rule 4:6-2(e) on a separate basis. It argued it did not own or control the property on which plaintiff alleged she was injured, and therefore, could not be liable for any injury occurring on that property. In support of its application, Morristown provided its tax assessor's certification.

The parties agreed to waive oral argument, and the court denied MHA's and Morristown's motions on February 17, 2023, and supported its reasoning in an oral decision in which it explained the applicable standard for a motion to dismiss under Rule 4:6-2(e) required the court to limit its inquiry to an "examination of the 'legal sufficiency of the facts alleged on the face of the complaint.'" Printing-Mart Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). It also acknowledged the court was required to accept the facts alleged in the complaint as true and "construe all reasonable inferences of fact in favor of the plaintiff." Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625-26 (1995).

After noting Rule 4:6-2 permits courts to consider "allegations in the complaint, attached exhibits, matters of public record, and documents that form

the basis of the claim," Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005), the court noted both defendants had presented and relied upon materials outside the pleadings. In this regard, it stated Morristown "relie[d] on the certification of its tax assessor" and MHA relied on unspecified "materials and information beyond the facts alleged in the complaint" which the court characterized as "self-serving conclusions." The record before us further reflects MHA included in support of its application the certification of its deputy director, the certification of its counsel, and the May 2021 letter. Additionally, plaintiff presented the certification of her counsel, the certification of Morristown's tax assessor, and the May 2021 letter.

The court determined Morristown's denial of ownership, the TCA's notice requirements, and the statute of limitations constituted defenses which did not "justify a dismissal of plaintiff's claims on the pleadings under Rule 4:6-2(e)." In support, it relied upon Buteas v. Raritan Lodge No. 61 F. & A.M., 248 N.J. Super. 351, 363 (App. Div. 1991), which distinguished motions to dismiss for failure to state a claim under Rule 4:6-2(e) and motions to dismiss based on affirmative defenses. The court explained that "[d]efenses insulating defendants from liability do not go to the legal sufficiency of the complaint." Id. at 364.

"Viewing the allegations set forth in the complaint in the light most favorable to plaintiff," the court found the complaint "set forth a fundament of a cognizable cause of action for negligence." It further reasoned even though "defendants may have affirmative defenses that would insulate them from liability for the claims," that did not establish "a basis to dismiss plaintiff's complaint for failure to set forth a cause of action pursuant to Rule 4:6-2(e)."

MHA moved for reconsideration and in support argued the court erred by holding that "failure to file a notice of claim and the filing of a complaint outside the two-year statute of limitations had no bearing on the issue of whether the [plaintiff] set forth a cognizable claim against a public entity." The court denied MHA's reconsideration motion and explained MHA had failed to identify "any matters or controlling decisions that the court overlooked" or to "demonstrate[] the court erred." MHA moved for leave to appeal the orders denying its motions to dismiss and to reconsider, which we granted under Rule 2:2-3.[1]

[1] We denied Morristown's motion for leave to appeal the court's February 17, 2023 order. As noted, the court's denial of Morristown's motion was not grounded in plaintiff's non-compliance with the TCA.

II.

We review an order denying a motion to dismiss for failure to state a claim "de novo, applying the same standard under Rule 4:6-2(e) that governed the motion court." Wreden v. Twp. of Lafayette, 436 N.J. Super. 117, 124 (App. Div. 2014). That standard is whether the pleadings even "suggest[]" a basis for the requested relief. Printing Mart-Morristown, 116 N.J. at 746. A reviewing court assesses only the "legal sufficiency" of the claim based on "the facts alleged on the face of the complaint." Green v. Morgan Props., 215 N.J. 431, 451 (2013) (quoting Printing Mart-Morristown, 116 N.J. at 746).

The court must "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." Printing-Mart Morristown, 116 N.J. at 746 (quoting Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Consequently, "[a]t this preliminary stage of the litigation the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint," ibid., rather the facts as pled are considered "true" and accorded "all legitimate inferences," Banco Popular, 184 N.J. at 166, 183.

When "matters outside the pleading are presented to and not excluded by the court [in considering a motion under Rule 4:6-2(e)], the motion shall be treated as one for summary judgment and disposed of as provided by Rule 4:46." R. 4:6-2. In reviewing summary judgment, we apply the same Rule 4:46-2(c) standard governing the trial court. H.C. Equities, LP v. Cnty. of Union, 247 N.J. 366, 380 (2021). "We construe the evidence in the light most favorable to the non-moving party and affirm the entry of summary judgment '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.'" Ibid. (quoting R. 4:46-2(c) and citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995)). In that inquiry, the "court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Id. at 381 (quoting McDade v. Siazon, 208 N.J. 463, 473 (2011)).

The court applies an abuse of discretion standard when reviewing an order denying reconsideration. Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016); Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (stating reconsideration is "a matter within the sound discretion of the

[c]ourt") (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). A trial court abuses its discretion "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (citation omitted). "When examining a trial court's exercise of discretionary authority, [a reviewing court] reverse[s] only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

III.

Before us, both parties reprise their arguments presented to the trial court. MHA asserts plaintiff's failure to file a timely TCA notice or a request to file a late notice unequivocally bars her claim. Additionally, it argues, the TCA's two-year statute of limitations expired before plaintiff filed her amended complaint.

Plaintiff responds that the discovery rule tolled the TCA notice period and statute of limitations until she became aware MHA was potentially liable for her injuries. She further avers when she became aware, she promptly amended her complaint. Plaintiff notes her initial complaint was filed within the two-year

limitations period and properly included fictitious defendants, "John Does A-Z." She also claims it was improper to dismiss her complaint at such an "early point in the case" and when "no formal discovery" has been conducted.

The guiding principle of the TCA "is 'that immunity from tort liability is the general rule and liability is the exception.'" H.C. Equities, 247 N.J. at 381 (quoting D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 133-34 (2013)). The TCA requires any party seeking to bring a tort claim against a public entity to file a tort claims notice informing the entity about the potential claim. N.J.S.A. 59:8-3; H.C. Equities, 247 N.J. at 370. The notice requirement serves the following objectives:

> (1) "to allow the public entity at least six months for administrative review with the opportunity to settle meritorious claims prior to the bringing of suit"; (2) "to provide the public entity with prompt notification of a claim in order to adequately investigate the facts and prepare a defense"; (3) "to afford the public entity a chance to correct the conditions or practices which gave rise to the claim"; and (4) to inform the State "in advance as to the indebtedness or liability that it may be expected to meet."
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> [H.C. Equities, 247 N.J. at 383-84 (quoting Beauchamp v. Amedio, 164 N.J. 111, 121-22 (2000)).]

A TCA notice must be filed within ninety days of the accrual of the claimant's cause of action. N.J.S.A. 59:8-8; H.C. Equities, 247 N.J. at 370. A

claimant may also seek leave to file a late notice of claim within one year of the claim's accrual. N.J.S.A. 59:8-9; H.C. Equities, 247 N.J. at 370. The claimant must provide the court a "motion supported by affidavits based upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances for his failure to file notice of claim within the period of time prescribed by section 59:8-8." N.J.S.A. 59:8-9. A failure to investigate "when the identity of the correct defendant was readily discoverable within the ninety days that the statute allows" does not constitute extraordinary circumstances. D.D., 213 N.J. at 153. Additionally, "the claimant must show that the public entity . . . has not been substantially prejudiced by the delay." H.C. Equities, 247 N.J. at 370; N.J.S.A. 59:8-9.

"After the expiration of that one-year period to file a late notice of claim, however, 'the court is without authority to relieve a plaintiff from his failure to have filed a notice of claim, and a consequent action at law must fail.'" H.C. Equities, 247 N.J. at 383 (quoting Rogers v. Cape May Cnty. Off. of Pub. Def., 208 N.J. 414, 427 (2011)). The TCA further provides that "in no event may any suit against a public entity . . . arising under this act be filed later than two years from the time of the accrual of the claim." N.J.S.A. 59:8-9.

The TCA defines accrual "in accordance with existing law in the private sector." H.C. Equities, 247 N.J. at 382 (quoting Beauchamp, 164 N.J. at 116). Generally, "a claim accrues on the date on which the underlying tortious act occurred." Ibid. (quoting Ben Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 134 (2017)). Under the discovery rule, however, the accrual date for TCA purposes may be tolled "when the victim is unaware of his injury or does not know that a third party is liable for the injury." Ibid. (quoting Ben Elazar, 230 N.J. at 134). Additionally, accrual may be tolled "when plaintiffs, knowing that one third party is liable, do not know that their injury is also the responsibility of an additional party." Ben Elazar, 230 N.J. at 127.

To determine whether the discovery rule applies, the "court must assess 'whether the facts presented would alert a reasonable person exercising ordinary diligence that he or she was injured due to the fault of another.'" J.P. v. Smith, 444 N.J. Super. 507, 525-26 (App. Div. 2016) (quoting Martinez v. Cooper Hosp.-Univ. Med. Ctr., 163 N.J. 45, 52 (2000)). Factors the court may consider include "(1) 'the nature of the alleged injury,' (2) 'the availability of witnesses and [] evidence,' (3) 'the length of time that has elapsed,' (4) the 'deliberate or intentional' nature of the delay, and (5) whether the delay 'peculiarly or

unusually prejudiced the defendant.'" J.P., 444 N.J. Super. at 526 (quoting Lopez v. Swyer, 62 N.J. 267, 276 (1973)) (alteration in original).

We conclude the court erred in denying MHA's motion to dismiss. Consistent with MHA's moving papers and Rule 4:6-2, the court should have considered the application under the summary judgment standard set forth in Rule 4:46-2(c), particularly where, as here, both parties relied on and the court considered materials outside the pleadings. However, we find this error inconsequential because, after conducting a de novo review and considering the evidence in the light most favorable to plaintiff, we are satisfied the pleadings, certifications, and uncontested evidence in the motion record establish the lack of a genuine issue as to any material fact regarding plaintiff's lack of compliance with the TCA. Simply put, plaintiff failed to file a timely TCA notice or move for leave to file a late notice of claim.

We also reject plaintiff's argument that the discovery rule should apply to toll the accrual date for her claim. The record, both below and before us, demonstrates no attempt by plaintiff to "exercise ordinary diligence" in pursuing her claim such that the discovery rule should toll accrual.[2] The facts here are

[2] To the extent plaintiff argues that she requires additional discovery to respond to MHA's motion, we are not persuaded. Plaintiff has not identified the specific

not analogous to Ben Elazar, on which plaintiff relies. That case involved a complex toxic tort claim, for which the public entity's responsibility was obscured. Ben Elazar, 230 N.J. at 139. Further, the plaintiffs in Ben Elazar promptly undertook to determine the identity of all responsible parties and comply with the TCA: they retained counsel soon after discovering their injuries were potentially linked to environmental contamination, filed an Open Public Records Act ("OPRA") request with the New Jersey Department of Environmental Protection, and filed a notice of claim within ninety days after the OPRA records revealed the township was potentially responsible. Id. at 130-31.

In contrast, here the record is devoid of any steps taken by plaintiff to pursue her claim from the day she was injured to filing her initial complaint nearly two years later. Plaintiff has not shown that she was unaware of her injury or that a third party may be liable for that injury. She has pointed to no

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and necessary discovery she sought to obtain. Further, information relevant to the central issue—i.e., plaintiff's efforts to determine the responsible parties—is exclusively in plaintiff's and her counsel's control, not MHA's. See Friedman v. Martinez, 242 N.J. 449, 472 (2020) (holding summary judgment inappropriate when discovery incomplete only if critical facts are in moving party's control and non-moving party can demonstrate "with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action," but appropriate even if discovery incomplete where non-moving party is in control of information sought.)

reasonable, diligent efforts made to determine who may be responsible for her injuries nor anything preventing her from doing so. Even after receiving the May 2021 letter, which would put a reasonable person on notice that Morristown may not own the property where she fell, plaintiff failed to investigate ownership or whether any other parties were potentially liable for over a year. Therefore, we find that the discovery rule does not apply, and plaintiff's claim accrued on the day she slipped and fell, September 11, 2020.

Next, it is undisputed that plaintiff did not file a timely TCA notice with MHA or seek leave to file a late notice. Plaintiff does not allege in her complaint that she filed a notice within ninety days of September 11, 2020, as required by N.J.S.A. 59:8-8, nor does she dispute the statement of facts in MHA's application, which provides "an investigation of [MHA]'s records has revealed that no claim was ever filed by plaintiff."

Finally, the record before us does not establish plaintiff ever sought leave to file a late notice of claim within one year of September 11, 2020, as required by N.J.S.A. 59:8-9. Indeed, she did not file her initial complaint in this matter until August 31, 2022—nearly two years later. Plaintiff did not file notice or seek leave to file a late notice after joining MHA either. Even if plaintiff had

made such a motion, she has set forth nothing that would constitute extraordinary circumstances to excuse her failure to file a timely notice.

N.J.S.A. 59:8-8 provides that a "claimant shall be forever barred from recovering against a public entity . . . if: . . . [t]he claimant failed to file the claim with the public entity within [ninety] days of accrual of the claim except as otherwise provided in N.J.S.A 59:8-9." The Supreme Court has unequivocally stated that, upon expiration of the one-year late notice period, "the court is without authority to relieve a plaintiff from his failure to have filed a notice of claim, and a consequent action at law must fail." H.C. Equities, 247 N.J. at 383 (quoting Rogers, 208 N.J. at 427). As noted, plaintiff did not file a notice within ninety days or seek leave to file a late notice within one year. Therefore, her action fails as a matter of law and it was error for the court to deny MHA's motion to dismiss and its reconsideration application. In light of our determination, we need not address MHA's argument that the court should have dismissed plaintiff's complaint because it was filed outside the two-year statute of limitations for such actions.

Finally, we find the court's reliance on Buteas to be misplaced. Although the Buteas court did distinguish for Rule 4:6-2 purposes between a "fact resulting in the failure of the complaint to state a claim . . . or merely a fact

giving rise to an affirmative defense pursuant to [Rule] 4:5-4," that case involved neither a public entity defendant nor the application of the TCA. In contrast to a claim against a non-public entity like in Buteas, plaintiff's action against MHA required compliance with the TCA as a condition of asserting a claim. See Ben Elazar, 230 N.J. at 133 (notice of claim is "a prerequisite to proceeding with a tort claim against a public entity"); J.P., 444 N.J. Super. at 529 (failure to comply with time requirement "constitutes an absolute bar to recovery"); Pilonero v. Twp. of Old Bridge, 236 N.J. Super. 529, 532 (App. Div. 1989) ("Under [the TCA], a claimant's right to institute an action against a public entity is conditioned upon the claimant having filed with the public entity a notice of claim within [ninety] days"). By relying on Buteas to deny MHA's motion, the court effectively thwarted the principles of the TCA.

Reversed and remanded with direction to the court to dismiss plaintiff's complaint as to MHA.