SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3611-14T1

DIANE TIDER and CARL MATTIAS JOHANSSON,

Plaintiffs-Appellants,

v.

CITY OF JERSEY CITY,

Defendant-Respondent,

and

CITY OF JERSEY CITY,

Third-Party Plaintiff-Respondent,

v.

JERSEY CITY MUNICIPAL UTILITIES AUTHORITY,

Third-Party Defendant-Respondent.

Argued March 6, 2017 – Decided April 4, 2017

Before Judges Sabatino and Nugent.

On appeal from Superior Court of New Jersey, Chancery Division, General Equity Part, Hudson County, Docket No. 1-14.

Diane Tider and Carl Mattias Johansson, appellants, argued the cause pro se.

Philip S. Adelman, Assistant Corporation Counsel, argued the cause for respondent City of Jersey City (Jeremy Farrell, Corporation Counsel, attorney; Mary Ann Murphy, Assistant Corporation Counsel, on the brief).

Matthew L. Rachmiel argued the cause for respondent Jersey City Municipal Utilities Authority (Methfessel & Werbel, attorneys; Mr. Rachmiel, on the brief).

PER CURIAM

Plaintiffs Diane Tider and Carl Mattias Johansson appeal the Law Division's summary judgment order dismissing their complaint in this case. They also appeal the Law Division's order denying their motion for reconsideration. For the reasons that follow, we affirm.

I.

This case arises out of an uneven surface that had persisted on the public street outside of plaintiffs' residence in Jersey City. The condition of the roadway caused vibrations to plaintiffs' dwelling until the condition was ultimately successfully repaired.

We discuss the pertinent facts from the summary judgment record in a light most favorable to plaintiffs as the non-moving parties. R. 4:46-2(c); Townsend v. Pierre, 221 N.J. 36, 59 (2015).

Plaintiffs purchased their home in Jersey City ("the City") in August 2012. Beginning the following month, they began to contact City officials regarding a stretch of uneven pavement in front of their home. In particular, plaintiffs alleged that when vehicles passed over the uneven pavement, "the floors would shake and the windows rattle[d]."

During the ensuing six months, plaintiffs repeatedly contacted municipal officials, including the Mayor's Action Bureau and the City's Division of Engineering, in an attempt to have the uneven pavement repaired. As those efforts were unavailing, plaintiffs retained the services of a civil engineer, who examined the condition. Based on the engineer's review, plaintiffs advised the City by letter in June 2013 that their property had been structurally damaged, and that it would be likely to incur more damage in the future if the condition were left unabated. Plaintiffs also served a timely tort claims notice upon the City in accordance with to N.J.S.A. 59:8-4.

Later in June 2013, the sewer underneath the pavement on plaintiffs' street collapsed. The Jersey City Municipal Utilities Authority ("JCMUA") responded by excavating and repairing the sewer. This initial repair temporarily resolved plaintiffs' vibration issue for a period of time. However, according to plaintiffs, after several days, the patched area began to sink,

thus causing the vibrations to resume. Plaintiffs resumed complaining to numerous City officials about the problem.

Plaintiffs served a second tort claims notice upon the City in early December 2013. In that second notice, they indicated they intended to file a civil action against the City by the end of the month unless the City "permanently and satisfactorily" resolved the situation.

As contemplated, plaintiffs, then represented by counsel,[1] filed a complaint in the Law Division against the City on December 31, 2013. The complaint sought an injunctive order compelling the City to repair the road surface and eliminate the vibrations to their home. Plaintiffs also sought money damages from the City for (1) the estimated costs of repairing their home, (2) the alleged diminution of their property's value, and (3) punitive damages. Plaintiffs subsequently amended the complaint to assert further allegations and request additional forms of relief.

The City denied liability in its answer and simultaneously filed a third-party complaint against the JCMUA for indemnification and contribution. In essence, the City asserted that the JCMUA was responsible for any damages to plaintiffs, because the JCMUA had previously done work on the street and

[1] Plaintiffs are self-represented on this appeal.

thereby had caused any alleged dangerous condition. The JCMUA, in turn, denied liability.[2] Discovery and pretrial motion practice thereafter occurred.

In December 2014, the JCMUA completed a final repair to the pavement in front of plaintiffs' home. Plaintiffs do not contest that this repair abated the condition and ceased the associated vibrations. Nevertheless, they continued with the lawsuit seeking monetary damages, but no longer needed a mandatory injunction.

The City and the JCMUA moved for summary judgment. After considering plaintiffs' opposition and oral argument, the trial court granted summary judgment to the public entities and dismissed plaintiffs' complaint.

In his written statement of reasons dated February 17, 2015, the motion judge explained at length why he did not find plaintiffs' claims viable as a matter of law. As a preliminary item, the judge did reject the JCMUA's procedural argument that plaintiffs had failed to serve timely tort claims notices. The

[2] Plaintiffs never amended their complaint to name the JCMUA as a direct defendant. Accordingly, the trial court's orders and other items in the record that refer to the City and the JCMUA collectively as "defendants" are mislabeled. However, for purposes of this opinion and consistency with those documents, we shall likewise refer to the JCMUA as a "defendant," recognizing that in actuality the JCMUA is strictly a third-party defendant that only could be derivatively accountable to plaintiffs through the City.

judge accepted plaintiffs' contention, subject to the evidence, that each repeated shaking of plaintiffs' house could be construed as a new tort that restarted the statute of limitations and notice period. However, the judge agreed with defendants that plaintiffs' monetary claims were untenable under the Tort Claims Act, N.J.S.A. 59:1-1 to 59:14-4 ("the TCA").

In particular, the motion judge concluded that plaintiffs failed to establish a reasonable basis to find that the vibrations to their home qualify as a "dangerous condition" of public property, as defined in N.J.S.A. 59:4-1. The judge rejected in this regard plaintiff's claim that it is foreseeable that uneven road surfaces can create the kind of injury and damage they alleged. The judge ruled that, although the shaking of plaintiffs' home "may not be trivial or insignificant to them," such a condition nevertheless does not, in the judge's view, "rise to the level of a significant risk of harm and is not a foreseeable injury arising from an uneven roadway."

As an independent ground for dismissal, the motion judge ruled that, even if a dangerous condition were found to exist here, the City cannot be liable to plaintiffs under the TCA because its conduct was not "palpably unreasonable," as is required to be proven by N.J.S.A. 59:4-2. The judge acknowledged that the City delayed in effectuating a repair of the roadway. Even so, the

judge accepted the contentions in the uncontroverted affidavit of the City's engineer that an outside contractor refused to do the repair work as part of the original bid price and that any change in the price required a new public bid and approval by the City Council.

Lastly, the motion judge agreed with the City that plaintiffs' claims of failure to inspect are barred by the immunity in N.J.S.A. 59:2-6. Likewise, the judge found persuasive that the City was protected by the separate immunity in N.J.S.A. 59:2-3 for discretionary decisions.

Plaintiffs thereafter moved for reconsideration, providing the motion judge with numerous additional photographs and exhibits. The judge denied that motion in a written decision dated May 11, 2015, further amplifying its analysis and finding that plaintiffs had failed to demonstrate that the court had overlooked critical information in the record or misapplied legal authority.

II.

Plaintiffs now appeal. In their main brief they raise the following arguments:

> Point I.
> The trial court erred when it did not consider the significance of [the fact] that the vibrations caused by the uneven road surface

[were] in violation of the Municipal Code and whether the shaking to plaintiffs' home could be considered a nuisance, and thus a dangerous condition under NJ TCA.

> Point I.A.
> The shaking to plaintiffs' home violated Municipal Code and plaintiffs have a legal standing to pursue adherence.
>
> Point I.B.
> The trial court erred when it did not consider whether the shaking to the plaintiffs' home caused by the uneven road surface could be considered a nuisance.
>
> Point I.C.
> The trial court erred when not recognizing the existence of a nuisance as a dangerous condition under NJ TCA.

Point II.
The trial court erred when granting summary judgment on the issue of negligent inspection pursuant to [N.J.S.A.] 59:2-6, as no immunity attaches when a dangerous condition exists on a public property.

Point III.
The trial court erred when it determined that no rational fact finder could conclude that defendant's response to the dangerous condition was "palpably unreasonable."

> Point III.A.
> Defendant has provided no competent or probative evidence to support its claim that its response could not be considered palpably unreasonable.

Point III.B.
Defendant's counsel put forward claims in support of the summary judgment motion that are not supported by the record but referenced by the court when granting summary judgment.

Point III.C.
The witness on which defendant relies does not have personal knowledge of plaintiffs' complaints, the uneven road surface or defendant's response to plaintiffs' complaints, prior to plaintiffs filing suit.

Point III.D.
Ample evidence exists that would allow a rational fact finder to conclude that defendant's response to plaintiffs' complaints was "palpably unreasonable."

Point IV.
The trial court erred when it granted defendants' immunity for exercise of discretion pursuant to N.J.S.A. 59:2-3(c) and (d).

Point IV.A.
Defendant failed to show that it exercised any discretion that might grant immunity under [N.J.S.A.] 59:2-3(c) as a matter of law, and therefore failed to sustain the burden of proof required for summary judgment.

Point IV.B.
Defendant failed to show that it exercised and applied any discretion that might grant immunity under [N.J.S.A.] 59:2-3(d), and therefore failed to

sustain the burden of proof required for summary judgment.

Point IV.C.
Defendant's argument that it could not repair the street due to a lack of funds is moot as it could have caused the repair without any expenditure of funds.

Point V.
Summary judgment shall not be granted as defendants have failed to provide discovery.

Plaintiffs advance in their reply brief these further arguments, which substantially overlap with or repeat the points in their main brief:

Point I.
Pursuit of the case is in the public interest and warranted.

Point I.A.
Summary judgment in the instant case would elevate callous disregard to acceptable policy for a public entity, enshrined in case law.

Point I.B.
Abatement would not have been achieved by anything less than litigation and staunch pursuit [thereof].

Point II.
The shaking to plaintiffs' home was a nuisance that is recognized as a dangerous condition under NJ TCA.

Point II.A.
Defendant misrepresents case law to undermine the notion that physical damage is not required for a

nuisance to exist and a public entity to be liable under NJ TCA.

Point II.B.
The shaking to plaintiffs' home violated Municipal Code and plaintiffs have legal standing to pursue compliance.

Point III.
Dangerous condition, nuisance, negligence and foreseeable risk.

Point III.A.
Defendant's reliance [on] tort of negligence case law is misplaced as negligence is not an element of nuisance.

Point III.B.
Defendant intentionally maintained invasions of plaintiffs' property.

Point III.C.
Federal transportation authority guidelines establish[] that road defects are known to cause building vibrations.

Point III.D.
Risk of perceived new precedence.

Point IV.
The trial court erred when it determined that no rational fact finder could conclude that defendant's response to the dangerous condition was "palpably unreasonable."

Point V.
Defendant has failed to sustain the burden of proof to establish immunity as a matter of law.

Point V.A.
Defendant has failed to meet the requirements of [Rule] 4:46 and defendant's claim of immunity should be barred.

Point V.B.
Defendant's counsel put forward claims in support of the summary judgment motion that are not supported by the record.

Point V.C.
Defendant's argument that it could not repair the street due to a lack of funds is moot as it could have caused the repair without any expenditure of funds.

Point VI.
Discovery is not complete and could reveal relevant evidence.

Point VII.
Defendant has put forth documentation that may not be part of the record below.

We have fully considered these points, as well as those emphasized by plaintiffs at oral argument and their citations to the record. Having completed that review, we affirm the trial court's rulings. We do so substantially for the cogent reasons set forth in the court's written decisions, except for the finding of the lack of a provable dangerous condition. We add the following words of supplementation.

As a general proposition, the tort liability of public entities in New Jersey is the exception, and immunity from

liability is the rule. Fluehr v. City of Cape May, 159 N.J. 532, 539 (1999). The public policy adopted by the Legislature is to construe the immunity provisions of the TCA broadly and the liability provisions narrowly. See, e.g., Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J. Super. 24, 34 (App. Div. 2000); see also N.J.S.A. 59:1-2 (declaring "the public policy of this State [to be] that public entities shall only be liable for their negligence within the limitations of [the TCA] and in accordance with the fair and uniform principles established herein"). The overall approach of the statute is to broadly limit public entity liability. D.D. v. UMDNJ, 213 N.J. 130, 133-34 (2013).

Putting aside for the moment the specific immunity provisions invoked by defendants, the critical portion of the TCA that plaintiffs must fulfill to establish a theory of liability in this case is N.J.S.A. 59:4-2, concerning dangerous conditions. The TCA defines a "dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." N.J.S.A. 59:4-1(a). The condition must present a "substantial risk of injury" to be actionable. Polyard v. Terry, 160 N.J. Super. 497, 508 (App. Div. 1978), aff'd, 79

N.J. 547 (1979). It cannot be "minor, trivial or insignificant." Id. at 509.

Plaintiffs stress that their contentions fundamentally concern the tort of nuisance. The TCA does not specifically refer to nuisance liability. However, "a public entity may be liable for creating a nuisance under the TCA" when it produces "a hazardous condition on the property of another." Posey ex rel. Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 185 (2002) (internal citations omitted); see also Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes, 90 N.J. 582, 593 (1982); Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 97-98 (1996).

We agree with plaintiffs that the trial judge erred in deeming the repeated vibrations of their home allegedly caused by the uneven surface of the adjacent roadway as too minor to rise to the level of a "dangerous condition" under the TCA. Assuming plaintiffs' contentions of fact are true, the condition was not a trivial or insignificant problem. As shown by the video recordings plaintiffs supplied to the City, the vibrations were strong enough to cause their windows to rattle as far away as the top floor of the back of their building. The City admitted that the vibrations at times exceeded the performance standards set forth in the City's municipal code. The City also admitted that, as measured in May

2014, the vibrations surpassed the "Good Environment Standard," as defined by the American National Standards Institute, as many as 525 times during that measuring period. Viewing the record, as we must, in a light most favorable to plaintiffs, a rational fact-finder could conclude that these pre-existing and excessive tremors comprised a "dangerous condition" under the Act.

Nevertheless, we concur with the trial court that plaintiffs have failed to demonstrate that the delay of more than a year before the vibrations were abated was so extreme as to be "palpably unreasonable" conduct under N.J.S.A. 59:4-2. "[T]here can be no recovery [under N.J.S.A. 59:4-2] unless the action or inaction on the part of the public entity in protecting against the condition was 'palpably unreasonable,' a term nowhere defined in the [TCA]." Kolitch v. Lindedahl, 100 N.J. 485, 492-93 (1985). To that end, a public entity must act in a palpably unreasonable manner to incur liability. Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51 (App. Div. 2002). This is a question of law to be determined by the court. Ibid.

Palpably unreasonable conduct is "behavior that is patently unacceptable under any given circumstance." Posey, supra, 171 N.J. at 188 (quoting Kolitch, supra, 100 N.J. at 493). The Supreme Court in Polzo v. Cty. of Essex, 209 N.J. 51 (2012), looked to the Task Force Comment on N.J.S.A. 59:4-2, in explaining the concept:

> This section recognizes the difficulties inherent in a public entity's responsibility for maintaining its vast amounts of public property. Thus it is specifically provided that when a public entity exercises or fails to exercise its discretion in determining what action should or should not be taken to protect against the dangerous condition that judgment should only be reversed where it is clear to the court that it was palpably unreasonable. That decision was based on the thesis that a public entity's discretionary decisions to act or not to act in the face of competing demands should generally be free from the second guessing of a coordinate branch of Government.
>
> [Polzo, supra, 209 N.J. at 76 (quoting Harry A. Margolis and Robert Novak, Claims Against Public Entities, 1972 Attorney General's Task Force on Sovereign Immunity comment on N.J.S.A. 59:4-2 (Gann 2011) (internal citations omitted)).]

See also Schwartz v. Jordan, 337 N.J. Super. 550, 555 (App. Div.) (observing that "ordinary care, the breach of which is termed negligence, differs in degree from the duty to refrain from palpably unreasonable conduct. The latter standard implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff.") (quoting Williams v. Phillipsburg, 171 N.J. Super. 278, 286 (App. Div. 1979)), certif. denied sub nom., Schwartz v. Plainsboro Twp., 168 N.J. 293 (2001).

Here, the unrefuted certification from the City's engineer, Stanley Huang,[3] explains that the City lacks the personnel or equipment to resurface streets. Accordingly, any repair projects must be put out to public bid. The funds for such projects must be allocated on an annual basis by the City Council. Each year, a master list of streets needing repair is created by the City Engineer. Due to budget limitations, that master list is pared down to a "priority list" of the streets considered most in need of repair; given not only their condition but the relative amounts and types of traffic that traverse them. The priority list is used to generate bid specifications, and a plan is developed for the entire City.

As the record indicates, the contractor who was awarded the City's repaving contract in 2012 continued to perform certain work through the first few months of 2014. Huang asked that contractor to see if plaintiffs' street could be added to the work list

[3] We reject plaintiffs' contention that Huang lacks sufficient personal knowledge of the City's repair and bidding processes to provide a factual certification under Rule 1:6-6. The record indicates that he has been the City Engineer since August 2013 and, as such, has ample experience to describe the routine practices of the Engineering Department. N.J.R.E. 406. Although he did not recall at his deposition becoming aware of plaintiffs' situation until after they filed suit, his personal efforts to attempt to obtain a repair from the City's outside paving contractor described in his certification are probative and, in fact, unrefuted by competing evidence.

through a change order. Unfortunately, the contractor declined, asserting that it would not work on any additional streets at the original contract price.

As Huang attests, by the time the City Council finalized the 2014 budget, which did include funds for street repaving, the necessary bidding process delayed the awarding of a contract to late 2014. By that point, the JCMUA had committed to repaving plaintiffs' street, which it eventually did in December 2014.

Although we empathize with plaintiffs' plight in enduring ongoing vibrations, the trial court did not err in finding that the delay in effectuating a repair in this budget-restricted context was not "palpably unreasonable" as a matter of law. The City has limited resources, and it had the discretion to allocate those resources in a manner that prioritized other needs over repaving projects in the face of competing demands. See Polzo, supra, 209 N.J. at 69 (noting the courts' lack of "authority or expertise to dictate to public entities the ideal form" in which public expenditures should be made with "limited resources").

We agree with plaintiffs that, in an ideal world, the vibrations on their street should have been abated sooner. But the fiscal and practical constraints involved do not justify a finding of palpably unreasonable conduct by the City. Indeed, as we have noted, the City Engineer tried to get the City's contractor

to do the work under an outstanding contract, and it balked until a new contract was procured.

The balance of plaintiffs' arguments and sub-arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.