SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5231-15T2

BRIAN KRUZEL,

Plaintiff-Appellant,

v.

CITY OF NEWARK, the Department of Engineering, the Department of Water and Sewer, the Department of Neighborhood and Recreational Services, and the Department of Police,

Defendant-Respondent,

and

COUNTY OF ESSEX, the Department of Public Works, the Utilities Authority, and the Improvement Authority,

Defendant,

and

CITY OF NEWARK,

Third-Party Plaintiff,

v.

NEWARK HOUSING AUTHORITY,

Third-Party Defendant-Respondent.

Argued October 24, 2017 – Decided December 19, 2017

Before Judges Leone and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3974-16.

Glenn A. Montgomery argued the cause for appellant (Montgomery, Chapin & Fetten, PC, attorneys; Glenn A. Montgomery, of counsel and on the brief; Michael D. Noblett, on the brief).

Handel T. Destinvil, Assistant Corporation Counsel, argued the cause for respondent City of Newark (Willie L. Parker, Corporation Counsel, attorney; Gary S. Lipshutz, Assistant Corporation Counsel, of counsel; Handel T. Destinvil, on the brief).

James G. Serritella argued the cause for respondent Newark Housing Authority (Biancamano & DiStefano, attorneys; James G. Serritella, on the brief).

PER CURIAM

Plaintiff Brian Kruzel appeals the July 22, 2016 denial of his motion to file a late notice of claim against defendant Newark Housing Authority (NHA), pursuant to the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 13-10. We affirm.

I.

The motion judge's oral opinion and the certification of plaintiff's counsel include the following facts. On September 18, 2015, plaintiff, while working as a New Jersey state trooper, fell

into an uncovered manhole. As a result, he allegedly suffered personal injuries and had surgery on his ankle.

The manhole was in the middle of a street near the intersection of Van Duyne Street and Frelinghuysen Avenue in Newark. As plaintiff acknowledges, the street runs through the NHA's Seth Boyden Project Complex, which was vacant and abandoned at the time of the accident. Plaintiff argues there was no sign indicating the street was called Seth Boyden Terrace.

On October 15, 2015, plaintiff retained counsel. On October 19, 2015, plaintiff's counsel served a notice of claim on the City of Newark. On June 10, 2016, plaintiff filed a complaint against the City, the County of Essex, and their various subdivisions.[1] Despite filing against nine public entities, plaintiff did not file a notice of claim against the NHA.

It is undisputed that "public housing authorities are public entities under the Tort Claims Act." Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 131 (1993); accord Ramapo Brae Condo. Ass'n, Inc. v. Bergen Cty. Hous. Auth., 328 N.J. Super. 561, 569 (App. Div. 2000), aff'd o.b., 167 N.J. 155 (2001). A housing authority

[1] The nine public entities were the City of Newark, including its Department of Engineering, Department of Water and Sewer, Department of Neighborhood and Recreational Services, and Department of Police; and the County of Essex and its Department of Public Works, Utilities Authority, and Improvement Authority.

is itself "a body corporate and politic." Ramapo Brae, 328 N.J. Super. at 566 (citing N.J.S.A. 40A:12A-17). Thus, the Newark "housing authority is a separate, independent entity," and "is not a subordinate branch of the governing body" but "a unique separate entity, possessing and enjoying many governmental powers and privileges." English v. Newark Hous. Auth., 138 N.J. Super. 425, 430 (App. Div. 1976); see Nat'l Newark & Essex Bank v. Hous. Auth., 75 N.J. 497, 506 (1978).

On June 22, 2016, the City informed plaintiff that the manhole into which he fell was owned or controlled by the NHA. On June 28, 2016, plaintiff filed a notice of motion for leave to serve a late notice of claim against the NHA. Plaintiff's motion was denied by the trial court on July 22, 2016. Plaintiff appeals.[2]

II.

The TCA "imposes strict requirements upon litigants seeking to file claims against public entities." McDade v. Siazon, 208 N.J. 463, 468 (2011). "No action shall be brought against a public entity or public employee under this act unless the claim upon which it is based shall have been presented" to the appropriate public entity in a written notice of claim. N.J.S.A. 59:8-3; see

[2] The NHA does not concede it is the actual owner of the street where plaintiff was injured. We offer no opinion whether NHA is the owner.

N.J.S.A. 59:8-4 to -7. "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." N.J.S.A. 59:8-8.

> A claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this act, may, in the discretion of a judge of the Superior Court, be permitted to file such notice . . . within one year after the accrual of his claim provided that the public entity or the public employee has not been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon 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 of this act or to file a motion seeking leave to file a late notice of claim within a reasonable time thereafter[.]
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> [N.J.S.A. 59:8-9 (emphasis added).]

"By its terms, the statute commits the authority to grant a plaintiff's motion for leave to file late notice 'to the sound discretion of the trial court, and [its decision] will be sustained on appeal in the absence of a showing of an abuse thereof.'" D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 147 (2013) (alteration in original) (quoting Lamb v. Global Landfill Reclaiming, 111 N.J. 134, 146 (1988)); see Jones v. Morey's Pier, Inc., 230 N.J. 142, 154 n.3 (2017) (citation omitted) (quoting

N.J.S.A. 59:8-9). Indeed, the extraordinary circumstances prong of N.J.S.A. 59:8-9 "requires the trial court to conduct a fact-sensitive analysis of the specific case." McDade, 208 N.J. at 478.

Nevertheless, plaintiff argues the denial of his motion to file a late notice of claim is an issue of law requiring plenary review. However, plaintiff has failed to show that the trial court's conclusion was "reached under a misconception of the law." D.D., 213 N.J. at 147. Accordingly, we hew to the abuse of discretion standard.

III.

On the record before us, we are unable to find the motion judge abused his discretion because plaintiff's motion failed to satisfy the extraordinary circumstances requirement for the late filing of a notice of claim.

A.

Under the TCA, the claimant must show "extraordinary circumstances for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act[.]" N.J.S.A. 59:8-9. The Supreme Court has emphasized that "[t]he Legislature has commanded that relief be granted only in circumstances that are extraordinary." D.D., 213 N.J. at 158. Extraordinary circumstances is a "strict standard." Zois v. N.J.

Sports & Exposition Auth., 286 N.J. Super. 670, 673 (App. Div. 1996). In applying this "more exacting standard," courts "must ensure that their decisions are faithful to the overall legislative framework in order that the [immunity] statute's essential purposes be preserved and not eroded through excessive or inappropriate exceptions." D.D., 213 N.J. at 148-49.[3]

It is undisputed plaintiff's claims accrued when he was injured on September 18, 2015. Under the TCA, he had until December 17, 2015 to file a notice of claim against the NHA pursuant to the TCA. Although he timely filed the notice of claim against the City of Newark, he did not file a notice of claim against the NHA for over nine months after the accrual of the claim.

Plaintiff argues he was unaware who owned the street where the manhole resided, he thought it was an extension of Van Duyne Street, he was under the impression the City was the owner, and

[3] The original text of N.J.S.A. 59:8-9 stated that "mere 'sufficient reasons' sufficed to warrant relief from the statutory bar." Leidy v. Cty. of Ocean, 398 N.J. Super. 449, 456 (App. Div. 2008) (quoting Lowe v. Zarghami, 158 N.J. 606, 625 (1999)). "The 'extraordinary circumstances' language was added by amendment in 1994, L. 1994, c. 49, § 5, in order to 'raise the bar for the filing of late notice from a "fairly permissive standard" to a "more demanding" one.'" Id. (quoting Beauchamp v. Amedio, 164 N.J. 111, 118 (2000)). We have viewed the 1994 amendment as "signal[ing] the end to a rule of liberality," ibid. (quoting Lowe, 158 N.J. at 626), and "sending a strong message that . . . relief should be granted less frequently." D.D., 213 N.J. at 157.

the City did not correct his misimpression until after he filed his complaint. The trial court found plaintiff had not shown "extraordinary circumstances" as required by N.J.S.A. 59:8-9. We agree.

First, the TCA requires that the motion for permission to file a later notice of claim be "supported by affidavits based upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances." N.J.S.A. 58:8-9. However, plaintiff did not supply such an affidavit. Plaintiff's arguments about his thoughts and impressions are not supported by the record.

Plaintiff's counsel provided a certification, but it did not relate any efforts to determine the ownership of the manhole. Rather, it simply asserted that "the manhole was located in the center of a paved street in which motor vehicles travel on, and that the paved street is located in the City of Newark." Cf. Lamb, 111 N.J. at 153 (accepting "affidavits submitted by the plaintiffs' attorneys [that] describe the investigations they undertook in order to identify the cause of action and the public entities involved").

Thus, plaintiff failed to provide the required affidavit showing any efforts to ascertain ownership. See S.P. v. Collier High Sch., 319 N.J. Super. 452, 465 (App. Div. 1999). "The

existence of a reasonably prompt and thorough investigation is thus the crucial inquiry," and its absence is damning. McDade, 208 N.J. at 477-79.

Even if plaintiff's alleged beliefs and impressions are accepted as true, his claim fails. This case strongly resembles Leidy v. Cty. of Ocean, 398 N.J. Super. 449 (App. Div. 2008). In Leidy, the plaintiff, also a police officer, was "under the impression that since [his roadway] accident occurred in Jackson [Township], the property was controlled and maintained by Ocean County," so he filed a notice of tort claim against Jackson, Ocean County, and the State. Id. at 454. However, the roadway formed the boundary with the County of Monmouth, which had exclusive jurisdiction over and maintained that portion of the road. Id. at 453-54. Eight months later, the plaintiff filed a motion for leave to file a late notice of tort claim against the County of Monmouth. Id. at 454.

We held Leidy could not show extraordinary circumstances, because a "reasonable investigation within a reasonable time following the accident would, no doubt, have led to prompt identification of the County of Monmouth as the responsible party." Id. at 460. "The issue then boils down to whether plaintiff was diligent and made reasonable efforts to discover the identity of the true tortfeasor." Id. at 461.

Here, plaintiff argues it was reasonable "to attribute ownership and control over the street containing the uncovered manhole at issue to the City of Newark and, perhaps, the County of Essex given the proximity to Frelinghuysen Avenue."[4] However, performing basic investigative tasks, such as conducting a title search or requesting the record owner of the property from the Newark Tax Assessor, would have revealed the ownership of the street. Here, "the record is barren of any reasonable efforts undertaken by plaintiff during the ninety-day period to ascertain ownership, control or operation of the portion of the roadway[.]" Id. at 461.

Like plaintiff here, Leidy tried to excuse his failure to investigate by blaming the public entity he did serve with a notice of claim for not informing him that another public entity was responsible. He "cit[ed] as 'extraordinary circumstances' the fact that the County of Ocean never suggested 'another public entity was responsible for the roadway.'" Id. at 457. We did "not view this circumstance under the present facts to be a sufficient, much less extraordinary, reason warranting relaxation of the time constraints of N.J.S.A. 59:8-8." Ibid. We found that

[4] Plaintiff assumes Frelinghuysen Avenue is a county road. But this section of Frelinghuysen Avenue is State Route 27. N.J.S.A. 27:6-1.

it was unreasonable to expect Ocean County, to have responded to the plaintiff when the plaintiff waited to file the notice of claim two days before the ninety-day deadline. Id. at 461.

Plaintiff here served a notice of claim on the City and County two months before the ninety-day deadline. However, plaintiff still must show defendant thwarted his investigation or obscured its identity. Leidy, 398 N.J. Super. at 457-58.

> Even before the 1994 amendment, when a more permissive standard governed, courts recognized that sufficient reasons could exist for the filing of late notice of claim based on misidentification of the responsible party only where a plaintiff had been thwarted in his or her diligent efforts to determine the responsible party or where the tortfeasor's identity had been actively obscured by the original defendants.
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> [Id. at 457 (emphasis added).]

"Post-1994 amendment cases, utilizing the more demanding 'extraordinary circumstances' test, continued to insist that the identity of the proper party be 'obscured' as a condition of relaxing the time bar of N.J.S.A. 59:8-8." Id. at 458.

Here, as in Leidy, "there is no thwarting by the original defendants of any efforts by plaintiff to discover that actual fact." Id. at 461. There was no "official[] misrepresentation." Id. at 457-58, 460 (distinguishing Zwirn v. Cty. of Hudson, 137 N.J. Super. 99, 101 (Law Div. 1975) (permitting late claim where

the county police mistakenly told the plaintiff that a state road was a county road), and Dambro v. Union Cty. Park Comm., 130 N.J. Super. 450, 453 (Law Div. 1974) (permitting late claim where the borough tax assessor mistakenly told the plaintiff that borough property was county property)).

Also "[a]bsent here is the dilatory conduct present in Feinberg [v. N.J. Dep't of Envtl. Prot., 137 N.J. 126 (1994)]." Leidy, 398 N.J. Super. at 457-58, 460. In Feinberg, the State Department of Environmental Protections leased a canal to a State Authority with the knowledge of the Attorney General. 137 N.J. at 129. After Feinberg gave notice to and sued the Department and the Attorney General, they did not tell the plaintiff of the unrecorded lease, failed to file a timely answer, defaulted, filed an answer which did not name the Authority, failed to answer interrogatories, had their answer stricken, drew a motion to dismiss their answer with prejudice, and only right before the hearing disclosed the involvement of the Authority. Id. at 129-31.

In Feinberg, our Supreme Court emphasized that, "through delay in answering the complaint and interrogatories, defendants failed to disclose the identity of the Authority for two years beyond the accrual of the claim." Id. at 135. Further, "[b]ecause the lease between the [department] and the Authority was

unrecorded, plaintiff and her counsel could not have known of the Authority's involvement in the Canal" except from the defendants. Ibid. Thus, the Court found the "problem was not that [Feinberg] failed to make reasonable efforts to ascertain the identity of such parties, but that the original defendants thwarted those efforts." Id. at 134-35. Stressing "the singular context of this case," the Feinberg Court held that, given "defendants' dilatory tactics, the unique facts of this case support the conclusion that notification to the [Department] constituted notification to the Authority." Id. at 135.

By contrast, here the City told plaintiff the NHA was responsible for the manhole within two weeks of plaintiff filing his complaint, before its answer or any discovery was due. Moreover, unlike Feinberg, it appears the ownership of the street was a matter of public record which plaintiff could have ascertained independently, but he made no effort and the City did nothing to thwart such efforts. See D.D., 213 N.J. at 152-53 (distinguishing cases where "correct identification of the defendant as a public entity or public employee was not possible").

Notably, the Court in Feinberg relied on the defendants' failure to answer the complaint or the interrogatories, and did not suggest the defendants had a duty to inform the plaintiff, during the ninety-day period for filing a notice of claim or the

six-month period before suit can be filed, that another public entity was responsible. See N.J.S.A. 59:8-8. The Supreme Court has not included such a duty in the goals of those periods:

> "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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> [McDade, 208 N.J. at 475-76 (citations omitted).]

We reject plaintiff's suggestion that the City had a duty to inform him within the ninety-day period if it believed that another public entity was responsible. His service of a notice of claim "upon the incorrect public entity . . . did not absolve plaintiff[] of the obligation to promptly identify the [street]'s owner and serve a timely notice of claim." See id. at 479 (citing Leidy, 398 N.J. Super. at 457). Plaintiff cannot excuse his failure to do so where the City did nothing to thwart his investigation. In any event, nothing in the record indicates the City knew that the NHA owned or controlled the street, and that plaintiff had not served a notice of claim against the NHA, until after he served his complaint, which alerted the City he had not sued the NHA.

Thus, this case is not "like Feinberg, Zwirn, and Dambo, where the unique facts of the case obscured the public employment of defendant" despite diligent efforts by the plaintiff. Lowe, 158 N.J. at 630 (citations omitted); see Eagan v. Boyarsky, 158 N.J. 632, 642 (1999); see also Forcella v. City of Ocean City, 70 F. Supp. 2d 512, 520 (D.N.J. 1999) (distinguishing Feinberg).

Plaintiff next argues that the identity of the proper party was "obscured" as in Lowe, 158 N.J. at 630. There, a doctor treating the plaintiff at a private hospital was also a professor at a public university, UMDNJ. Id. at 612-13. We determined that the doctor was not acting as a public employee, but the Supreme Court reached the contrary conclusion after a lengthy analysis. Id. at 614-24. The Court then found extraordinary circumstances allowed the plaintiff to file a late notice of claim because "[r]easonable people, indeed, reasonable judges, disagreed on the employment status of UMDNJ professors practicing in private hospitals," the doctor's "status as a public employee was obscured by his apparent status as a private physician," and "Lowe had no reason to suspect that her doctor was even associated with a public entity." Id. at 629, 630. In Leidy, we distinguished the complex areas of medical employment and malpractice and the simpler issue of a fall on or near public property. Leidy, 398 N.J. Super. at

458-60. Moreover, plaintiff knew the manhole was owned by a public entity, but made no effort to find out which public entity.

Plaintiff attempts to analogize his case to our decision in Blank v. City of Elizabeth, 318 N.J. Super. 106 (App. Div.), aff'd as modified, 162 N.J. 150 (1999). Blank, "a non-English speaking, sixty-one year old Russian immigrant," tripped over a pipe protruding from the sidewalk abutting a home. Id. at 108. Blank gave notice to and sued the homeowners, whose counsel ultimately informed Blank the pipe belonged to the city. Ibid. We reversed the order granting Blank's "deficient" motion to file a late notice against the city. Id. at 108, 110.

Nonetheless, we remanded so Blank could try again to show extraordinary circumstances. Id. at 115. We noted it was unclear whether anything about the pipe suggested its ownership by a public utility. Id. at 112. We drew a "distinction between knowing that one has a cause of action against a public entity and not pursuing it properly and timely for personal reasons and, on the other hand, not timely knowing or being chargeable with timely knowledge that a public entity may be liable for an injury." Id. at 113.

However, the Supreme Court in Blank rejected our decision to remand, instead deciding to

> affirm the Appellate Division's disposition to the extent that it reversed the Law Division's grant of permission to file a late notice of

> claim, but modify that disposition to preclude a remand to the Law Division for a further presentation of evidence to demonstrate extraordinary circumstances justifying a late notice of claim.
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> [Blank v. City of Elizabeth, 162 N.J. 150, 153 (1999).]

As the Court later explained, it found claims such as Blank's "barred when the identity of the correct defendant was readily discoverable within the ninety days[.]" D.D., 213 N.J. at 153 (citing Blank, 162 N.J. at 152-53; Leidy, 398 N.J. Super. at 454); see McDade, 208 N.J. at 477; Leidy, 398 N.J. Super. at 460.

Moreover, unlike in Blank, here plaintiff knew he had a cause of action against a public entity and did not pursue it properly because he made no effort to ascertain which public entity was responsible. Also unlike in Blank, plaintiff here did not claim his personal circumstances prevented him from doing so.

Additionally, plaintiff cites Ventola v. N.J. Veteran's Mem'l Home, 164 N.J. 74, 82 (2000), which found that, because "the dominant agency in providing veterans' benefits is the United States Department of Veterans' Affairs," a medical malpractice plaintiff's service of the notice of claim against that federal agency but not the state veteran's agency gave rise to extraordinary circumstances. Id. at 82. Plaintiff contends the City was the dominant agency in providing roadways in Newark. This

is a dubious contention, given that there are federal, state, and county roadways in Newark. Ownership or control under the TCA "does not simply mean any property falling within the geographical boundaries of a municipality." Christmas v. Newark, 216 N.J. Super. 393, 398 (App. Div. 1987).

In any event, we found Ventola distinguishable in Leidy:

> Of course, as the Court itself noted in Ventola, for purposes of applying the "extraordinary circumstances" standard, there is a fundamental difference between on the one hand the "more complex areas [of] medical malpractice or toxic tort causation" and on the other hand, "a fall on the steps of a courthouse or on an obstruction on a public sidewalk," to which "[t]he notice provisions of the Tort Claims Act are well suited[.]"
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> [Leidy, 398 N.J. Super. at 460 (alterations in original) (quoting Ventola, 164 N.J. at 81-82).]

In Leidy, we ruled Ventola's "federal-state jurisdiction" concerns were inapplicable to the issue of what local agency was responsible for the roadway, which was "much more akin to the issue of the ownership of the offending utility valve on which the plaintiff tripped in Blank." Ibid. Here, as in Leidy and Blank, "reasonable investigation within a reasonable time following the accident would, no doubt, have led to prompt identification of . . . the responsible party." Ibid. Because plaintiff failed to

make any investigation, the trial court did not abuse its discretion in finding no extraordinary circumstances.

B.

In addition, the absence of "proof of due diligence in the record precludes plaintiff from satisfying N.J.S.A. 59:8-9's other requirement that a claimant file a late notice of tort claim within 'a reasonable time.'" Leidy, 398 N.J. Super. at 461. In Leidy, we found the plaintiff's eight-month delay was unreasonable. Id. at 462. As plaintiff's excuse that he "was simply not aware that Monmouth County controlled the roadway" did "not suffice to establish 'extraordinary circumstances,' neither does it render reasonable the delay in filing plaintiff's motion to file a late claim." Ibid. Similarly, plaintiff's excuse that he filed over nine months after the accident was that he was unaware of the ownership of the road is equally inadequate to establish reasonable delay.

IV.

Finally, plaintiff argues the NHA is not prejudiced by the late filing. He notes the City filed a third-party complaint against the NHA on August 5, 2016, and asserts the litigation is still in its infancy. However, NHA opposed plaintiff's motion to file a late claim not by asserting prejudice, but by correctly pointing out plaintiff failed to establish extraordinary

circumstances. Thus, we need not reach the "substantial prejudice" analysis. See, e.g., D.D., 213 N.J. at 135, 140, 142 (holding a trial "court is not authorized to grant leave to file a late notice of tort claim" absent extraordinary circumstances, even though "defendants did not advance any argument that they were prejudiced by the untimely filing" and there was "no evidence that defendants were prejudiced by the delay").

The trial court did not abuse its discretion in declining to grant plaintiff permission to file a late notice of claim under N.J.S.A. 59:8-9.

Affirmed.