SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1311-16T1

MARIA HERNANDEZ,

Plaintiff-Appellant,

v.

SNYDER HIGH SCHOOL and JERSEY CITY BOARD OF EDUCATION,

Defendants-Respondents,

and

CITY OF JERSEY CITY,

Defendant.

Submitted January 9, 2018 - Decided January 24, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2473-15.

Lipsky Portales, PA, attorneys for appellant (Sean M. Lipsky and Elena Portales, of counsel and on the briefs).

Nirenberg & Varano, LLP, attorneys for respondents (Howard M. Nirenberg, of counsel; Sandra N. Varano, on the brief).

PER CURIAM

Plaintiff Maria Hernandez appeals from the Law Division's October 21, 2016 order granting summary judgment in favor of defendants Snyder High School and Jersey City Board of Education (Board) for failure to serve a timely notice of tort claim. We affirm.

I.

Plaintiff alleges she was injured on November 20, 2014, when she fell into an uncovered trench drain at Snyder High School, a public school operated by the Board. The following day, plaintiff delivered a handwritten note to the school stating:

> Last night[,] my daughter and I were [at] parents['] night at Innovation High School[1] from 6:00 [p.m.] to 8:00 [p.m.]. After it was over, we exited the building going down the stairs to Kennedy [Boulevard] [and] made a right to the bus stop. While we were waiting[,] I backed up into the driveway to cover from the wind, and as I stepped back, my right foot stepped on the metal plate. But my left foot and leg went right through the hole[,] causing me to fall and hit my left shoulder[,] elbow[,] and hand on the ground. My leg was stuck inside the hole. Also[,] my lower back hit the concrete floor. My daughter assisted me to pull me out because one of my legs [was] still in the hole. There [were] witnesses[,] two Innovation students[,] and a sibling of one student.

[1] Innovation is a public school located in the basement of Snyder High School.

Plaintiff's note was signed, dated and contained her phone number. It did not include her home address, the nature and extent of her injuries, her loss or damages, or her intent to file a claim against defendants.

Plaintiff thereafter retained counsel, and on December 12, 2014, counsel sent tort claim notices to the City of Jersey City (City) and the Board. Both notices were sent to 280 Grove Street, Jersey City, which is the address for City Hall. However, the Board was never located there, but rather it maintained its administrative office at 346 Claremont Avenue.

On June 8, 2015, plaintiff filed a complaint in the Law Division against defendants for the personal injuries she allegedly sustained on November 20, 2014. The summons and complaint were served on Snyder High School, but again plaintiff served the Board at City Hall rather than 346 Claremont Avenue.

Defendants failed to answer, and default was entered against them on August 20, 2015. The Board contended it never received the tort claim notice, and "had no knowledge of service of the [c]omplaint or the [r]equest to [e]nter [d]efault until . . . December 9, 2015." At defendants' request, plaintiff consented to vacate the default. Defendants filed their answer on January 22, 2016, which asserted as an affirmative defense plaintiff's

failure to timely provide a notice of claim under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3.

Following a period of discovery, defendants moved for summary judgment, contending the lawsuit was barred because of plaintiff's failure to serve them with the required notice of claim. Defendants supported the motion with a certification from Luiggi Campana, the Board Secretary/Business Administrator, averring that a search of the Board's records failed to disclose any notice of claim filed on behalf of plaintiff. Campana further certified that "280 Grove Street is not, nor has it ever been, a location of the Jersey City Board of Education. The Jersey City Board of Education is located at 346 Claremont Avenue . . . ."

Plaintiff opposed the motion, arguing that material issues of fact existed as to whether her notice of claim was mailed to the proper address and whether it substantially complied with the TCA. Specifically, plaintiff contended there was a factual issue whether her handwritten note, delivered to Snyder High School the day after the incident, substantially complied with the notice requirement of the TCA. With respect to her December 12, 2014 notice of claim, plaintiff argued that "280 Grove Street is listed as one of the three [Y]ellow [P]ages' addresses of the [B]oard of [E]ducation [and] [d]efendants' motion for summary judgment leaves unclear whether the listing is accurate . . . ."

The trial court granted the motion on October 21, 2016. In a comprehensive sixteen-page written opinion, Judge Daniel D'Alessandro noted plaintiff was required by N.J.S.A. 59:8-8 to serve defendants with a tort claim notice within ninety days of her accident, and that a motion for permission to file a late notice of claim was not filed pursuant to N.J.S.A. 59:8-9.

Citing N.J.S.A. 18A:10-1 and Otchy v. City of Elizabeth Bd. of Educ., 325 N.J. Super. 98 (App. Div. 1999), the judge also noted "[t]he [Board] and the City are separate public entities." Judge D'Alessandro found that while the December 12, 2014 "tort claim notice was promptly, timely and effectively served on the City at [C]ity [H]all[,] [s]ervice on the [Board] and Snyder was not effective at [C]ity [H]all." Rather, the judge found Campana's certification was undisputed and "[t]he record does not present any facts to support . . . plaintiff's contention that the [Board] or Snyder could be properly served at [C]ity [H]all." Moreover, "[t]he postings in the [online] Yellow [P]ages," upon which plaintiff's counsel apparently relied, "were incorrect[,]" and there was "no evidence" that "defendants were responsible for the erroneous listing."

Addressing plaintiff's alternative argument, Judge D'Alessandro acknowledged the doctrine of substantial compliance

allows leniency from the strict notice requirements of the TCA, but found it inapplicable here. The judge explained:

> The "doctrine of substantial compliance" "has been limited carefully to those situations in which the notice, although both timely and in writing, had technical deficiencies that did not deprive the public entity of the effective notice contemplated by the statute." [citation omitted]. The doctrine requires the moving party to show: (1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim; and (5) a reasonable explanation why there was not strict compliance with the statute. Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 151 (2003) (citations omitted).
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> . . . .
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> The court cannot find on this record that the [Board] and Snyder [High School] received information satisfying "[t]he very purpose of the [ninety]-day requirement . . . to compel a claimant to expose his intention and information early in the process . . . to permit the public entity to undertake an investigation while witnesses are available and the facts are fresh." Lutz v. Gloucester, 153 N.J. Super. 461, 466 (App Div. 1977) (discussing [the] purpose of N.J.S.A. 58:8-8).

Plaintiff's handwritten note did not express her intent to pursue a claim but rather merely documented that the accident occurred, and failed to include other information required by N.J.S.A. 59:8-4, such as her address and injuries. Accordingly,

the judge concluded the note was not "substantially compliant" with the notice requirements of the TCA.

II.

On appeal, plaintiff contends defendants should be estopped from arguing that she failed to comply with the notice requirements of the TCA because they delayed answering the complaint until more than one year after the incident, thereby precluding plaintiff from seeking to file a late notice of claim as authorized by N.J.S.A. 59:8-9. Plaintiff also argues her handwritten note, delivered to Snyder High School the day after she fell, substantially complies with the notice requirements of the TCA. Finally, plaintiff contends summary judgment was improper because the discovery period had not ended. We do not find these arguments persuasive, and affirm substantially for the reasons set forth In Judge D'Alessandro's thoughtful written opinion. We add the following comments.

We review a trial court's summary judgment disposition de novo based upon our independent review of the motion record, applying the same standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). The court should grant summary judgment if the record establishes 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." R. 4:46-2(c).

An issue of fact is genuine 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." Ibid. "If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).

As the Supreme Court continues to reaffirm, the "guiding principle" of the TCA is "that 'immunity from tort liability is the general rule and liability is the exception.'" D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 134 (2013) (quoting Coyne v. State Dep't of Transp., 182 N.J. 481, 488 (2005)). "The Legislature's waiver of sovereign immunity remains a limited one and [this Court is] not free to expand that waiver beyond its statutorily-established boundaries." Id. at 158.

As the Court further instructed in D.D., our courts may not "permit sympathy for a particular plaintiff to obscure the statutory standard [for a timely notice of claim] to the point of obliterating it." Id. at 158. This is because "[t]he Legislature has commanded that [such] relief be granted only in circumstances

that are extraordinary." Ibid. Hence, neither "an attorney's inattention, [n]or even an attorney's malpractice, constitutes an extraordinary circumstance sufficient" to permit filing a notice of claim outside of the one-year window of N.J.S.A. 59:8-9, even if there is a lack of prejudice to the plaintiff. Id. at 156; see also Beauchamp v. Amedio, 164 N.J. 111, 118 (2000) (explaining the more stringent standards for timely claim notices following the TCA's amendment in 1994).

The Legislature has directed that "[n]o action shall be brought against a public entity . . . under th[e] [TCA] unless the claim upon which it is based shall have been presented in accordance with the procedure set forth" by the Act. N.J.S.A. 59:8-3 (emphasis added). Claimants "shall be forever barred from recovering against a public entity" if, among other things, the 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[.]" N.J.S.A. 59:8-8(a) (emphasis added).

We have repeatedly made clear that, after the ninety-day deadline has passed and a plaintiff has not utilized the procedure under N.J.S.A. 59:8-9 to obtain an extension of that period up to one year, courts lack jurisdiction to entertain tort claims if the required notices were not timely filed. See, e.g., Iaconianni v. N.J. Tpk. Auth., 236 N.J. Super. 294, 298 (App. Div. 1989)

("Because the late notice of claim was filed well beyond the one-year outer limit, the trial court had no jurisdiction to extend the filing period."); see also Pilonero v. Twp. of Old Bridge, 236 N.J. Super. 529, 532 (App. Div. 1989) ("After the one-year limitation has passed, '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.'") (quoting Speer v. Armstrong, 168 N.J. Super. 251, 255 (App. Div. 1979)). Indeed, the filing of a late notice of claim with the public entity, in the absence of prior court approval pursuant to N.J.S.A. 59:8-9, has been deemed a nullity. Rogers v. Cape May Cty., 208 N.J. 414, 427 (2011).

With these principles in mind, we begin our analysis by noting that plaintiff did not raise an estoppel argument in the trial court. Consequently, we need not reach the issue. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

In any event, even if plaintiff had invoked the doctrine of equitable estoppel in opposing defendants' summary judgment motion, we conclude the doctrine is unavailing here. Rather, we agree with defendants that, had they filed a timely answer to the complaint asserting a notice defense under the TCA, plaintiff has nonetheless failed to demonstrate she would have been successful in moving to file a late notice of claim pursuant to N.J.S.A.

59:8-9. Plaintiff's explanation for serving defendants with a tort claim notice at the incorrect 280 Grove Street address is that her attorney relied upon the addresses for the Board listed in the online Yellow Pages. However, it is undisputed the Board is a political entity distinct from the City, and its separate 346 Claremont Avenue address appears on its official website. Thus, the Board's correct address was readily ascertainable, and counsel's reliance on the Yellow Pages, a private publication, is incompatible with a claim of extraordinary circumstances sufficient to excuse plaintiff's failure to serve defendants with a notice of claim within the ninety-day period prescribed by N.J.S.A. 59:8-8.

Next, as Judge D'Alessandro correctly recognized, plaintiff's handwritten note, delivered to Snyder High School on November 21, 2014, while timely, does not constitute substantial compliance with the TCA's notice requirements. Specifically, N.J.S.A. 59:8-4, entitled "Contents of claim," requires that:

> A claim shall be presented by the claimant or by a person acting on his behalf and shall include:
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> a. The name and post office address of the claimant;
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> 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;
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> 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;
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> 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.
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> [(Emphasis added).]

Here, plaintiff's note did not provide her address, the nature and extent of her injuries, the damages or loss incurred, and the amount claimed. The note also did not state plaintiff intended to file a lawsuit against the Board. Accordingly, the note was akin to an accident report rather than a notice of tort claim, and the trial court correctly concluded it did not substantially comply with N.J.S.A. 59:8-4.

Finally, the absence of additional discovery did not inhibit the grant of summary judgment. While summary judgment is often inappropriate when discovery has not been completed and "critical facts are peculiarly within the moving party's knowledge," Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988)

(quoting Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981)), plaintiff has not shown that further discovery would have changed the relevant facts. See Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977).

Here, it is undisputed that plaintiff sent notices of claim to both the City and the Board at 280 Grove Street, the address for City Hall. Judge D'Alessandro correctly determined that the notice of claim sent to the City was not sufficient to provide notice to the Board, which is a distinct entity maintaining a separate address. Luiggi Campana, the Board's Secretary and Business Administrator, certified the Board never received the notice of claim sent to the wrong address. Plaintiff has failed to demonstrate that additional discovery would change these operative facts, or the legal conclusions that flow from them.

Affirmed.