SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1741-16T3

GREGORY CRESCENZO, Administrator of the Estate of JEFFREY CRESCENZO,

Plaintiff-Appellant,

v.

MARGATE CITY BEACH PATROL, a public entity, and CITY OF MARGATE, a public entity,

Defendants-Respondents.

Submitted December 19, 2017 - Decided January 8, 2018

Before Judges Fasciale and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-2711-14.

Lombardi and Lombardi, PA, attorneys for appellant (Paul R. Garelick, on the brief).

Barker, Gelfand & James, attorneys for respondents (A. Michael Barker, on the brief).

PER CURIAM

In this case involving tragic injuries and claims under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, plaintiff appeals

from a December 9, 2016 order granting summary judgment to Margate Beach Patrol and City of Margate (collectively defendants). The judge dismissed the complaint, determined that any alleged dangerous condition did not proximately cause plaintiff's injuries, and concluded defendants were entitled to immunity under the TCA. The December order also denied as moot plaintiff's motions to bar or limit expert testimony from various witnesses. We reverse the order granting summary judgment, remand, and direct the judge to adjudicate plaintiff's motions.

When reviewing an order granting summary judgment, we apply "the same standard governing the trial court." Oyola v. Liu, 431 N.J. Super. 493, 497 (App. Div. 2013). We owe no deference to the motion judge's conclusions on issues of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We therefore look at the facts in the light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

Plaintiff went to Margate Beach with Adrienne Nave, Adrienne's daughter, and her daughter's boyfriend. Plaintiff selected a spot near the lifeguard stand on Knight Avenue. Plaintiff and Ms. Nave went into the ocean and then exited after about fifteen minutes. Plaintiff went back into the water while Ms. Nave returned to their blanket on the beach.

Plaintiff stated that he re-entered the ocean by the lifeguard stand on Knight Avenue. Regina Gialloreto, a friend of plaintiff's, witnessed him walk to the water near Kenyon Avenue, where the Knight Avenue lifeguard had been located. She testified that water had been covering a rock jetty in the area of Kenyon Avenue.

Plaintiff stated that when he returned to the ocean, he sat down fifteen feet from the water's edge, in about one-and-a-half to two feet of water, and let the waves hit him. Plaintiff testified that he was there for no more than ten minutes when he saw a wave. Plaintiff "twisted and tucked [his] head so [the wave] wouldn't splash in [his] face." He passed out and woke up in the hospital.

On the date of the incident, Nicholas Rando, Jr., a retired Atlantic City firefighter, was kayaking and found plaintiff floating in about waist deep water near Plymouth Beach, south of Iroquois Beach. Plaintiff was more than 100 feet from the rock jetty when Mr. Rando found him. Mr. Rando dragged plaintiff toward the shore and someone helped him remove plaintiff from the water, and a lifeguard performed CPR. Plaintiff remained comatose for eight days.

On appeal, plaintiff argues that the judge erred by concluding defendants were entitled to immunity pursuant to N.J.S.A. 59:4-8,

N.J.S.A. 59:2-7, and N.J.S.A. 59:4-2. Plaintiff contends that the judge erroneously resolved the question of proximate cause, which a jury should decide. Thus, plaintiff asserts that the judge decided disputed facts and erred as a matter of law.

The judge concluded that defendants were entitled to the unimproved property immunity pursuant to N.J.S.A. 59:4-8, which provides "[n]either a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." In reaching this conclusion, he found that N.J.S.A. 59:4-8 immunized defendants from liability because plaintiff's injuries were caused exclusively by the ocean.

Immunity pursuant to N.J.S.A. 59:4-8 is inapplicable if the natural dangerous condition was not the sole cause of injury, and the public entity's acts or omissions contributed substantially to plaintiff's injury. Aversano v. Palisades Interstate Parkway Comm'n, 180 N.J. 329, 331 (2004) (citation omitted) (holding that the unimproved property immunity does not apply when a "cliff's dangerous natural condition was not the sole cause of [the plaintiff's] death, and the same public entity's acts or omissions contributed substantially to reducing [the plaintiff's] chances of survival").

The parties have disputed the cause of plaintiff's injuries. "Ordinarily, the issue of proximate cause should be determined by the factfinder." Fleuhr v. City of Cape May, 159 N.J. 532, 543 (1999). Plaintiff asserts the lifeguards failed to supervise him by allowing his body to float hundreds of feet over a substantial distance. Plaintiff mainly argues that the failure to rescue him caused his injuries. Defendants contend the ocean solely caused plaintiff's injuries.

Plaintiff produced opinions from various experts concluding that he sustained his injuries from hitting a rock jetty and also from the lifeguards failing to notice him as he drifted a distance in the water. The parties dispute the details of who rescued plaintiff, the length of time his body had been submerged in the water, the distance he floated, and the general nature of how plaintiff received his injuries. Consequently, the unimproved property immunity was an erroneous basis at the summary judgment stage to dismiss the complaint.

As to the alleged dangerous rocky condition of the jetty, the TCA declares that

> [a] public entity is liable for [an] injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable

> risk of the kind of injury which was incurred, and that either:
>
> > a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
> >
> > b. a public entity had actual or constructive notice of the dangerous condition under [N.J.S.A.] 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.
>
> [N.J.S.A. 59:4-2.]

Even assuming the rock jetty is a dangerous condition on the property, plaintiff has not established that defendants acted palpably unreasonably. Plaintiff was not on the rock jetty when a wave struck him.

Finally, there were at least four lifeguards supervising in the area where plaintiff had been sitting before the wave struck him. Consequently, N.J.S.A. 59:2-7 is inapplicable because

defendants undertook efforts to supervise.[1] See Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 210-11 (App. Div. 2006) (citation omitted) (noting that "[a]lthough an exception allows liability for failure to protect against a dangerous condition, this exception relates to the physical condition of the property not to activities that take place on it").

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

[1] N.J.S.A. 59:2-7 provides "[a] public entity is not liable for failure to provide supervision of public recreational facilities; provided, however, that nothing in this section shall exonerate a public entity from liability for failure to protect against a dangerous condition as provided in chapter 4."