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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2883-16T3

CELESTINA COCCA,

Plaintiff-Appellant,

v.

NEW JERSEY TRANSIT CORP.
and JOSEPH VEGA,

Defendants-Respondents,

and

WENDY A. MILLER, EDWARD MILLER
and MARC COCCA,

Defendants.

MARC COCCA,

Plaintiff,

v.

WENDY A. MILLER, EDWARD MILLER,
NJ TRANSIT CORP., JOSEPH VEGA,
and AMERICAN COMMERCE INSURANCE CO.,

Defendants.

Submitted February 13, 2018 – Decided April 20, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-4397-
15.

Arturi, D'Argenio, Guaglardi & Meliti, LLP,
attorneys for appellant (Anthony X. Arturi,
Jr., of counsel and on the brief).

Gurbir S. Grewal, Attorney General, attorney
for respondents (Melissa Dutton Schaffer,
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A. Tuason, Deputy Attorney General, on the
brief).

PER CURIAM

Plaintiff Celestina Cocca appeals from an order entered by the Law Division on January 22, 2016, which dismissed with prejudice all claims and cross-claims against defendants New Jersey Transit Corporation (NJT) and Joseph Vega (Vega) (collectively defendants). Plaintiff also appeals from an order dated April 6, 2016, which denied her motion for reconsideration. We affirm.

I.

This action arises from a multi-vehicle accident that took place on July 14, 2013, at the Pleasantville Toll Plaza on the Atlantic City Expressway (ACE) in Atlantic City, New Jersey. According to plaintiff, she and her husband, Marc Cocca (Cocca), were traveling eastbound on the ACE in an automobile that Cocca

was operating. At that time, Wendy A. Miller (Miller) was operating an automobile owned by her husband Edward Miller (E. Miller), which was also traveling eastbound on the ACE.

Plaintiff claims that as Miller approached the toll plaza, she was unsure which toll to use and decided to enter the EZ Pass lane. Miller then crossed into an adjacent lane of travel and struck the right rear of a NJT bus that Vega was operating. The NJT bus collided with the Cocca automobile, which struck a concrete median barrier and was dragged about forty feet.

The New Jersey State Police (NJSP) arrived at the scene shortly after the accident and prepared a Crash Investigation Report (CIR). Plaintiff was transported to Atlantic City Medical Center, where she was treated for injuries to her head, back, neck, knees, and legs. On the day of the accident, NJT prepared an Operator's Occurrence Report, which Vega signed, and an Incident Report.

Plaintiff and Cocca retained separate counsel for the purposes of bringing lawsuits for damages arising from the accident. Under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, a person may not bring an action against a public entity or public employee unless the person presents the public entity with a notice of claim (NOC), in accordance with the procedures set forth in the TCA. N.J.S.A. 59:8-3.

On October 11, 2013, Cocca submitted a NOC to NJT, which identified plaintiff as a witness to the accident and included a copy of the NJSP's CIR. That same day, plaintiff sent a NOC to the New Jersey Treasury Department (NJTD).

On October 15, 2013, NJT responded to the NOC, stating that it had investigated the accident and determined that there was no negligence or liability on the part of NJT or any of its employees. By letter dated January 16, 2014, the NJTD acknowledged receipt of plaintiff's NOC but stated that it had been served on the wrong public entity.

On June 24, 2015, plaintiff filed a complaint naming Miller, E. Miller, NJT, Vega, and Cocca as defendants. Cocca also filed a separate action.

On November 5, 2015, in lieu of an answer, defendants filed a motion to dismiss the claims against them pursuant to Rule 4:6-2(e). Defendants argued that plaintiff's claims must be dismissed because there was no record plaintiff had filed a timely NOC with NJT. Plaintiff opposed the motion. On December 4, 2015, the trial court consolidated plaintiff's and Cocca's lawsuits.

On January 8, 2016, the motion judge heard oral argument on defendants' motion. Plaintiff argued that her claims should not be dismissed because she had substantially complied with the TCA's NOC requirements, defendants would suffer no prejudice, and

defendants had notice of plaintiff's potential claim from Cocca's NOC and the NJSP's CIR. In response, defendants argued that plaintiff's claims must be dismissed because NJT is a "sue and be sued" entity, which is separate and apart from the departments and agencies of the State government. They therefore argued that the NOC that plaintiff's counsel sent to the NJTD was legally deficient under the TCA.

The motion judge rejected plaintiff's argument that Cocca's NOC provided defendants with notice of a potential claim by plaintiff. The judge also determined that a potential claimant may not rely upon the doctrine of substantial compliance when the NOC is served on the wrong public entity. However, the judge adjourned the motion to January 22, 2016, and directed the parties to submit supplemental briefs on whether NJT is a "sue and be sued" entity.

At the conclusion of oral argument on January 22, 2016, the motion judge placed her decision on the record. The judge rejected plaintiff's argument that she had substantially complied with the NOC requirements under the TCA and granted defendants' motion to dismiss because plaintiff had served her NOC on the wrong public entity. The judge found that plaintiff could not rely upon the NOC filed with the NJTD, and that neither the NJTD nor NJT had done anything to mislead plaintiff with regard to the filing of the

NOC. The judge entered an order dated January 22, 2016, dismissing plaintiff's claims against defendants with prejudice.

On January 29, 2016, plaintiff served a subpoena duces tecum upon NJT, seeking all documents in NJT's file pertaining to the accident. The subpoena was returnable February 16, 2016. On February 9, 2016, plaintiff filed a motion for reconsideration of the court's January 22, 2016 order. Plaintiff argued that the court had not correctly applied the substantial compliance doctrine.

On February 25, 2016, NJT produced documents in response to plaintiff's subpoena, which included the Operator's Occurrence Report, the Incident Report, Cocca's NOC, and the NJSP's CIR. Plaintiff supplemented her motion for reconsideration with the documents NJT had produced.

On April 1, 2016, the motion judge heard oral argument and denied plaintiff's motion for reconsideration. The judge stated that NJT was a "sue and be sued" public entity, which is an entity that is separate and distinct from the departments and agencies of the State's government. The judge again determined that filing of the NOC with the NJTD was not a filing with NJT, and it was not substantial compliance with the TCA's NOC requirements.

On October 24, 2016, plaintiff settled with the Miller defendants, and thereafter dismissed her claims against Cocca.

Cocca dismissed the claims he asserted against defendants in his separate action. Plaintiff's appeal followed.

II.

We note initially that the record does not disclose whether Cocca's claims against American Commerce Insurance Company (American Commerce) remain pending in the trial court. Rule 2:2-3(a)(1) provides that appeals from the trial divisions of the Superior Court may only be taken from "final judgments." To be appealable as of right under Rule 2:2-3(a)(1), the judgment or order must be final as to all parties and all issues. Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 549 (App. Div. 2007) (citing S.N. Golden Estates, Inc. v. Cont'l Cas. Co., 317 N.J. Super. 82, 87 (App. Div. 1998)).

The rule of finality applies to all issues and all parties in consolidated actions. Prudential Prop. Ins. v. Boylan, 307 N.J. Super. 162, 165 n.2 (App. Div. 1998); Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.2 on R. 2:2-3 (2017). Therefore, if Cocca's claims against American Commerce remain pending in the trial court, the January 22, 2016 order from which plaintiff has appealed is not final and appealable as of right under Rule 2:2-3(a)(1), and can only be reviewed by leave granted pursuant to Rule 2:2-4.

We have determined that in the event Cocca's claims against American Commerce remain pending in the trial court, leave to appeal from the trial court's order of January 22, 2016, as within time should be granted pursuant to Rule 2:4-4(b)(2). Plaintiff's appeal was taken within the time for appeals from final judgments, the issues have been fully briefed, and good cause exists to resolve the issues that plaintiff has raised at this time.

III.

On appeal, plaintiff argues: (1) the trial court erred by granting defendants' motion to dismiss because she presented evidence sufficient to establish substantial compliance with the NOC requirements of the TCA; (2) the trial court should have estopped defendants from asserting a lack of proper service of the NOC; and (3) the court should have granted her motion for reconsideration because its decision was palpably incorrect and new information had been provided.

We note initially that when the court reviews an order dismissing a complaint pursuant to Rule 4:6-2(e), we exercise de novo review and "owe[] no deference to the trial court's conclusions." Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 349 (App. Div. 2012) (quoting Rezem Family Assocs. LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011)). In reviewing a motion to dismiss under Rule 4:6-2(e), our

review "is limited to examining 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) (citing Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)).

The TCA "is the statutory mechanism through which the [State] effected a [limited] waiver of sovereign immunity." D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 133 (2013). Under the TCA, a claimant may not bring suit against a public entity or public employee unless the claimant presents the public entity involved with a NOC within ninety days after the cause of action accrues. N.J.S.A. 59:8-7; N.J.S.A. 59:8-8. Generally, a cause of action accrues when the alleged negligent act or omission occurred. Beauchamp v. Amedio, 164 N.J. 111, 117 (2000) (citing Fuller v. Rutgers, The State Univ., 154 N.J. Super. 420, 423 (App. Div. 1977); Torres v. Jersey City Med. Ctr., 140 N.J. Super. 323, 326 (Law Div. 1976)).

The TCA differentiates between a "public entity" and "the State." N.J.S.A. 59:1-3. A public entity "includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State." Ibid. The State is defined as "the State and any office, department, division, bureau, board, commission or agency of the State," but does not include "any such entity which is statutorily

authorized to sue and be sued." Ibid. NJT is authorized under N.J.S.A. 27:25-5(a) to "sue and be sued." See also Muhammad v. N.J. Transit, 176 N.J. 185, 193 (2003) (holding that NJT is a "sue and be sued" public entity under the TCA).

In this case, there is no dispute that plaintiff's cause of action accrued on July 14, 2013, the date of the accident. Consequently, plaintiff had until October 11, 2013, to file a NOC with NJT. It is undisputed that plaintiff never filed a NOC with NJT. Rather, plaintiff filed a NOC with the NJTD, an entity that is not the public entity involved, and is legally distinct from NJT. By failing to file a NOC with NJT within ninety days after the cause of action accrued, plaintiff is precluded from asserting any claims against defendants with regard to the accident of July 14, 2013.

We note that in certain limited circumstances, a claimant may move in the trial court for leave to file a late NOC. N.J.S.A. 59:8-9. To succeed on such motion, the claimant must demonstrate that the late filing was the result of "extraordinary circumstances" and that the public entity "has not been substantially prejudiced" by the delay. Ibid.

The statute does not define the term "extraordinary circumstances." However, courts have held that a claimant's failure to conduct a reasonable investigation to determine the

public entity actually responsible for the claimant's injury does not constitute an extraordinary circumstance that would permit the filing of a NOC beyond the time prescribed by the TCA. D.D., 213 N.J. at 153 (citing Blank v. City of Elizabeth, 162 N.J. 150, 152-53 (1999); Leidy v. Cty. of Ocean, 398 N.J. Super. 449, 454 (App. Div. 2008)).

As noted, the TCA requires that a claimant serve a NOC upon the public entity allegedly involved in the matter. N.J.S.A. 59:8-7; N.J.S.A. 59:8-8. A claimant's unfamiliarity with the TCA's requirements does not, however, excuse the failure to file the NOC with the correct public entity. S.P. v. Collier High Sch., 319 N.J. Super. 452, 465 (App. Div. 1999). "[I]gnorance of the [TCA's requirements] . . . 'without more, does not constitute sufficient reason for . . . delay.'" Ibid. (quoting O'Neill v. City of Newark, 304 N.J. Super. 543, 552 (App. Div. 1997)). To obtain permission to file a late notice of claim, the claimant must establish that the correct entity's identity was obscured or misleading. Lowe v. Zarghami, 158 N.J. 606, 628 (1999).

In this case, plaintiff argues that it was unreasonable for NJT to "insist that persons wishing to file a claim against it use its particularized [NOC] form and then not make that form readily available via the internet." Plaintiff also argues it was unreasonable for NJT to provide "no information on its website for

how and where to file a notice of claim." These arguments are unavailing.

As the motion judge determined, plaintiff has not shown "anything on [NJT's] website that would mislead people into thinking that they can file a [NOC] with the [NJTD] and not [with] [NJT]." The NJT website does not explain the procedure to be followed. However, there is no evidence that NJT attempted to conceal its identity or that the NJTD misled plaintiff with regard to the filing of the NOC. We conclude there is no extraordinary circumstance to justify the filing of a late NOC.

IV.

Plaintiff argues that the trial court erred by dismissing her claims against defendants because she substantially complied with the NOC requirements of TCA. We disagree.

Substantial compliance is an equitable doctrine intended "to avoid the harsh consequences that flow from technically inadequate actions that nonetheless meet a statute's underlying purpose." Cty. of Hudson v. State, Dep't of Corr., 208 N.J. 1, 21 (2011) (quoting Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 352 (2001)).

To warrant application of the doctrine, a party must 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 [a plaintiff's]

claim; and (5) a reasonable explanation why there was not strict compliance with the statute.

[Ferreira v. Rancocas Orthopedic Assoc., 178 N.J. 144, 151 (2003).]

Although the substantial compliance doctrine has occasionally been applied to matters under the TCA, the doctrine "has been limited carefully to those situations in which the notice, although both timely and in writing, had technical difficulties that did not deprive the public entity of the effective notice contemplated by the statute." D.D., 213 N.J. at 159. In D.D., the Court found "no basis to extend the substantial compliance theory so as to relieve plaintiffs of their obligation to comply with the statute's requirement that they file a notice, and that it be in writing." Id. at 159–60.

Plaintiff maintains, however, that the NOC that Cocca filed with NJT establishes that she substantially complied with the TCA's NOC requirements. In support of that argument, plaintiff cites Speer v. Armstrong, 168 N.J. Super. 251 (App. Div. 1979). In Speer, the plaintiff was injured after falling over the root of a tree that was owned by a public entity, but located on private property. Id. at 254. Plaintiff filed a lawsuit against the property owner, who in turn filed a third-party complaint against the public entity. Ibid.

Plaintiff then moved in the trial court to amend her complaint to assert a claim against the public entity, and the court denied the motion and dismissed the complaint. On appeal, we held that plaintiff was not required to file a timely NOC to proceed directly against the public entity. Id. at 255-56. We held that plaintiff could rely on the NOC filed by defendants as substantial compliance with plaintiff's own notice obligation. Ibid. We stated that the public entity's position was "the same whether it receive[d] the notice from plaintiff or from a third-party plaintiff." Id. at 257. In this case, however, the NOC that Cocca filed provided NJT notice of Cocca's claim. It did not provide notice of plaintiff's claim.

In support of her argument, plaintiff also cites Milacci v. Mato Realty Co., Inc., 217 N.J. Super. 297 (App. Div. 1987). In that case, one spouse filed a NOC, but the spouse who asserted a per quod claim did not file a NOC. Id. at 299. We determined that the spouse asserting the per quod claim did not have to file a separate NOC because "any investigation made by the State to determine the merits of the wife's claim necessarily would cover the same ground as the per quod claim of the husband." Id. at 306.

Plaintiff's reliance on Millaci is misplaced. In this case, plaintiff is not asserting a per quod claim. She is alleging she sustained injuries to her head, back, neck, knees, and legs, which

were not identified or referenced in Cocca's NOC. Although plaintiff was identified in Cocca's NOC as a spouse and witness, the NOC did not provide the required information about plaintiff's claim and did not relieve plaintiff of her statutory obligation to file her own NOC with regard to the accident of July 14, 2013. See Pilonero v. Twp. of Old Bridge, 236 N.J. Super. 529, 534 (App. Div. 1989) (finding that despite one accident, there existed "two entirely separate claims by different parties with different injuries and damages are involved").

We therefore conclude that the motion judge correctly determined that the doctrine of substantial compliance does not apply in this case. Plaintiff's filing of a NOC with the NJTD and Cocca's NOC do not constitute substantial compliance with the TCA's NOC requirements.

V.

Next, plaintiff argues the court should have estopped defendants from asserting that she did not properly serve her NOC. Plaintiff argues that it is fundamentally unfair to "punish" her with the "drastic sanction" of dismissal with prejudice since defendants failed to show that they were prejudiced by her failure to file the NOC with NJT within the time prescribed by the TCA.

In support of her argument, plaintiff relies upon Murray v. Brown, 259 N.J. Super. 360 (Law Div. 1991). In Murray, the Law

Division noted that even though a party fails to show substantial compliance with the TCA's NOC requirements, a public entity nevertheless may be estopped from asserting such failure if "the interest of justice, morality and common fairness dictate that course." Id. at 363-64 (citing Anske v. Borough of Palisades Park, 139 N.J. Super. 342, 350-51 (App. Div. 1976)).

The plaintiff in Murray filed a timely notice of claim, containing all of the information required by the TCA. Id. at 362. Defendants moved to dismiss the complaint because the plaintiff failed to comply with N.J.S.A. 59:8-6. Ibid. The court held:

[w]hen a governmental entity receives a claim, however defective, it is unreasonable for it to essentially disregard the claim because of deficiencies. The interests of justice and fairness require that the claimant be promptly advised of the deficiencies and that failure to cure will result in rejection of the claim by the entity and a possible loss of the right to maintain a civil action.


[Id. at 365.]

Plaintiff's reliance on Murray is misplaced. Here, plaintiff did not submit a deficient NOC to NJT. Rather, plaintiff failed to file any NOC with the NJT, the public entity involved in the incident that gave rise to her claim. Thus, defendants may not be estopped from asserting plaintiff's failure to comply with the statutory NOC requirements.

Plaintiff also contends the trial court erred by failing to grant her motion for reconsideration. This argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION