SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5291-15T1

STEPHEN STANZIANO,

Plaintiff-Appellant,

v.

MICHAEL FRESSOLA and
ELENA ZSOLDOS,

Defendants,

and

MANCHESTER TOWNSHIP,

Defendant-Respondent.

Submitted February 27, 2018 – Decided April 25, 2018

Before Judges Yannotti and DeAlmeida.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1245-13.

Lueddeke Law Firm and Lynda Lee, attorneys for appellant (Karri Lueddeke, on the brief).

Barker, Gelfand & James, PC, and Kevin B. Riordan, attorneys for respondent (Todd J. Gelfand, on the brief).

PER CURIAM

Plaintiff Stephen Stanziano appeals from an order entered by the trial court on April 11, 2016, which denied his motion for de novo review of a decision terminating his employment with Manchester Township (Township), and an order entered by the court on June 24, 2016, which granted summary judgment to defendants on plaintiff's breach-of-contract claim. We affirm.

I.

We briefly summarize the pertinent facts and procedural history. The Township employed plaintiff as its Director of the Department of Public Works from 1995 to 2013, and he acquired tenure in that position. In the period relevant to this action, Michael Fressola served as the Mayor of the Township, and Elena Zsoldos was the Township's Business Administrator.

In February 2013, plaintiff filed a complaint in the Law Division against the Township, Fressola, and Zsoldos alleging violations of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42; the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 43:19-1 to -8; invasion of privacy; emotional distress; political discrimination; promise to pay; and civil conspiracy.

On May 10, 2013, Fressola issued disciplinary charges against plaintiff seeking to terminate his employment for cause. Plaintiff was charged with: engaging in retaliatory conduct, unlawfully

considering race in a personnel matter, failing to care for departmental equipment, attempting to engage in a conspiracy to falsify federal funding, engaging in personal business while on duty, failing to cooperate with purchasing procedures, unnecessarily delaying the repair of police vehicles, and making false and misleading statements to employees regarding the Township's "open door policy." Plaintiff was immediately suspended with pay.

On May 22, 2013, defendants filed an answer to plaintiff's complaint. On that date, plaintiff filed his first amended complaint, adding a claim for deprivation of constitutional rights. Plaintiff also alleged that the Township filed the disciplinary charges in retaliation for his assertion of a claim under CEPA.

On June 12, 2013, defendants answered the first amended complaint. Plaintiff later filed a second amended complaint adding a claim alleging that defendants violated certain statutes by seeking his removal.

In June 2013, plaintiff sought the issuance of an order to show cause in the trial court arguing that he could not be removed from his tenured position except for good cause upon written charges filed with the municipal clerk and after a public, fair and impartial hearing. Judge Arnold B. Goldman entered the order

and required defendants to show cause why the relief requested should not be granted. However, on June 26, 2013, plaintiff withdrew the application.

In July 2013, plaintiff filed a motion seeking to enjoin the Township from proceeding with the scheduled disciplinary hearing. Plaintiff argued that there should be no departmental or Township-level administrative hearing. He asserted that the court should determine in the first instance whether the Township had good cause to seek his removal.

In response, defendants asserted that the Superior Court did not have jurisdiction to consider the charges at that time. Defendants noted that the court would have jurisdiction to consider any final decision on the charges in the exercise of its prerogative writs jurisdiction under Rule 4:69-1.

Judge Goldman heard oral argument on plaintiff's motion. The judge placed his decision on the record. The judge determined that plaintiff's request for judicial review was premature. The judge stated that "if the matter comes back and arises after a hearing and comes into a trial, the [c]ourt will make determinations with regard to the merits. But at this point it appears that a hearing, fair and impartial, should be had." The judge entered an order denying plaintiff's motion in its entirety as to "all forms of relief requested."

On July 10, 2013, Fressola filed additional disciplinary charges against plaintiff. These charges included: insubordination, neglect of duty, and making false and misleading statements to the media regarding his suspension. The Township appointed an attorney to act as hearing officer and, thereafter, the attorney conducted the administrative hearing. Plaintiff did not participate.

On August 23, 2013, the hearing officer issued his decision finding that twelve of the charges had been sustained. The hearing officer recommended that the Township terminate plaintiff's employment. On August 26, 2013, Fressola wrote to plaintiff and informed him that he was accepting the hearing officer's recommendation, and that plaintiff was terminated from his position, effective September 17, 2013.

On October 31, 2013, plaintiff's attorney sent a letter to Judge Goldman and defendants stating:

> Plaintiff hereby exercises his right to Superior Court de novo review of this termination. This right either arises under N.J.S.A. 40A:9-161 which plaintiff contends applies or under plaintiff's right to seek prerogative writ review which the defendants concede is applicable. . . . It does not appear necessary to amend plaintiff's complaint to seek this de novo review. However, if defendants' counsel deems it necessary I will so move immediately.

Defendants did not reply to the letter.

On November 27, 2013, plaintiff filed a third amended complaint alleging defendants had breached his employment agreement with the Township. On December 10, 2013, defendants answered the third amended complaint. Thereafter, plaintiff filed a motion for leave to amend his complaint to assert a claim for de novo review of the Township's decision to terminate his employment, but he withdrew the motion.

On May 27, 2015, plaintiff filed a motion for leave to file a fourth amended complaint and for change of venue based upon plaintiff's allegation that the hearing officer had a conflict of interest due to his association with the law firm that was appointed in 2013 to serve as the Township's municipal prosecutor. In his proposed complaint, plaintiff alleged his termination violated N.J.S.A. 40:69A-43(c) and N.J.S.A. 40A:9-161. Plaintiff also alleged that defendants were subject to and violated the removal procedures for tenured employees in N.J.S.A. 40A:9-161. He alleged that the disciplinary hearing conducted was a legal nullity, and his removal was arbitrary, capricious, and unreasonable. In addition, plaintiff added a claim against the hearing officer for legal malpractice.

On June 26, 2015, Judge Craig L. Wellerson heard oral argument on plaintiff's motion. Defendants argued, among other things, that the court did not have jurisdiction to undertake de novo review

of plaintiff's removal because plaintiff had never filed a complaint seeking such review. On July 24, 2015, Judge Wellerson entered an order denying plaintiff's motion. Thereafter, Judge Goldman and Judge Wellerson recused themselves. The matter was assigned to Judge Robert E. Brenner.

In April 2016, the parties filed cross-motions on the issue of whether plaintiff was entitled to de novo review of his termination. Judge Brenner later heard oral argument on the motions and entered an order, which denied plaintiff's motion for de novo review of plaintiff's removal and granted the Township's motion to preclude such review.

Thereafter, the parties resolved all of plaintiff's claims except his claim that the Township breached his employment contract by failing to provide him with severance pay and his contention that he was entitled to de novo judicial review of the Township's decision to terminate his employment. The parties later filed cross-motions for summary judgment on the breach-of-contract claim. On June 24, 2016, Judge Brenner heard oral argument on the motions. The judge entered an order, which denied plaintiff's motion and granted defendant's motion. Plaintiff's appeal followed.

On appeal, plaintiff raises the following arguments:

[POINT I]
THIS COURT SHOULD RULE AS A MATTER OF LAW THAT THE PLAINTIFF'S DISCIPLINARY HEARINGS ARE A NULLITY DUE TO THE FACT THAT THE HEARING OFFICER . . . HAD A CONFLICT OF INTEREST

A. PLAINTIFF WAS DEPRIVED OF A FAIR, PUBLIC, AND IMPARTIAL HEARING

B. THE HEARING OFFICER . . . HAD A CONFLICT OF INTEREST

C. THE DISCIPLINARY HEARING WAS A LEGAL NULLITY AS A RESULT OF THE CONFLICT OF INTEREST

[POINT II]
THERE WAS NO GOOD CAUSE FOR PLAINTIFF'S REMOVAL AS REQUIRED BY N.J.S.A. 40A:9-154.6 AND DEFINED BY N.J.S.A. [40:69A-43(c)]

[POINT III]
THE TRIAL COURT ERRED IN DENYING PLAINTIFF THE RIGHT TO DE NOVO REVIEW OF THE DISCIPLINARY HEARINGS

A. THERE IS NO REQUIREMENT FOR PLAINTIFF TO FILE AN ACTION IN LIEU OF A PREROGATIVE WRIT WHEN HIS RIGHT TO DE NOVO REVIEW IS PRESCRIBED BY STATUTE

B. PLAINTIFF JUSTIFIABLY RELIED UPON [THE FIRST JUDGE'S] RULING ON THE RECORD ON AUGUST 9, 2013 THAT PLAINTIFF WOULD HAVE A DE NOVO REVIEW PURSUANT TO N.J.S.A. 40A:9-161

C. PLAINTIFF'S COUNSEL CONFIRMED THE COURT'S RULING IN THIS REGARD BY LETTER DATED OCTOBER 31, 2013

D. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF HAD TO FILE AN ACTION IN LIEU OF PREROGATIVE WRIT IN ORDER TO OBTAIN DE NOVO REVIEW

E. THE TRIAL COURT ERRED IN FINDING THAT [THE SECOND JUDGE'S] DECISION DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT CONSTITUTED THE LAW OF THE CASE WITH REGARD TO [THE HEARING OFFICER'S] CONFLICT OF INTEREST

[POINT IV]
THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF'S DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS DID NOT WARRANT RELAXATION OF THE [FORTY-FIVE] DAY TIME PERIOD FOR FILING AN ACTION IN LIEU OF A PREROGATIVE WRIT

[POINT VI]
THE TRIAL COURT ERRED IN GRANTING DEFENDANT SUMMARY JUDGMENT ON THE EMPLOYMENT AGREEMENT CLAIM

A. THE TRIAL COURT ERRED IN RELYING UPON [McGarry v. St. Anthony of Padua Roman Catholic Church, 307 N.J. Super. 525 (App. Div. 1998)]

B. THE TRIAL COURT SHOULD HAVE ENFORCED THE AGREEMENT AS IT WAS WRITTEN AND IN ACCORDANCE WITH [Fields v. Thompson Printing Co., 363 F.3d 259 (3d. Cir. 2004)]

C. EVEN IF THE COURT INSERTS AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING INTO THE CONTRACT, WHETHER PLAINTIFF BREACHED THE COVENANT IS A JURY QUESTION

II.

We turn first to plaintiff's contention that he is entitled to de novo review of the Township's decision to remove him from his tenured position. He contends he was not required to file an action in lieu of prerogative writs because he had a statutory right to de novo review under N.J.S.A. 40A:9-161.

Here, the Township acted to remove plaintiff pursuant to N.J.S.A. 40A:9-161, which provides that "[t]he Superior Court shall have jurisdiction to review the determination of the governing body, which court shall hear the cause de novo on the record below and affirm, modify or set aside the determination." (emphasis added). However, as Judge Brenner determined, in order to obtain such review, a person aggrieved by the governing body's determination must file an action in lieu of prerogative writs pursuant to Rule 4:69-1. The rule permits parties to seek review of all actions of municipal agencies by the Law Division. Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 378 (1996).

Moreover, Rule 4:69-6(a) requires that, except as otherwise provided by paragraph (b) of the rule, an action in lieu of prerogative writs must be filed within forty-five days after the right to review a municipality's decision has accrued. In addition, Rule 4:69-5 requires a party filing the action to exhaust administrative remedies, "[e]xcept where it is manifest that the interest of justice requires otherwise."

On appeal, plaintiff argues that because his right to de novo review is provided by statute, he was not required to comply with the rules governing actions in lieu of prerogative writs. Plaintiff also argues that there is no express statute of limitations in N.J.S.A. 40A:9-161 or any requirement for a formal pleading to

invoke the right to de novo judicial review. We find no merit in these contentions.

In Mason v. City of Hoboken, 196 N.J. 51, 69 (2008), the Court held that the requirements in the rules governing actions in lieu of prerogative writs apply to the review of municipal actions where the statute conferring jurisdiction on the court does not otherwise specify a different procedure or statute of limitations. The Court explained, "Rule 4:69 in general, governs challenges to municipal and municipal-agency actions, all of which are subject to the Rule's [forty-five]-day limit." Ibid. (citing Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:69 (2008)).

This principle applies here. N.J.S.A. 40A:9-161 provides that the court may review a municipality's decision to remove a tenured employee. However, N.J.S.A. 40A:9-161 does not specify the procedure for obtaining such review or the time in which it must be sought. Therefore, under Mason, the rules governing actions in lieu of prerogative writs apply.

In support of his argument that he was not required to file a timely action in lieu of prerogative writs to challenge the decision to terminate his employment, plaintiff cites Pepe v. Township of Springfield, 337 N.J. Super. 94, 95 (App. Div. 2001). In that case, a firefighter who was convicted on disciplinary

charges sought de novo review by the Superior Court of the action pursuant to N.J.S.A. 40A:14-22, but he did not file an action in lieu of prerogative writs seeking such review. Ibid.

N.J.S.A. 40A:14-22 provides that the Superior Court may review such a disciplinary conviction. The statute also states in pertinent part:

> Such review shall be obtained by serving a written notice of an application therefor upon the officer or board whose action is to be reviewed within [ten] days after written notice to the member or officer of the conviction. The officer or board shall transmit to the court a copy of the record of such conviction, and of the charge or charges for which the applicant was tried. The court shall hear the cause de novo on the record below and may either affirm, reverse or modify such conviction.
>
> [Ibid.]

Plaintiff's reliance upon Pepe is misplaced. As stated previously, unlike N.J.S.A. 40A:14-22, N.J.S.A. 40A:9-161 does not specify the procedure for obtaining judicial review of the municipality's action, nor does it require the aggrieved employee to file the request for review within any particular time. Thus, the procedural requirements pertaining to actions in lieu of prerogative writs apply to plaintiff's removal.

In further support of his argument, plaintiff cites Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338 (2013). In that

case, a police officer in a non-civil service municipality sought de novo review by the Superior Court of a hearing officer's recommendation to terminate his employment pursuant to N.J.S.A. 40A:14-150. Id. at 343. The Court in Ruroede discussed the applicable procedures for obtaining judicial review in these disciplinary matters. Id. at 354-55. The Court noted that if the charges are upheld after a disciplinary hearing, the aggrieved officer could seek review in the Superior Court. Id. at 355 (citing N.J.S.A. 40A:14-150).

The Court did not specifically address the issue of whether the rules governing actions in lieu of prerogative writs apply. However, like N.J.S.A. 40A:14-22, N.J.S.A. 40A:14-150 provides that judicial review of the disciplinary decision

> shall be obtained by serving a written notice of an application therefor upon the officer or board whose action is to be reviewed within [ten] days after written notice to the member or officer of the conviction. The officer or board shall transmit to the court a copy of the record of such conviction, and of the charge or charges for which the applicant was tried. The court shall hear the cause de novo on the record below and may either affirm, reverse or modify such conviction. . . .
>
> [N.J.S.A. 40A:14-150.]

In any event, as we explained previously, N.J.S.A. 40A:9-161 does not specify the procedure for seeking judicial review of a municipality's decision to remove a tenured employee. Therefore,

the rules governing actions in lieu of prerogative writs apply to such actions. Thus, plaintiff's reliance on Ruroede is misplaced.

In this case, plaintiff was required to file a pleading seeking judicial review of the Township's decision to remove him from his position within forty-five days after the decision was made, which was August 26, 2013. Plaintiff failed to do so. The trial court correctly determined that, under the circumstances, plaintiff was not entitled to de novo review of the Township's decision.

III.

Plaintiff further argues that the October 31, 2013 letter from his attorney to Judge Goldman was sufficient to invoke the court's review jurisdiction under Rule 4:69-1. In that letter, plaintiff's attorney stated that plaintiff "hereby exercises his right to Superior Court de novo review of this termination." The record shows that in July 2013, plaintiff sought, among other things, relief in furtherance of an action in lieu of prerogative writs. At that time, plaintiff was seeking review of the disciplinary charges, which the Township had not yet adjudicated.

The request for review was premature because plaintiff had not yet exhausted his administrative remedies. Moreover, the letter of October 31, 2013, was not a pleading, and it was

insufficient to invoke the court's jurisdiction to review the Township's final administrative action.

Plaintiff also argues he was justified in relying upon Judge Goldman's statement that, although the court was denying plaintiff's July 2013 motion for review of the administrative charges as premature, the court could review any final termination decision by the Township on the charges. Plaintiff claims Judge Goldman's statement indicated he had the right to de novo review of any final decision on his removal, and he need not file a pleading seeking such review.

Again, we disagree. Although the judge recognized plaintiff had a right to de novo review of the decision, the judge never indicated he could obtain such review without complying with the applicable court rules.

Plaintiff also argues that the trial court should have extended the time for filing an action in lieu of prerogative writs. Rule 4:69-6(c) allows the court to enlarge the forty-five-day limitations period for filing an action in lieu of prerogative writs "where it is manifest that the interest of justice so requires."

Our Supreme Court has identified three general categories of cases where the "interest of justice" exception applies: "(1) important and novel constitutional questions; (2) informal or ex

parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975). None of these exceptions apply in the present matter.

As Judge Brenner found, plaintiff's removal raises no novel constitutional questions, and there is no public interest at stake in this dispute. The judge aptly observed that this is "purely a private personnel matter" between the Township and plaintiff. The judge correctly determined that there was no basis under the Brunetti standards to relax the forty-five-day limitations period in Rule 4:69-6(a).

IV.

Next, plaintiff argues that the trial court erred by granting summary judgment to defendants on his breach-of-contract claim. Plaintiff relies upon Article XV of his employment agreement, which provides:

> The Township shall notify each applicable Department Head, in writing [ninety] days prior to the end of their appointment as to the status of their ensuing reappointment. In the event the Department Head is not re-appointed, or is terminated from employment, they are entitled to their current salary for ninety (90) days, except where statutory provisions mandate otherwise, continuation of all health benefits and any and all other terms and conditions of this contract.

In reviewing a trial court's decision to grant or deny a motion for summary judgment, we conduct a de novo review, using "the same standard that governs trial courts in reviewing summary judgment orders." Hanisko v. Billy Casper Golf Mgmt., Inc., 437 N.J. Super. 349, 355 (App. Div. 2014) (quoting Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998)). We must first determine whether there are genuinely disputed issues of fact. Ibid. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). If there are none, we must then decide whether the moving party is entitled to judgment as a matter of law. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987).

Here, Judge Brenner found that plaintiff's employment agreement included an implied covenant of good faith and fair dealing, and plaintiff breached that implied covenant by engaging in conduct that resulted in his removal. The judge therefore determined that plaintiff forfeited his right to receive severance pay under Article XV of the agreement.

In support of this decision, the judge relied upon McGarry, 307 N.J. Super. at 525. In that case, the plaintiff entered into an employment contract with the defendant church, which required the church to give plaintiff thirty-days prior notice of termination and to continue paying him during that period if it

wanted to terminate the plaintiff immediately. Id. at 529. The plaintiff was later arrested and charged with certain criminal offenses. Ibid. The church terminated the plaintiff's employment immediately and refused to pay him pursuant to the agreement. Ibid.

The plaintiff filed suit against the church, seeking the wages he would have received had he been given the thirty-day notice provided for in the agreement. Id. at 532. The court found that because the plaintiff breached the implied covenant of good faith and fair dealing, he was not entitled to be paid in the thirty-day notice period. Id. at 536.

Plaintiff argues that the judge erred by relying upon McGarry because he did not engage in any criminal conduct. We are not persuaded by this argument. Here, the judge correctly found that because defendant engaged in misconduct that resulted in his removal, he breached the implied covenant of good faith and fair dealing in his employment agreement and could not recover severance pay under the agreement.

Plaintiff further argues the trial court should have enforced the terms of the employment agreement as written. In support of this contention, he relies upon Fields, 395 F.3d at 259. In Fields, the court recognized that every contract in New Jersey contains an implied covenant of good faith and fair dealing. 363 F.3d at

270. The court explained, however, that the covenant cannot alter the express provisions of a written agreement. Id. at 271.

In Fields, the plaintiff had entered into an employment contract with the defendant corporation, which included a non-forfeiture clause. Id. at 263. The clause stated, "This [c]ontract shall be non-terminable by . . . [defendant]. In the event . . . [defendant] shall terminate the employment of . . . [plaintiff], all of the benefits as contained herein shall continue in accordance with the terms and provisions of this Agreement." Ibid. The contract did not differentiate between termination with or without cause. Ibid.

Citing McGarry, the Fields defendants argued that they should be relieved of their obligations under the employment contract because the plaintiff had engaged in misconduct. Id. at 272. The court held, however, that the defendants' failure to pay the required compensation constituted a breach of the employment contract. Id. at 273. In so holding, the court distinguished McGarry. The court stated, "[u]nlike McGarry, here the [c]ontract speaks specifically to . . . [what happens to the plaintiff's benefits upon termination]." Ibid.

Thus, Fields does not support plaintiff's argument. In that case, the employment contract expressly stated that the employee was entitled to benefits notwithstanding his termination. Here,

the employment agreement did not expressly provide that plaintiff would be paid severance pay in the event he was terminated for cause.

V.

Plaintiff contends the court erred by finding that the hearing officer did not have a conflict of interest, which precluded him from conducting a fair hearing on the disciplinary charges. He contends the conflict of interest rendered the hearing a legal nullity.

We note that the issue of whether the hearing officer was disqualified from conducting the hearing in this matter is an issue that could have been raised in a de novo review of the Township's removal decision. As we have determined, plaintiff was not entitled to de novo review of the Township's decision because he failed to file a timely request for such review under Rule 4:69-4 and Rule 4:69-6(a).

In any event, we conclude plaintiff's arguments on this issue are without sufficient merit to warrant extended comment. R. 2:11-3(e)(1)(E). However, we add the following.

In support of his argument, plaintiff cites N.J.S.A. 40A:9-22.5(d), a provision of the Local Government Ethics Law (LGEL), N.J.S.A. 40A:9-22.1 to -22.5. The statute provides that "[n]o local government officer or employee shall undertake any

employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties." N.J.S.A. 40A:9-22.5(d).

The statute does not apply to the Township's hearing officer. As the Office of the Attorney General found in an opinion published shortly after the LGEL was enacted, "an attorney who serves the agency in a special, limited capacity . . . is more akin to an independent contractor and [is] . . . not . . . subject to the [LGEL]."

Moreover, the attorney was not precluded from acting as the hearing officer under the principles enunciated in Kane Props., LLC v. City of Hoboken, 214 N.J. 199, 221 (2013). There, the Court explained that the "appearance of impropriety" test continues to apply to judicial and municipal officials acting in a quasi-judicial capacity, even though it no longer applies to attorneys generally. Id. at 220-21.

Thus, the applicable standard, which is the same standard that applies to judges, is whether "a reasonable, fully informed person [would] have doubts about the judge's impartiality." Id. at 221. No showing of actual prejudice is required; "an 'objectively reasonable' belief that the proceedings were unfair is sufficient." Id. at 222 (quoting DeNike v. Cupo, 196 N.J. 502, 517 (2008)).

Here, plaintiff argues that the hearing officer would be inclined to rule in favor of the Township and against the plaintiff, because the Township previously had appointed his law firm to act as its municipal prosecutor. We disagree.

We are convinced that a reasonable, fully informed person would not have doubts as to the hearing officer's ability to conduct the hearing on plaintiff's disciplinary charges in a fair and impartial manner. Moreover, there is no evidence in the record that the hearing officer was anything other than fair and impartial in conducting the hearing and rendering his decision on the charges.

Affirmed.