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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1687-21

CRYSTAL MONTALVO,

Plaintiff-Appellant,

v.

IMPERIAL DADE, VIRGINIA WOTMAN, and ALEXANDRA BERKOWITZ,

Defendant-Respondents.

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Argued January 24, 2023 – Decided June 20, 2023

Before Judges Sumners and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2440-21.

Fred Shahrooz-Scampato argued the cause for appellant (Law Office of Fred Shahrooz-Scampato, PC, and Leslie A. Farber, LLC, attorneys; Fred Shahrooz-Scampato and Leslie A. Farber, of counsel and on the briefs).

Robyn L. Aversa argued the cause for respondents (Jackson Lewis, PC, attorneys; Robyn L. Aversa, of counsel and on the brief; Kurt J. Ferdenzi, on the brief).

PER CURIAM

Plaintiff Crystal Montalvo sued Imperial Bag and Paper Co., LLC,[1] her employer, Virginia Wotman, her supervisor, and Alexandra Berkowitz, Imperial's Vice President of Human Resources, claiming they violated and interfered with her right to leave afforded by the Family Leave Act (FLA), N.J.S.A. 34:11B-1 to -16, that was needed due to the childcare issues she faced in the summer of 2020, stemming from the COVID-19 pandemic. The motion judge granted defendants' Rule 4:6-2(e) motion for failure to state a claim and dismissed Montalvo's complaint without prejudice.

Montalvo appeals,[2] arguing the judge erred by failing to give her the benefit of all favorable inferences stemming from a work-at-home provision in

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[1] Improperly pled as "Imperial Dade."

[2] Montalvo did not file an amended complaint, but instead filed this appeal. A dismissal without prejudice, absent a specific vacation provision, is generally appealable as of right, and vacation of the dismissal is not required to be sought before appealing. See Rubin v. Tress, 464 N.J. Super. 49, 56 n.3 (App. Div. 2020) (explaining "[a]lthough orders of dismissal without prejudice, which adjudicate[] nothing, invite questions as to their finality" under Rule 2:2-3(a)(1) and thus require "finality review in the Clerk's Office," if that order "disposes of all issues as to all parties" it may be appealable as of right, "depending on the circumstances") (quotations and citations omitted); see also Morris County v. 8 Court Street Ltd., 223 N.J. Super. 35, 39 (App. Div. 1988) (holding that a dismissal without prejudice may operate as a final judgment).

a pandemic-related executive order and her FLA right to family leave because her childcare provider was unavailable due to the pandemic. We disagree and affirm.

Beginning in the spring of 2020, in an effort to curb the catastrophic effects of COVID-19, Governor Phillip Murphy signed numerous executive orders. One such declaration, Executive Order 107, issued on March 21, 2020, temporarily closed all schools in New Jersey. Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020). The order also directed businesses and nonprofits in New Jersey, whether closed or open to the public, to accommodate their workforce, wherever practicable, to work from home. Ibid.

On March 25, Governor Murphy issued Executive Order 110, limiting access to professional childcare to "essential persons[,]" including, but not limited to, health care workers, police officers, and essential retail businesses. Exec. Order No. 110 (Mar. 25, 2020), 52 N.J.R. 828(a) (Apr. 20, 2020). That same day, someone from Imperial purportedly called Montalvo to advise her that she had been furloughed and a confirming letter would be mailed to her. (Pa4).

On May 30, Executive Order 149 was issued, rescinding Executive Order 110 by permitting professional childcare to be opened to the public as of June

15, and youth summer camps to be opened to the public as of July 6. Exec. Order No. 149 (May 29, 2020), 52 N.J.R. 1297(a) (July 6, 2020).

On August 13, Executive Order 175 was issued, superseding Executive Order 107's provision regarding school and childcare and ordering that all schools reopen on either a full or hybrid in-person basis by the fall of 2020. Exec. Order No. 175 (Aug. 13, 2020), 52 N.J.R. 1699(a) (Sep. 21, 2020).

The following turn of events, all in 2020 and related to the pandemic, were alleged in Montalvo's complaint.

On or about March 22, Montalvo learned that the childcare sitter for her daughter would be unable to watch her daughter anymore due to "medical reasons." Two days later, Montalvo went to work at Imperial to discuss the childcare issue with her superiors. She asserts that, "[w]hile there, there were several discussions . . . about allowing [] Montalvo to take family leave"; "[h]owever, without any decision being made, her supervisors advised [her] to go home for the day and that they would tell her how she could go about taking the family leave."

Montalvo's further alleged that in April 2020, during her furlough, Wotman called her several times to ask her to come back to work. According to Montalvo, she responded that she did not have childcare and was fully capable

of working from home like all the others in her department, yet Wotman rejected her request for a work-from-home accommodation. Montalvo claimed Wotman denied the request by asking, "How would I know you are working?"

During the last week of June, Montalvo alleged she received a call from Nelson Figueroa, Imperial's accounts receivables supervisor, asking if she could come back to work. Despite Montalvo telling him she did not have childcare, he replied that her return from furlough had been scheduled. On June 29, Montalvo received Imperial's "official recall notice," requiring her return to work on July 13.

Later, on July 10, Montalvo emailed Berkowitz, as well as Wotman and Figueroa, stating:

> I apologize for my delayed response, since receiving this notice I have been seeking child care and have not been successful. My childcare provider is elderly and was mandated by her healthcare practitioner to stay quarantined to limit her exposure to any unnecessary people in light of the COVID-19 pandemic. Additionally, she lives with her son who is suffering from renal failure and is scheduled for a kidney transplant. My back up childcare provider is his wife and she is going to be his donor because she is a perfect match. The surgery is scheduled for August. The family advised me that once they have recovered from the surgery, they would resume caring for my child. However, in the interim, the problem remains the same; I don't have childcare.

> The recall notification that I received states that if I do not show up for work on 7/13/2020, I will be abandoning my job. I have been a dedicated employee for more than nine years. In light of my childcare situation and the COVID-19 pandemic, I have been more than willing to work from home and have made this suggestion on several occasions. I can effectively manage [my] key responsibilities from home. Collection calls, reconciliations, [p]roblem solving and even posting.
>
> Would you consider this option until my childcare situation is resolved[,] or schools are reopened?
>
> If not, kindly advise what my options are.

Montalvo alleged she attempted to follow up by calling human resources and the company's Chief Administrative Officer (CAO), but her calls were forwarded to the voicemail boxes of the CAO and Berkowitz.

On July 13, Montalvo claimed that Wotman emailed her, advising that her start time had changed from 9:15 a.m. to 8:30 a.m. and that she was being transferred to a different location, which added approximately thirty minutes to her commute. Given that Montalvo had a history of needing extra time in the morning with her daughter, she alleged Wotman took these actions to encourage her to resign.

Montalvo received a July 17 email from Berkowitz, stating Montalvo: (1) had an additional two weeks to find childcare; (2) was due back to work on or

before August 3; and (3) failure to return to work by that date would constitute job abandonment. Another Berkowitz email to Montalvo on July 25 confirmed Montalvo's new start time and the job abandonment consequence if she did not return, which could potentially affect her unemployment benefits.

Montalvo alleges she emailed back, stating she was not refusing to work but "simply cannot do so in the office" and had "suggested on numerous occasions" that she work from home, like other employees. Montalvo contended Imperial "ignored her letter and again refused to engage in the interactive process or supply her with any information about leaves there were available for employees during the pandemic."

On August 13, Montalvo received an email terminating her employment, by way of an attached termination letter, and her final paycheck. Montalvo contends she "suffered significant economic and severe emotional distress" because of being terminated, and she felt "betrayed and humiliated in the manner in which she was dismissed."

Montalvo's complaint essentially claimed she qualified for family leave under N.J.S.A. 34:11B-3(i)(4)(a), which affords leave when a school or place of childcare of the employee's child is closed by order of a public official. In response to defendants' motion to dismiss, she argued Executive Order 107's

temporary closures of schools and directive that businesses allow employees to work from home where practicable, required defendants to grant her family leave because her daughter's childcare providers could not provide care due to the pandemic.

The motion judge, Kimberly Espinales-Maloney, granted the motion, reasoning in her written decision:

> [Montalvo] has not shown that her child's place of care was closed "by order of a public official," as required by N.J.S.A. 34:11B-3(i)(4)(a), upon which her claim relies. Indeed, in her [c]omplaint, she includes an email that she sent to her employer ([d]efendants) on July 10, 2020, stating that she did not have childcare because her typical childcare provider was experiencing health issues, and as such she could not return to work on July 13, 2020. . . . Her [c]omplaint further alleges that she was later given until August 3, 2020, to find alternative childcare and return to work. . . . She did not return to work and her employment was subsequently terminated on August 13, 2020. . . . The issue with [Montalvo's] argument is that per Executive Order No. 149, childcare was available to the general public starting June 15, 2020. While her usual childcare provider may not have been available, [Montalvo] has not supplied this [c]ourt with any law showing that her employer was required to accommodate her top childcare-provider preference, when other childcare providers were available to the general public. [Montalvo] has not shown that her usual childcare provider was closed 'by order of a public official' as required by N.J.S.A. 34:11B-3(i)(4)(a).

The judge also noted that schools are traditionally closed during the summer, and "[Montalvo] fails to cite law showing that [d]efendants were required to grant her leave request so that she could provide in-home childcare during the summer months when schools are typically closed, regardless of the [COVID]-19 pandemic." In addition, the judge agreed with defendants' position that the FLA does not contain an accommodation requirement. Upon finding Montalvo was not entitled to leave under the FLA, the judge found defendants neither violated the FLA nor interfered with her rights under the FLA and dismissed the complaint without prejudice.

Montalvo asserts the motion judge erred in failing to give her the benefit of every reasonable inference as it pertained to Executive Order 107's work-at-home provision, which employers were to put into effect to the extent "practicable." 52 N.J.R. 554(a). Specifically, she argues the judge failed to consider the adverse impact of school closures and did not give her the benefit of all reasonable inferences therefrom. Montalvo notes that Executive Order 107 temporarily closed schools in New Jersey, and the "closure of schools had an impact on [her] ability to find childcare and to return to work." See 52 N.J.R. 554(a). These arguments are without merit, and we affirm substantially for the

reasons expressed by Judge Espinales-Maloney in her thoughtful decision. We add the following brief comments.

Appellate review of a trial court's ruling on a motion to dismiss is de novo. Watson v. N.J. Dep't of Treasury, 453 N.J. Super. 42, 47 (App. Div. 2017) (citing Castello v. Wohler, 446 N.J. Super. 1, 14 (App. Div. 2016)). Since our "review is plenary[,] . . . we owe no deference to the trial judge's conclusions." State ex rel. Comm'r of Transp. v. Cherry Hill Mitsubishi, Inc., 439 N.J. Super. 462, 467 (App. Div. 2015) (citation omitted). In considering a motion under Rule 4:6-2(e), courts must accept the facts asserted in the complaint and should accord the plaintiff all favorable inferences. Watson, 453 N.J. Super. at 47. "A complaint should be dismissed for failure to state a claim pursuant to Rule 4:6-2(e) only if 'the factual allegations are palpably insufficient to support a claim upon which relief can be granted.'" Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010) (quoting Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)). "Our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Green v. Morgan Prop., 215 N.J. 431, 451 (2013) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). Therefore, the pleading must be "searche[d] . . . in depth and with liberality to ascertain whether the fundament

of a cause of action may be gleaned even from an obscure statement of claim[.]" Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)).

Neither Executive Order 107 nor any other executive order closed Montalvo's childcare provider when she chose not to return to work in August 2020, prompting her termination. The order closed schools, not her preferred provider, especially considering that day camps and professional daycares were available beginning June 15. See Exec. Order No. 149, 52 N.J.R. 1297(a). By August 3, the day Montalvo was directed to end her furlough, professional childcare had been available to the public for almost two months. See ibid. Furthermore, youth summer camps and youth programs operated by municipalities had been reopened as of July 6. See ibid. Since Montalvo's FLA claim hinged upon an assertion that her child's place of care was closed by order of a public official, the judge correctly found that her factual allegations—even if accepted as true—did not entitled her to leave under the FLA.

We fully appreciate the upheaval and financial consequences the pandemic caused families that required childcare while parents had to work away from home. Montalvo, however, did not allege she had to stay home with her daughter because of a school closure but because her preferred childcare

provider became unavailable. Accordingly, the FLA, combined with our governor's executive orders, did not obligate defendants to grant Montalvo family leave.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION