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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2000-21**

SAMAN F. KHOURY,

Plaintiff-Appellant,

v.

**TOWNSHIP OF LITTLE EGG
HARBOR, Township Employees and
Administrators, RODNEY TOZER,
Housing Inspector, BARBARA JO
CREA, Mayor (Former), MICHAEL
FROMSKY, Code Enforcement
Officer, MARK ELLIS, Zoning Officer,
MUNICIPAL COURT OF LITTLE
EGG HARBOR, Court Employees and
Administrators, DAMIAN MURRAY,
Municipal Court Judge, CITTA,
HOLZAPFEL & ZABARSKY,
Employees and Senior Partners of
CITTA, HOLZAPFEL & ZABARSKY,
JAMES W. HOLZAPFEL, ESQ.,
Senior Partner, STEVEN A.
ZABARSKY, ESQ., Senior Partner,
BRIAN K. WILKE, ESQ., Attorney,
and BARRY A. STEIBER, ESQ.,
Attorney,**

Defendants-Respondents.

Submitted January 31, 2023 – Decided June 23, 2023

Before Judges Sumners and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3091-21.

Saman F. Khoury, appellant pro se.

Rothstein, Mandell, Strohm, Halm & Cipriani, PA, attorney for respondents (Michael S. Nagurka, on the brief).

PER CURIAM

The bulkhead¹ on plaintiff's property was cited for violating a Little Egg Harbor Township ordinance. Plaintiff decided to supervise the construction correcting the violation and made an accommodation request to the township. He sought an air mattress so he could rest if his musculoskeletal condition flared up and toiletries to attend to his hygienic needs due to his diabetes. The request was denied.

Plaintiff, representing himself, subsequently made a motion before the municipal court to dismiss the citation, claiming he was discriminated against due to his disability. After initially denying the request, the municipal court

¹ Bulkheads generally serve as a barrier between a homeowner's property and a nearby body of water to prevent water from eroding the property.

later rescinded its decision. Plaintiff contends the motion remains unresolved after the municipal court adjourned multiple hearing dates.

In the meantime, plaintiff, continuing to represent himself, filed a one-count Law Division complaint alleging defendants violated his rights under 42 U.S.C. § 12182(b)(1)(E)² of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 to 12213, and N.J.S.A. 10:5-12(b) of the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to 10:5-50, by failing to accommodate his disability request for an air mattress and toiletries.³ Defendants moved under Rule 4:6-2(e) to dismiss the complaint for failing to state a claim upon which relief can be granted.

The trial court granted the motion. Procedurally, the trial court determined that, because the complaint was based upon the municipal court action, plaintiff had to appeal the municipal court's order, not file a separate Law Division complaint. See R. 4:74-3. As for the merits, the trial court determined the ordinance is not facially discriminatory because, as a waterfront

² Plaintiff's complaint inadvertently cited 42 U.S.C. § 7604, a federal antipollution statute, he contends he meant to cite to 42 U.S.C. § 12182(b)(1)(E), a component of the ADA.

³ The complaint was initially filed in Morris County, where plaintiff primarily resides, but was transferred to Ocean County, where defendants work or reside and where plaintiff's property is situated.

municipality, the township must regulate the size and efficacy of bulkheads. In addition, the court found plaintiff "fail[ed] to show how the ordinance is discriminatory as applied." The court acknowledged a municipality is prohibited from regulating land use or housing in a manner that discriminates based on disability pursuant to the NJLAD. See N.J.S.A. 10:5-12.5(a). However, it found plaintiff provided "no basis for his claim that the municipality was [legally] responsible for purchasing an air mattress and toiletries for him." Finding there was no viable cause of action in plaintiff's complaint, the trial court dismissed the complaint without prejudice. The court, however, made clear that plaintiff had the opportunity to refile his complaint and "clarify what [his] claims are." Plaintiff did not file an amended complaint but instead filed this appeal.⁴

⁴ 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 Cnty. v. 8 Ct. St. Ltd., 223 N.J. Super. 35, 38-39 (App. Div. 1988) (holding that a dismissal without prejudice may operate as a final judgment).

Based upon our de novo review of the court's ruling on a Rule 4:6-2(e) motion to dismiss, State ex rel. Campagna v. Post Integrations, Inc., 451 N.J. Super. 276, 279 (App. Div. 2017), and a liberal reading of plaintiff's complaint, Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010), the complaint failed to set forth a cause of action under either the NJLAD or the ADA. Accordingly, we affirm the trial court's dismissal order substantially for the cogent reasons set forth in its written statement of reasons. We add the following brief comments.

Initially, we point out that most of the arguments raised in plaintiff's reply brief are raised for the first time and neither supplement the arguments made in his initial brief nor rebut defendants' arguments in their brief. Because these new arguments should not be raised in a reply brief, we limit our discussion to the arguments plaintiff raises in his initial brief. N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 615 n.37 (2020) (declining "to consider plaintiffs' separation of powers argument, raised for the first time in their reply brief"); Bacon v. N.J. State Dep't of Educ., 443 N.J. Super. 24, 38 (App. Div. 2015) ("We generally decline to consider arguments raised for the first time in a reply brief.").

Plaintiff's argument that the trial court should have granted him leave to amend his complaint, rather than deny it without prejudice, is without merit. He contends the court erred in not allowing him to amend his complaint because it "did not decide the case on its merits. Rather, [the court] decided it on technicalities."⁵ As defendants correctly point out, the dismissal was without prejudice, which meant plaintiff could amend his complaint. Plaintiff did not exercise his opportunity to amend his complaint. The trial court did not err.

Plaintiff argues the trial court erred in granting defendants' motion to dismiss without allowing him to amend the complaint and not converting the motion to dismiss to a summary judgment motion per Rule 4:46-2. We disagree. A motion to dismiss can be converted to a summary judgment motion where "matters outside the pleading are presented to and not excluded by the court . . . and all parties shall be given reasonable opportunity to present all materials pertinent to such a motion." R. 4:6-2(e). Because there was no legal basis for plaintiff's ADA and NJLAD claims, there was no need to convert defendants'

⁵ Plaintiff cites unpublished state and federal decisions case for the proposition that he should be given the opportunity to amend his complaint. We decline to consider unpublished opinions because they do not constitute precedent and are not binding on this court. R. 1:36-3.

motion to a summary judgment motion. Moreover, as mentioned, plaintiff had the right to amend his complaint but did not do so.

Plaintiff argues "[the trial court's] rationale that federal case law is not binding in state trial courts violates the United States Supreme Court mandate." He cites federal case law to support his position that he should have been allowed to amend his complaint. He contends the Full Faith and Credit Clause of the United States Constitution supports his position that the trial court erred in not considering his reliance on federal case law to defeat the motion to dismiss. Because none of the federal authority plaintiff presents is binding or persuasive, his argument fails.

Plaintiff argues the trial court wrongfully considered "the defenses and points of law arguments before the municipal court with this civil action." He asserts the pending municipal court proceeding is separate from this action. We disagree because there was no error by the trial court as plaintiff's accommodation claim is not ripe for consideration. The municipal court vacated its ruling denying plaintiff's reasonable accommodation request and has yet to rule on the request. Plaintiff was obligated to appeal the municipal court's ruling to the Law Division. See R. 4:74-3. His failure to do so does not afford the trial court, nor this court, the ability to decide his appeal. Nevertheless, plaintiff has

not shown any right for his accommodation request under the ADA or the NJLAD.

To the extent we have not commented on any of plaintiff's arguments, we are satisfied they are 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