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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2355-21

GIUSEPPE RIBAUDO,

Plaintiff-Appellant,

v.

CITY OF GARFIELD, THE CITY OF GARFIELD BUILDING DEPARTMENT, MICHAEL WISNOVSKY, GERALD WALIS, and JOHN PINTO,

Defendants-Respondents.

Argued August 17, 2023 – Decided September 1, 2023

Before Judges Currier and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-0327-21.

Adamo Ferreira argued the cause for appellant (Adamo Ferreira, Esq. LLC, attorneys; Adamo Ferreira, on the brief).

Kristen Jones argued the cause for respondents City of Garfield and John Pinto (Piro, Zinna, Cifelli, Paris &

Genitempo, LLC, attorneys; Kristen Jones, on the brief).

PER CURIAM

Plaintiff appeals from the February 7, 2022 order granting defendants City of Garfield (City) and John Pinto[1] summary judgment. We affirm.

In 1986, plaintiff purchased the residential property located at 5 Wendy Terrace (the property) in the City to use as a rental property. A survey of the property was not conducted at the time of the purchase.

The property has a higher elevation than the adjacent property at 3 Wendy Terrace. At the time of plaintiff's purchase, there was a five-foot-high retaining wall between the two properties. The owners of 3 Wendy Terrace, defendant Michael Wisnovsky and his wife Linda, had a survey performed in April 1986.

Plaintiff testified during his deposition that he did not perform any repairs or maintenance to the retaining wall through the years and that by 2009, the wall "ha[d] deteriorated" and "was leaning" towards the Wisnovsky property.

In February 2009, the City issued plaintiff a notice of violation of the municipal code for failure to maintain the wall. After meeting with the property

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[1] We refer to the City and John Pinto collectively as defendants. The remaining defendants were granted summary judgment in a separate order. That order is not under appeal.

maintenance officer, plaintiff advised the City he was "in the process of investigating the best way to correct the violation and [would] inform [the officer] in the near future of the schedule of the repairs."

In March 2009, the officer wrote a letter to plaintiff, requesting a survey of the property and informing plaintiff he had also asked the Wisnovskys to provide a survey.

Plaintiff obtained a survey of the property dated March 28, 2009. The Wisnovskys also had an updated survey completed, dated April 23, 2009.

After a hearing in municipal court on May 19, 2009, the judge dismissed the summonses, advising plaintiff and the Wisnovskys that "whoever [wa]s really upset, . . . [had] to file a lawsuit" because it was "the only way [they were] going to resolve" the dispute. He told the parties the issue was "not only whose property [the retaining wall] is . . . on[,] [b]ut who's responsible for maintaining it."

Plaintiff testified he did not make any repairs to the retaining wall in the ensuing years between 2009 and 2016. However, after the wall collapsed and fell onto the Wisnovskys' property, Wisnovsky asked Pinto, the City property maintenance code enforcement officer, to come to 3 Wendy Terrace to inspect the "collapsed retaining wall." Pinto went to the property and took photographs.

Pinto testified he "determined with . . . Wisnovsky that the wall was on [plaintiff's] property." He stated he also "conferred . . . with the building inspector and the zoning inspector, and they concurred that . . . [t]he wall was" located on 5 Wendy Terrace. Pinto stated he relied on both the Wisnovskys' survey, which depicted the wall on plaintiff's property, and plaintiff's survey, which showed that the wall "protruded onto" the Wisnovskys' property.

On August 15, 2016, Pinto issued plaintiff a notice of violation of the property maintenance municipal code for failure to maintain the wall. Plaintiff was to repair the wall by September 30, 2016.

Plaintiff stated he met with Pinto within a week after receiving the summons, informing Pinto the "wall had been addressed in 2009" and that the 2009 summons had been dismissed. Plaintiff also told Pinto he had a survey of the property but needed to locate it. According to plaintiff, he gave Pinto the March 28, 2009 survey about "a week before the wall was due to be repaired," or "within two weeks" from their meeting. Plaintiff stated Pinto said he "[wa]s not very familiar with surveys or with construction either" so he would "pass [the survey] along to the building inspector." In November 2016, Pinto called plaintiff, stating he had discussed the retaining wall with defendant Gerald

Walis, head of the building department, and the building inspector, and they concluded the wall was on plaintiff's property.

On November 14, 2016, Pinto issued plaintiff summonses for failure to repair the retaining wall. According to plaintiff, he spoke with the City's building inspector and asked him to look at the wall, which the building inspector did.

Plaintiff appeared in municipal court on November 29, 2016 to address the summonses. The court granted plaintiff an adjournment to consult with an attorney.

After plaintiff obtained a copy of the May 19, 2009 municipal court transcript, he delivered it to Pinto on February 28, 2017. In the letter accompanying the transcript, plaintiff stated his "position [wa]s the same as it was in 2009 that the portion of the wall to be repaired is not located on my property. It is located on the property of 3 Wendy Terrace." Plaintiff wrote, "I believe that unless you have specific information that the wall is mine, above what was available in 2009, you should withdraw the complaints or at a minimum, you should also cite the owners of 3 Wendy Terrace, as was the case in 2009."

The same day, plaintiff appeared in municipal court and requested a trial date. He advised the court he had not decided whether or not to retain counsel.

On March 21, 2017 plaintiff, self-represented, pleaded guilty to failure to make proper repairs. Thereafter, plaintiff moved to vacate the guilty plea. The court denied the motion on August 15, 2017.

On appeal to the Law Division, the court granted plaintiff's motion and vacated the guilty plea on December 18, 2017. In an oral decision, the judge stated he was "not convinced that . . . the plea [wa]s entirely knowing and voluntary" and found "there [wa]s no prejudice to the State" to remand the matter.

On February 23, 2018, plaintiff again appeared in municipal court at which time the judge dismissed the summonses.[2]

On May 25, 2018, plaintiff filed a notice of tort claim upon the City. On February 28, 2020, plaintiff filed a complaint in the Special Civil Part against defendants. Plaintiff sought to recover his expenses to defend the summonses and $10,000 for his pain and suffering and emotional distress caused by defendants' "outrageous conduct."

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[2] The record does not include the transcript from this proceeding.

Defendants' subsequent motion for summary judgment was denied. The parties signed a consent order transferring the matter to the Law Division and permitting plaintiff to amend his complaint.

Plaintiff filed an amended complaint on December 26, 2020, adding the City of Garfield Building Department, Michael Wisnovsky, and Gerald Walis as defendants. The complaint alleged the following causes of action: civil rights violations under federal and state law (count one); official misconduct (count two); malicious prosecution (count three); negligence, harassment, and retaliation (count four); and intentional infliction of emotional distress (count five).

All the defendants moved to dismiss the complaint under Rule 4:6-2(e). In an oral decision and written order on June 11, 2021, the court dismissed all counts against Wisnovsky and Walis. The court also dismissed count three as to the City.

Following the completion of discovery, defendants moved again for summary judgment. Defendants asserted plaintiff's claims in counts one, two, four, and five were untimely under the two-year statute of limitations. They contended the cause of action accrued in August 2016 when plaintiff received the summons and went to speak with Pinto, informing him of the prior municipal

court proceedings. Or, defendants asserted, at the latest, the cause of action accrued in February 2017 when plaintiff provided defendants with a copy of the municipal court transcript. In either instance, the February 2020 complaint was filed after the two-year statute of limitations expired.

As to count three—malicious prosecution—defendants asserted plaintiff could not establish the necessary elements to support the claim, particularly the existence of a special grievance or a showing of malice. Similarly, defendants contended plaintiff did not establish his claim of intentional infliction of emotional distress.

In an oral decision and accompanying order of February 7, 2022, the court granted defendants summary judgment and dismissed the amended complaint, with prejudice.

The court noted the cause of action in counts one, two, four, and five of the amended complaint were subject to two-year statutes of limitations. The court found plaintiff believed "probably as early as August 2016, certainly in November 2016 . . . that the . . . notice of violations and the summons were improper based on the 2009 [municipal court] proceeding." The court further noted that when plaintiff provided Pinto with the municipal court transcript in February 2017, "he believed [the transcript] established that the proceedings

should be discontinued." The court found February 2017 was the latest date the causes of action accrued. The court declined to apply the discovery rule to toll the accrual date, stating plaintiff "knew or by the exercise of reasonable diligence and intelligence ought to have known that . . . these facts may . . . create a cause of action." Therefore, the February 2020 complaint was untimely, requiring the dismissal of counts one, two, four, and five. As to count three, the court found plaintiff did not establish the required element of a special grievance.

A subsequent motion for reconsideration was denied.

On appeal, plaintiff contends the court erred in finding the discovery rule was inapplicable and it should have conducted a Lopez[3] hearing before making the determination.[4]

We review the trial court's decision on a motion for summary judgment de novo, applying the same standard used by the trial court. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). "[D]etermining the date upon which a statute of limitations begins to run is an issue of law, subject to plenary

[3] Lopez v. Swyer, 62 N.J. 267 (1973).

[4] The record does not reflect that plaintiff requested a Lopez hearing.

review." J.P. v. Smith, 444 N.J. Super. 507, 520 (App. Div. 2016) (citing Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013)).

Plaintiff does not dispute that the causes of action alleged in counts one, two, four, and five were subject to a two-year statute of limitation. Instead, he asserts the discovery rule applied to toll the statute of limitations until the municipal court proceedings were dismissed in February 2018.

The discovery rule can extend the accrual date of a cause of action "from the moment of the wrong" to "until plaintiff knew or had reason to know" of a basis for a cause of action. Lopez, 62 N.J. at 273-74; Burd v. N.J. Tel. Co., 76 N.J. 284, 291 (1978). Our Supreme Court has stated that the rule does not apply to extend the accrual date to the point when "plaintiff learns or should learn the state of the law positing a right of recovery upon the facts already known to or reasonably knowable by the plaintiff." Burd, 76 N.J. at 291-92. The basis for the claim is "constituted solely by the material facts of the case." Id. at 292. We "impute discovery if the plaintiff is aware of facts that would alert a reasonable person to the possibility of an actionable claim." Lapka v. Porter Hayden Co., 162 N.J. 545, 555 (2000).

We discern no error in the court's determination that the discovery rule was inapplicable here. As the court noted, the earliest accrual date was August

of 2016, when defendants issued the notice of violation. Plaintiff went to City Hall to inform Pinto of the prior municipal court proceedings and their dismissal. As the trial court stated, these actions showed plaintiff believed he may have had a cause of action.

Even if the accrual date was November 2016, when the City issued plaintiff the summonses, the complaint was still filed out of time. Plaintiff told the municipal court at the hearing regarding the summonses that he wanted to consult an attorney. This indicates that he had "knowledge that the law affords or may afford a cause of action." See Burd, 76 N.J. at 291.

The latest accrual date is February 2017, when plaintiff delivered the transcript of the 2009 municipal court proceeding to Pinto, demonstrating he believed the summonses were wrongly issued because the same issue had previously been dismissed.

"[B]ecause the record here unquestionably establishes plaintiff's awareness of the essential facts, no formal hearing was necessary to resolve the discovery rule issue." See Lapka, 162 N.J. at 558. A Lopez hearing was not supported by the factual evidence and the trial court did not err in concluding the discovery rule was inapplicable to toll the statute of limitations. The complaint was filed over two years after the last possible accrual date.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION