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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3469-15T1

STEVE WILSON,

Plaintiff-Appellant,

v.

PAUL MESSINA, CITY OF TRENTON
by and through its POLICE
DEPARTMENT,

Defendants-Respondents.

Argued May 24, 2017 — Decided June 30, 2017

Before Judges Accurso and Lisa.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Docket No. L-
1104-11.

Rudie O. Weatherman argued the cause for
appellant (Polino and Pinto, P.C., and Mr.
Weatherman, attorneys; Joseph M. Pinto and
Mr. Weatherman, on the briefs).

John Morelli argued the cause for respondent
Paul Messina (John Morelli, P.C., attorneys;
Mr. Morelli, on the brief).

Douglas E. Burry argued the cause for
respondent City of Trenton (Saponaro Law
Group, attorneys; George R. Saponaro and
Justin J. Yost, on the brief).

PER CURIAM

Plaintiff Steve Wilson appeals from a March 15, 2016 order for summary judgment dismissing his complaint under the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, against his former employer, the City of Trenton Police Department, and his superior officer, Paul Messina. Because we agree with the trial judge that plaintiff's claims are barred by the statute of limitations and not subject to equitable tolling, we affirm.

Wilson filed his complaint on April 19, 2011, claiming the Department had "tolerated the racist remarks and discriminatory conduct of Defendant Messina for approximately ten years." Wilson asserted claims for race discrimination and retaliation under the LAD, the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, and the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2. Discovery in the matter was protracted for a variety of reasons, including the illness and death of the lawyer filing the complaint on plaintiff's behalf.

At Wilson's deposition, which was not completed until July 2015, he testified to a host of allegedly discriminatory acts committed by Messina against him beginning in 2005. Wilson admitted, however, that his last contact with Messina had taken place in August 2008, and nothing untoward had occurred between

that time and the filing of his complaint three and one half years later.

Following the deposition, Wilson moved in August 2015 to amend his complaint to assert additional incidents of retaliation he claimed occurred after the filing of his lawsuit. The motion was granted and Wilson filed an amended complaint in September 2015 asserting three new alleged retaliatory acts. He claimed Messina, following his appointment as Patrol Division Commander in September 2012, "would arbitrarily deny Plaintiff's requests for earned vacation and sick days"; that in October 2012, "Plaintiff was transferred from the Vice Enforcement Unit . . . to the Patrol Bureau's midnight shift," a transfer he attributed to Messina; and that "[d]uring a dangerous hostage situation in 2013, . . . Messina removed Plaintiff from duty in favor of a Caucasian sergeant" and "ordered Plaintiff to go home early, depriving Plaintiff of overtime compensation."

Defendants moved for summary judgment, contending the claims raised in plaintiff's initial complaint were time-barred, even considered under a continuous violation theory, and that the supplemental claims were likewise barred as having been pled more than two years after the occurrence of the alleged last act of discrimination in 2013. Wilson withdrew his CEPA claim but otherwise opposed the motion. Although he acknowledged the

four-year gap between the 2008 acts and those occurring in 2012. In his amended complaint, he contended the continuous violation theory or equitable tolling rendered all of his claims timely. In the alternative, Wilson argued the supplemental claims arising after he filed his initial complaint stated an independent retaliation claim under the LAD, and were made timely by the "relation back" doctrine under Rule 4:9-3.

After hearing argument, Judge Massi entered summary judgment for defendants in a comprehensive opinion delivered from the bench on March 15, 2016. The judge determined that plaintiff's claims of discrimination occurring between 2005 and 2008 were time-barred even under a continuing violation theory because the last act in that series occurred in August 2008, and plaintiff did not file his complaint until April 2011. The judge rejected Wilson's claim that the 2012 and 2013 discriminatory acts could sweep in all prior acts of discrimination, finding those claims also time-barred because filed outside the two-year limitations period.

Finally, the judge rejected Wilson's claim of equitable tolling. Wilson claimed that when the head of Internal Affairs told him in 2009 that the Department was finally going to look into his claims against Messina, Wilson told the lieutenant, "That's good because I am ready to hire an attorney." Wilson

claimed the lieutenant replied, "Just don't, do me a favor, just lay back, let it play out. Let's see what [the Internal Affairs investigator] comes up with." Wilson claims he construed that request as an order to wait until the conclusion of the internal affairs investigation before hiring counsel or taking steps to pursue litigation. The judge rejected Wilson's claim that the conduct could support a claim of equitable tolling as a matter of law.

Judge Massi issued an amplified written statement of reasons supporting summary judgment on April 29, 2016. In it, the judge reiterated his reasons for finding the complaint time-barred under both the LAD and the Civil Rights Act and elaborated on his reasons for rejecting equitable tolling. Specifically, the judge found Wilson had "not put forth credible evidence to suggest that he was 'induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" See Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 280 (App. Div. 1997), certif. denied, 153 N.J. 402 (1998). Absent that sort of evidence, the judge concluded application of the doctrine of equitable tolling was unwarranted.

Wilson appeals, claiming the trial court erred because 1) his "post-lawsuit retaliation claims are independently actionable"; 2) "the continuing violation theory renders

Plaintiff's claims actionable"; 3) the trial court "acted under a misconception as to the doctrine of equitable tolling"; and 4) defendants waived any statute of limitations defense. We reject those arguments.

We review summary judgment using the same standard that governs the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). Thus, we consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). In considering application of the LAD to the facts adduced on the motion, our review is de novo without deference to any interpretive conclusions we believe mistaken; Nicholas v. Mynster, 213 N.J. 463, 478 (2013); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Applying that standard here makes plain summary judgment was appropriate. Wilson does not dispute that at the time he filed his initial complaint in April 2011, neither Messina nor anyone else in the Department had engaged in any discriminatory or hostile acts against him since August 2008. Accordingly, the claims raised in his initial complaint are barred by the LAD's

two-year statute of limitations.¹ See Montells v. Haynes, 133 N.J. 282, 286 (1993) (establishing two-year statute of limitations for LAD claims).

The continuing violation theory, which permits a plaintiff to pursue a discrimination claim based on a pattern of discriminatory conduct, does not alter that result because it requires a plaintiff to prove that "at least one of [the discriminatory] acts occurred within the statutory limitations period." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 7 (2002). Because Wilson did not demonstrate the existence of any discriminatory acts in the two years preceding his complaint, the continuing violation theory is not available to save his claims for acts occurring prior to the April 2011 filing date.

We similarly reject Wilson's argument that the trial court improperly rejected his equitable tolling claim. Judge Massi was correct in ruling that equitable tolling may be applied where "the complainant has been induced or tricked by his

¹ Plaintiff has not briefed any claims under the Civil Rights Act. We thus consider any such claim abandoned. See 539 Absecon Blvd., L.L.C. v. Shan Enters. Ltd. P'ship, 406 N.J. Super. 242, 272 n.10 (App. Div.), certif. denied, 199 N.J. 541 (2009); see also Pressler & Verniero, Current N.J. Court Rules, comment 5 on R. 2:6-2 (2017) ("It is, of course, clear that an issue not briefed is deemed waived.").

adversary's misconduct into allowing the filing deadline to pass." Dunn, supra, 301 N.J. Super. at 280 (quoting Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 458, 112 L. Ed. 2d 435, 444 (1990)). He was also correct in finding, as a matter of law, that the request to Wilson by the lieutenant in charge of Internal Affairs to "do [him] a favor," and not hire a lawyer while the internal investigation was pending, but instead to "just lay back, [and] let it play out," is insufficient to support such a claim. See Villalobos v. Fava, 342 N.J. Super. 38, 45 (App. Div.), certif. denied, 170 N.J. 210 (2001). There was no trickery or misconduct in the lieutenant's request, and thus simply no basis for application of equitable tolling. See R.A.C. v. P.J.S., Jr., 192 N.J. 81, 103 (2007) (declining to apply the doctrine where a defendant had not engaged in overt trickery or active deception that caused the plaintiff to sleep on his rights).

We also agree the court was correct here to reject plaintiff's attempt to rely on post-litigation acts to re-animate his time-barred claims under a continuous violation, relation-back theory. Plaintiff made no attempt to amend his complaint to assert supplemental claims of discrimination until after his deposition in 2015, when it was obvious there was no basis for application of the continuous violation theory to save

his claims for acts occurring between 2005 and 2008.² By that time, however, even those supplemental claims were similarly time-barred, having accrued more than two years earlier. Leaving aside the conceptual difficulty of applying the relation-back doctrine to claims arising out of events that had yet to occur on the filing date of the complaint,³ it is clear to us the new claims were not independently actionable.

As the Supreme Court explained in Roa v. Roa, 200 N.J. 555, 569 (2011), the statute of limitations for a discrete discriminatory act under the LAD "begins to run on the day that

² We reject plaintiff's claim that defendants waived the defense of the statute of limitations by not asserting it until they filed for summary judgment nearly five years after the case was filed. As already mentioned, discovery was extraordinarily protracted here. Because of plaintiff's reliance on the continuing violation doctrine and equitable tolling, defendants obviously required plaintiff's deposition in order to move for summary judgment on statute of limitations grounds. As that deposition was delayed by the illness and death of plaintiff's first lawyer, we cannot find waiver on this record.

³ That circumstance distinguishes this case from Notte v. Merchants Mutual Insurance Company, 185 N.J. 490, 497 (2006). There, the plaintiff sought leave to re-characterize his time-barred CEPA claims as ones for wrongful discharge under the LAD and the common law. Although by the time of the amendment, both the common law and LAD claims would both have been time-barred, the relation-back doctrine treated them as if originally filed under those theories, thus making them timely as of the filing date of the original complaint.

act takes place." Wilson's complained of transfer from the Vice Enforcement Unit to the Patrol Bureau's midnight shift in October 2012 was plainly a discrete act that he knew or should have known was actionable.⁴ Because the continuing violation doctrine does not permit "the aggregation of discrete discriminatory acts for the purpose of reviving an untimely act of discrimination," ibid., Wilson's failure to assert the claim until 2015 makes it untimely under the LAD's two-year statute of limitations.

The remainder of Wilson's supplemental claims, Messina's denial of Wilson's requests for vacation and sick days, which Wilson admitted he took with approval by other supervisors, and his being relieved of duty for several hours during a "dangerous hostage situation" commanded by Messina in 2013, in addition to being untimely filed, are simply too insignificant to be actionable, even assuming they were retaliatory. See Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 67, 126 S. Ct. 2405, 2414, 165 L. Ed. 2d 345, 359 (2006) (explaining "[t]he anti[-]retaliation provision protects an individual not from all retaliation, but from retaliation that produces an

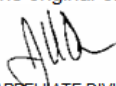
⁴ Plaintiff's claimed loss of a "well-equipped, unmarked, take-home vehicle" which was part and parcel of his untimely transfer claim, is not itself separately actionable.

injury or harm") (emphasis added). Because neither act by Messina could be considered materially adverse under the objective standard adopted by our Supreme Court in Roa, Wilson could not establish a prima facie case of retaliation under the LAD, even had the claims been timely pled. See Prager v. Joyce Honda, Inc., 447 N.J. Super. 124, 139-41 (App. Div.), certif. denied, 228 N.J. 408 (2016).

Because we agree that all of plaintiff's claims, those pre-dating and post-dating the complaint, are time-barred, we affirm the entry of summary judgment dismissing the complaint, substantially for the reasons expressed by Judge Massi in his written supplemental opinion of April 29, 2016.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION