

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-4190-15T2

LYDIA D. KRAMARCHUK,

Plaintiff-Appellant,

v.

BOROUGH OF FAIR LAWN,

Defendant-Respondent,

and

CAROL WAGNER and JOANNE
KWASNIEWSKI,

Defendants.

Submitted October 23, 2017 – Decided December 13, 2017

Before Judges Accurso, O'Connor and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-
8536-13.

Gareth David De Santiago-Keene, attorney for
appellant.

Pfund McDonnell, PC, attorneys for respondent
(Mary C. McDonnell, of counsel and on the
brief).

PER CURIAM

Plaintiff, Lydia D. Kramarchuk, a former employee of the Borough of Fair Lawn, appeals from orders denying her motion for reconsideration of an order dismissing some of her claims, denying her request to file a late notice of tort claim, and granting defendants' motion for summary judgment dismissing her complaint alleging statutory and common law causes of action. We affirm.

I.

The pertinent facts are not in dispute. Plaintiff was employed by Fair Lawn in various capacities commencing in 1989. Defendants Carol Wagner and Joanne Kwasniewski were also employed by Fair Lawn and, at times pertinent to plaintiff's claims, served as her supervisors. In 2006 and in 2010, plaintiff received the Fair Lawn employee handbook, acknowledging she was an employee-at-will and that the handbook did not constitute a contract or create any contractual rights.

Plaintiff was diagnosed with bi-polar disorder in 2005. In January 2011, plaintiff went on medical leave and was scheduled to return to work on February 7, 2011. Plaintiff's physician subsequently advised Fair Lawn that plaintiff was not medically able to return to work as scheduled. During the ensuing months, plaintiff, her physician and Fair Lawn communicated concerning requests for accommodations that would allow plaintiff to return to work and perform her job duties. On September 15, 2011, the

Borough Administrator wrote to plaintiff, identified the accommodations Fair Lawn was willing to make, and requested that plaintiff return to work by October 3, 2011. Dissatisfied with Fair Lawn's proposed accommodations, plaintiff sent Fair Lawn an October 3, 2011 letter advising that its proposed accommodations "ignore[d] everything that has gone on . . . over the last six months" and that Fair Lawn would "next hear from [her] lawyer."

On October 6, 2011, Fair Lawn delivered a preliminary notice of disciplinary action to plaintiff stating her employment "was to be terminated effective October 6, 2011." The notice advised plaintiff that she could request a hearing concerning the termination of her employment. Plaintiff failed to request the hearing and was provided a final notice of disciplinary action on October 24, 2011, terminating her employment.

More than two years following the October 6, 2011 notice, plaintiff filed a pro se complaint on October 24, 2013, generally alleging that Fair Lawn failed to provide reasonable accommodations and unlawfully terminated her employment because of her disability.

Defendants moved to dismiss the pro se complaint, arguing it failed to state a claim upon which relief could be granted. In response, plaintiff's newly retained counsel filed a cross-motion requesting leave to file a proposed first amended complaint, which

alleged fifteen separately pleaded causes of action.¹ The proposed first amended complaint asserted the following causes of action: violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.A. §§ 2000e to 2000e-17 (count one); violation of her equal protection and due process rights (count two); violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §§ 1001 to 1461 (count three); violation of the Equal Pay Act, 29 U.S.C.A. § 206(d) (count four); violation of the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -49 (count five); violation of the American With Disabilities Act, 42 U.S.C.A. §§ 12101 to 12213 (count six); negligence (count seven); violation of plaintiff's civil rights under 42 U.S.C.A. § 1983 and § 1985 (count eight); breach of contract under the New Jersey Public Employee Retirement System (count nine); breach of the alleged employment agreement between plaintiff and Fair Lawn (count ten); intentional infliction of emotional distress (count eleven); breach of the implied covenant of good faith and fair dealing (count twelve); violation of the Family Medical Leave Act, 29

¹ The proposed first amended complaint is not included in the appendices of the parties submitted on appeal. Respective counsel for the parties were unable to provide the proposed complaint in response to our requests. We therefore discern the causes of action asserted in the proposed first amended complaint from the parties' briefs and other submissions to the motion court as well as the motion court's orders and attached riders.

U.S.C.A. §§ 2601 to 2654 (count thirteen); the "[t]ort of [w]rongful [d]ischarge" (count fourteen); and violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -14 (count fifteen).

In response to plaintiff's motion to file the first amended complaint, defendants argued leave to file the complaint should be denied because each of the asserted causes of action failed to state a claim upon which relief could be granted. After hearing argument on the motions, the court denied without prejudice defendants' motion to dismiss the complaint and granted in part plaintiff's cross-motion to file an amended complaint.

The court determined it would be futile to permit the filing of an amended complaint asserting the causes of action in counts one, three, four, five, seven, eight, eleven, thirteen, fourteen, and fifteen of the proposed amended complaint because they were time barred under the applicable statutes of limitation. The court further determined it would be futile to permit the assertion of the tort claims alleged in counts seven, eleven, fourteen, and fifteen because they were barred due to plaintiff's failure to file a notice of tort claim as required by the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3.

In orders with attached decisions entered on June 16, 2014, the court granted plaintiff's cross-motion to file an amended

complaint, but only as to the claims alleged in counts six, ten, and twelve of the proposed first amended complaint.² The court's orders denied plaintiff's request to assert the causes of action alleged in counts one, three, four, five, seven, eight, thirteen, fourteen, and fifteen of the proposed amended complaint.

Plaintiff subsequently moved for leave to file a late notice of tort claim under the TCA. In its oral opinion denying the motion, the court reasoned that plaintiff failed to show any exceptional circumstances during the one-year period following the accrual of her causes of action, plaintiff's request was made beyond the one-year time period allowed for the filing of a tort claims notice under N.J.S.A. 59:8-8 and -9, the court lacked jurisdiction to grant a request after the one-year period, and plaintiff's asserted tort claims against defendants were otherwise time-barred under the applicable two-year statute of limitations.³

² In its opinion, the court explained that it made "no ruling regarding [c]ounts [two] and [nine]" because they were asserted against the New Jersey Public Employee Retirement System. Those claims were dismissed pursuant to a stipulation of dismissal that was filed on October 10, 2014, and therefore counts two and nine are not at issue on appeal.

³ Plaintiff does not challenge the court's application of the TCA's notice requirements to her claim that defendants violated her civil rights in violation of 42 U.S.C.A. §§ 1983 and 1985. See Greenway Dev. Co., Inc. v. Paramus, 163 N.J. 546, 554 (2000) (explaining the TCA notice requirements are inapplicable to claims

In July 2014, plaintiff filed a "Revised Corrected Second Amended Complaint." In August, plaintiff filed a "motion to restore"⁴ counts one, three, four, five, seven, eight, thirteen, fourteen, and fifteen of her proposed first amended complaint. In September, defendants filed a motion to dismiss the revised corrected second amended complaint. Plaintiff then filed a motion for leave to file a third amended complaint.

During oral argument on the motions, the parties and the court discussed the status of plaintiff's revised corrected second amended complaint and her request to file a third amended complaint. It was agreed that plaintiff would be permitted to file a third amended complaint limited to the claims allowed under the court's June 16, 2014 order. The court therefore granted defendants' motion to dismiss the revised corrected second amended complaint.

made pursuant to 42 U.S.C.A. § 1983). Because the claim is otherwise time-barred, the court's error is of no moment.

⁴ It was a misnomer for plaintiff to characterize its motion as one to "restore" the nine causes of action. As noted, the court denied plaintiff's motion to file the first amended complaint, which would have included the nine claims. Thus, the nine claims were never filed against defendants and could not be restored. As the motion court correctly observed, plaintiff's "motion to restore" was actually a motion for reconsideration of the court's June 16, 2014 order denying plaintiff's request to assert the claims in her putative first amended complaint.

The court also considered plaintiff's motion to "restore" counts one, three, four, five, seven, eight, thirteen, fourteen, and fifteen as a motion for reconsideration of its June 16, 2014 order denying plaintiff's request to include those claims in the proposed first amended complaint. The court found plaintiff offered no basis supporting reconsideration of its prior order and thus denied the motion.

In accordance with the court's order, plaintiff filed an amended verified complaint on November 26, 2014, which alleged three causes of action: violation of the ADA (count one); breach of contract (count two); and breach of the covenant of good faith and fair dealing (count three).⁵

Seven months later, in June 2015, plaintiff moved for leave to file yet another amended complaint to add a claim alleging a violation of the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701 to 796l. Defendants opposed the motion and filed a cross-motion for dismissal of count one of the amended verified complaint that alleged a violation of the ADA. In a detailed October 16, 2015 order and written decision, the court denied plaintiff's request

⁵ Counts one, two, and three of the amended verified complaint respectively asserted the same claims alleged in counts six, ten, and twelve of plaintiff's proposed first amended complaint. This was in accordance with the court's November 14, 2014 order and decision.

to amend the complaint by adding a Rehabilitation Act claim and granted defendants' cross-motion for dismissal of the ADA claim, finding the proposed Rehabilitation Act and ADA claims were time-barred under the applicable statutes of limitations.

Defendants subsequently moved for summary judgment on plaintiff's remaining claims alleging breach of contract (count two) and breach of the covenant of good faith and fair dealing (count three) in the amended verified complaint. In a May 13, 2016 order and comprehensive rider detailing the court's reasoning, the court granted summary judgment dismissing plaintiff's remaining claims. The court determined that the undisputed facts showed plaintiff was an at-will employee and did not have any contractual rights supporting the causes of action asserted in those counts. Plaintiff appealed.

On appeal, plaintiff presents the following arguments:

POINT I

THE MOTION COURT HEARD THE MOTION OCTOBER 10, 2014 WHICH REFUSED TO RESTORE COUNTS 1, 3, 4, 5, 7, 8, 13, 14 AND 15 WHICH WAS ERROR AND ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION.

POINT II

WE ARE ALSO APPEALING THE MOTION HEARD [ON] JULY 25, 2014 DENYING PLAINTIFF'S MOTION TO FILE A LATE NOTICE OF CLAIM.

POINT III

WE ARE ALSO APPEALING THE MOTION HEARD [ON JULY 10, 2015,] AND [AUGUST 13, 2015] IN WHICH THE MOTION COURT DISMISSED PLAINTIFF'S ADA COUNT.

POINT IV

THE MOTION COURT ERRED WHEN IT REFUSED TO TAKE UP THE CLAIM IN MINUTE PARTICULARITY IN THE AMENDED COMPLAINT FOR A CLAIM OF VIOLATION OF THE NEW JERSEY LAW AGAINST DISCRIMINATION AND THIS CASE WENT ON FOR OVER TWO (2) PLUS YEARS OF LITIGATION IN THIS CASE.

POINT V

THE MOTION COURT ERRED AND ABUSED ITS DISCRETION AND WAS ABITRARY AND CAPRICIOUS WHEN IT DISMISSED THE SINGLE AND ONLY CLAIM WE WERE LEFT WITH AFTER STARTING OUT TWO (2) YEARS EARLIER WITH A VERIFIED COMPLAINT OF 22 COUNTS – WHEN THE MOTION COURT DISMISSED THE LAST COUNT WE HAD WHICH WAS BREACH OF CONTRACT.

II.

We first consider plaintiff's argument that the court erred by denying the motion to restore counts one, three, four, five, seven, eight, thirteen, fourteen, and fifteen of her initial proposed amended complaint. As previously noted, the motion court correctly considered plaintiff's request as a Rule 4:49-2 motion for reconsideration of its June 16, 2014 order. In order to succeed on a motion for reconsideration, the movant must "state with specificity the basis on which [the motion] is made, including

a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred[.]"
R. 4:49-2.

"[T]he decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). "Reconsideration should be used only where '1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence.'" Ibid. (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

"[A] trial court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion." Ibid. (citing Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994)). An "abuse of discretion only arises on demonstration of 'manifest error or injustice[,]'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J. 554, 572 (2005)), and occurs when the trial court's "decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (quoting

Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)). Applying these standards, we discern no abuse of discretion here.

We reject plaintiff's claim that the court erred by denying her motion for reconsideration for two reasons. First, the record on appeal is devoid of any showing plaintiff presented the motion court with argument or evidence establishing that the court's June 16, 2014 order denying plaintiff's request to add the nine causes of action was "palpably incorrect," rested on an "irrational basis," or that the court failed to "consider, or . . . appreciate the significance of probative, competent evidence." See Pitney Bowes Bank, supra, 440 N.J. Super. at 382. Thus, we find no basis to conclude the motion court abused its discretion by denying plaintiff's reconsideration motion. See D'Atria, supra, 242 N.J. Super. at 401 (finding "a litigant must initially demonstrate that the [c]ourt acted in an arbitrary, capricious, or unreasonable manner, before the [c]ourt should engage in the actual reconsideration process" under Rule 4:49-2).

Second, in support of its contention that the motion court abused its discretion, plaintiff argues only that the June 16, 2014 order denying plaintiff's request to add the nine causes of action was incorrect because the court failed to relate back the filing of the claims to the filing date of plaintiff's pro se complaint. See R. 4:9-3 (providing that "[w]henver the claim or

defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading[.]"); see, e.g., Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 502 (2005) (explaining that because an amended claim merely relabeled conduct already pleaded, it related back to the original pleading date). Plaintiff argues that if the court had properly applied the relation-back doctrine to the filing of the nine claims in the proposed first amended complaint, it would have concluded each of the claims was timely filed.

Plaintiff's argument is contradicted by the record. The court's determination that the nine causes of action were time-barred was not based on a rejection of a claim that they should relate back to the filing date of plaintiff's pro se complaint. To the contrary, the court determined the claims were time-barred because plaintiff's causes of action accrued no later than October 6, 2011, and plaintiff failed to file any of the claims, including those asserted in her pro se complaint, within two years of October 6, 2011.⁶ Thus, we are satisfied plaintiff's claim that the court

⁶ In plaintiff's motion for reconsideration of the court's June 16, 2014 order denying her request to add the nine claims, and before this court on appeal, she did not challenge the court's determinations as to the applicable limitations periods or its finding that plaintiff's causes of action accrued no later than

erred by failing to correctly apply the relation-back doctrine in its denial of her request to add the nine putative claims is unsupported by the record and does not support her contention that the court abused its discretion by denying her motion for reconsideration of the court's June 16, 2014 order.

Plaintiff next challenges the court's July 24, 2014 order denying her motion to file a late notice of claim under the TCA. Because that order is one deemed final for appeal purposes, R. 2:2-3(a)(3), plaintiff was required to appeal within forty-five days of its entry, R. 2:4-1(a), or within a thirty-day extension, R. 2:4-4(a). See GMAC v. Pittella, 205 N.J. 572, 586 (2011) (ordering that "Rule 2:2-3(a) be further amended to permit appeals as of right from all orders permitting or denying arbitration. Because the order shall be deemed final, a timely appeal on the issue must be taken then or not at all."). In addition to being procedurally barred, plaintiff's claim is substantively without merit.

October 6, 2011. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (finding appellate courts will decline to consider arguments that were not presented to the trial court unless they go to the court's jurisdiction or concern matters of great public concern); see also Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008) (finding an argument not briefed on appeal is waived).

The TCA requires that a notice of claim against a public entity be filed within ninety days after the accrual of a cause of action. N.J.S.A. 59:8-8. If a claimant does not timely file a notice of claim, the claim is "forever barred." N.J.S.A. 59:8-8; see also J.P. v. Smith, 444 N.J. Super. 507, 529 (App. Div.) (finding failure to timely file a notice of tort claim "constitutes an absolute bar to recovery"), certif. denied, 226 N.J. 212 (2016).

A notice of claim may be filed beyond the ninety-day time period if leave is obtained from the Superior Court "within one year after the accrual of [the] claim provided that the public entity . . . has not been substantially prejudiced thereby." N.J.S.A. 59:8-9. The motion must be "supported by affidavits based upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances for [the] failure to file [a timely] notice of claim" N.J.S.A. 59:8-9; D.D. v. Univ. of Med. and Dentistry of N.J., 213 N.J. 130, 147 (2013).

"After the one-year limitation has passed, 'the court is without authority to relieve a plaintiff from his [or her] failure to have filed a notice of claim, and a consequent action at law must fail.'" Pilonero v. Twp. of Old Bridge, 236 N.J. Super. 529, 532-33 (App. Div. 1989) (quoting Speer v. Armstrong, 168 N.J. Super. 251, 255-56 (App. Div. 1979)). The decision to grant or

deny leave to file a late notice of claim "is a matter left to the sound discretion of the trial court," Beyer v. Sea Bright Borough, 440 N.J. Super. 424, 429 (App. Div. 2015) (internal quotations and citation omitted), and will be "'sustained on appeal in the absence of a showing of an abuse thereof.'" D.D., supra, 213 N.J. at 147 (quoting Lamb v. Glob. Landfill Reclaiming, 111 N.J. 134, 146 (1988)).

Plaintiff does not dispute she was required to file a tort claims notice in order to prosecute the claims asserted in counts seven, eleven, fourteen, and fifteen of her proposed first amended complaint. She acknowledges she did not seek leave to file the late notice until July 2014, almost three years after her tort claims accrued. She argues, however, that the court should have determined the time for the filing of the notice was tolled because she was incapacitated and unable to timely file the notice due to her bi-polar condition.

Plaintiff relies on a 2015⁷ report from psychologist Dr. Stacey Cohen-Miessner that plaintiff claims establishes she was unable, due to a purported mental incapacity, to timely file a tort claims notice or move for an extension of time to file the

⁷ The report is not dated, but states it is based on examinations of plaintiff occurring on September 17 and 22, 2015. In plaintiff's appendix, she lists the report as "DATED OCTOBER 1, 2015."

notice within one year of the accrual of her causes of action. See N.J.S.A. 59:8-8 (providing that "[n]othing in this section shall prohibit an . . . incompetent person from commencing an action under [the TCA] within the time limitation contained herein, after his coming to or being of full age or sane mind").

We reject plaintiff's argument because her motion requesting leave to file a late notice of claim was filed in 2014, and was therefore not supported by the psychologist's report, which was prepared more than a year later. The record does not show that plaintiff presented the motion court with any competent evidence establishing she was unable to timely file a notice of tort claim because she was not of sane mind. See S.P. v. Collier High Sch., 319 N.J. Super. 452, 466 (App. Div. 1999) (finding plaintiff's learning disabilities did not excuse her failure to timely file a TCA notice claim because she failed to provide competent evidence she "was incompetent or psychologically or physically unable to file a timely notice").

Moreover, even if the psychologist's report had been provided to the motion court, the report does not support plaintiff's claimed incapacitation or inability to timely file a tort claim notice. The report describes problems experienced by plaintiff due her bi-polar condition, but does not state that any purported incapacity prevented her from filing a tort claims notice during

the one-year period following the accrual of her causes of action. See O'Neill v. City of Newark, 304 N.J. Super. 543, 554 (App. Div. 1997) (rejecting plaintiff's reliance on a psychologist's report supporting his motion to file a late tort claims notice because the report did not state plaintiff could not function sufficiently to appreciate the need to seek legal advice concerning liability for his injuries).

The record before the motion court did not establish any incapacity preventing plaintiff from timely filing the required tort claims notice. Lacking such evidence, the motion court did not abuse its discretion by denying plaintiff's motion for leave to file a late tort claims notice.

We next briefly address plaintiff's arguments, contained in Points III and IV of her brief, that the court erred by dismissing plaintiff's ADA claim (count one of the amended verified complaint) and by denying her request to amend her complaint to add claims arising under the NJLAD (count five of the proposed first amended complaint). To the extent we can discern plaintiff's arguments, she asserts the claims were adequately pleaded in the amended verified complaint and proposed first amended complaint, and there was evidence showing the claims were meritorious. Plaintiff argues the court therefore erred in barring her prosecution of the claims.

We find plaintiff's arguments lack sufficient merit to warrant discussion in a written decision. R. 2:11-3(e)(1)(e). We add only that the court denied plaintiff's motion for leave to add NJLAD claims and dismissed her ADA claim because they were time-barred by the applicable statutes of limitations. Thus, the merits of the claims are irrelevant. Plaintiff does not argue the court erred in finding the claims were time-barred, and has waived her right to do so. See Jefferson Loan Co., supra, 397 N.J. Super. at 525 n.4.

Last, we consider plaintiff's argument that the court erred by granting defendants' summary judgment motion and dismissing her claims for breach of contract (count two of the amended verified complaint) and breach of the covenant of good faith and fair dealing (count three of the amended verified complaint).⁸ Plaintiff asserts she presented sufficient evidence showing Fair Lawn was contractually obligated to pay her a higher salary than that which she was paid. We are not persuaded.

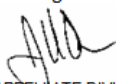
Because plaintiff admitted she was an employee-at-will of Fair Lawn, and failed to present any competent evidence showing

⁸ Plaintiff argues the court erred by granting defendant's motion to dismiss her "breach of contract claim." We read the brief broadly to challenge the court's dismissal of her breach of contract and breach of the covenant of good faith and fair dealing claims as alleged in counts two and three of the amended verified complaint.

she had a contract with Fair Lawn or otherwise had contractual rights enforceable against defendants, we are convinced plaintiff's contract claims were properly dismissed and affirm substantially for the reasons set forth in the court's comprehensive and detailed written decision in the rider annexed to the May 13, 2016 order.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION