SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4877-14T3

JAMES WARD,

Plaintiff-Appellant,

v.

BOARD OF FIRE COMMISSIONERS OF AVENEL, FIRE DISTRICT NO. 5 IN THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY; AVENEL FIRE COMPANY 1, a New Jersey General Corporation, and MARIA IRIZARRY,

Defendants-Respondents.

Submitted January 10, 2017 – Decided February 28, 2017

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-2557-14.

Bahgat & Bahgat, L.L.C., attorneys for appellant (Joseph A. Bahgat, on the brief).

Hill Wallack, L.L.P., attorneys for respondents Board of Fire Commissioners of Avenel, Fire District No. 5 and Avenel Fire Company No. 1 (Susan L. Swatski, of counsel and on the brief).

PER CURIAM

Plaintiff James Ward, a volunteer firefighter of captain's rank in the Avenel Fire Company No. 1 (the Company), filed a verified complaint in the Chancery Division, General Equity Part, against the Company and the Board of Fire Commissioners of Avenel Fire District No. 5 (the Board and collectively defendants). The complaint arose from the Board's formal "Notice of Discipline" (the Notice) issued June 20, 2012, charging plaintiff with "actions unbecoming a member and officer."

The Notice contained the following specifications:

> 1. On May 22, 2012 while answering a fire call [plaintiff] encountered a driver on a public road and there was some type of interaction. While volunteer Fire Fighters are permitted to utilize "blue lights" on their own vehicles when answering an emergency call, Fire Fighters are required to drive with due regard for the safety of others and to comply with all traffic laws (N.J.S.A. 39:3-54.12).
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> 2. After arrival at the firehouse a verbal exchange occurred between [plaintiff] and the driver of the other vehicle. During the exchange [plaintiff] gestured obscenely to the other driver and shouted a statement that may have included expletives.
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> 3. A Woodbridge Police Officer was summoned to the firehouse.
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> 4. The foregoing did not occur internally within the fire company but occurred between a Fire Fighter/Fire Officer, who was at the Firehouse and a member of the public.

> 5. On the above date [plaintiff] was insubordinate to Chief Strain by failing to accept a suspension as directed by Chief Strain and self imposed [sic] a longer one.

The Notice stated the Board would seek "appropriate discipline including possible removal" following the appointment of a hearing officer and receipt of the hearing officer's "binding" recommendation. On December 31, 2012, after the Board had notified him of the January 10, 2013 hearing date, plaintiff filed the complaint and sought an order to show cause enjoining the hearing.

The complaint contained five counts. In count one, plaintiff sought, among other things, a declaration that the Company bylaws were the "exclusive" procedure for disciplining a member or officer. In counts two and three, plaintiff alleged the disciplinary procedure used by the Board violated the separation of powers doctrine pursuant to Article 3, Paragraph I of the New Jersey Constitution, and the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 to -22.25. Count four alleged defendants had defamed plaintiff, and count five sought damages for the intentional infliction of emotional distress (IIED). Judge Frank M. Ciuffani entered the order to show cause, restrained defendants from proceeding with the disciplinary hearing and set a return date of January 29, 2013.

It is unclear what happened on the return date. If there were proceedings in court, a transcript was not provided. The judge apparently vacated the restraints on the administrative hearing, and the Board attempted to schedule hearing dates with plaintiff's counsel. Apparently, plaintiff sought the identity of the civilian complainant and defendant refused to provide it absent a protective order. The Board apparently presented its side at the administrative hearing in July 2013, but, for reasons not entirely clear from the record, the hearing remained incomplete during the ensuing nearly two years of litigation.

Meanwhile, on June 7, 2013, the judge entered an order requiring defendants to respond to plaintiff's discovery demands within forty-five days.[1] In December 2013, the judge ordered defendants to disclose the names of the complainant, Maria Irizarry, and another civilian witness, subject to the provisions of a protective order.

Shortly thereafter, defendants moved to dismiss the complaint for failure to state a cause of action and failure to comply with the notice provisions of the Tort Claims Act, N.J.S.A. 59:1-1 to 12-3. Plaintiff opposed the motion and cross-moved to amend the

[1] Plaintiff's complaint had been dismissed for some unexplained reason, and the June 7, 2013 order also reinstated the complaint and deemed defendants' answer, forwarded to the court in April, as filed.

complaint to name Irizzary as a defendant. On January 21, 2014, Judge Ciuffani dismissed the second and third counts of plaintiff's complaint,[2] but it was not until March 11, 2014, that the judge entered an order denying the motion to amend without explanation.

Plaintiff avers that a case management conference ensued, at which time the parties agreed to transfer the litigation to the Law Division. Judge Ciuffani entered an order to that effect on April 28, 2014.

Plaintiff did not move to amend the complaint again until August. In addition to Irizarry, the proposed first amended complaint also sought to add the Board's individual commissioners as defendants. The complaint further recast plaintiff's causes of action. Plaintiff alleged violations of the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, 42 U.S.C.A. § 1983, and defamation. Defendants opposed the amendment.

Following oral argument, the Law Division judge entered an order on September 19, 2014 (the September 2014 order) denying plaintiff's motion to amend. The judge explained:

> [H]ere we are in September deciding a motion . . . to bring in a whole bunch of new parties for a case that has a discovery end date [of October 31, 2014] and a trial date [of December 2, 2014] that [plaintiff was] aware of in April . . . . I have no rational

[2] Plaintiff does not appeal from the order dismissing these two counts.

> explanation as to the delay. . . . [P]laintiff has not been diligent . . . and has given no logical explanation for [his] failure to move to amend as to any party.

Plaintiff moved for reconsideration. Judge Ciuffani heard the motion and entered the December 5, 2014 order that permitted plaintiff to file an amended complaint as to Irizarry only. He also extended discovery for an additional ninety days.

In January 2015, plaintiff attempted to file a second amended complaint that named only Irizarry as an additional defendant and was limited to three counts: a request for the declaratory relief sought in the original complaint against defendants, as well as defamation and IIED against defendants and Irizarry. Controversy ensued between plaintiff's counsel and the clerk's office as to whether a filing fee was required. Meanwhile, plaintiff served Irizzary with the second amended complaint, and she filed an answer pro se in April.

In March 2015, defendants moved for summary judgment. Plaintiff opposed the motion and moved to extend discovery because Irizzary had recently been added as a party. Judge Ciuffani's May 22, 2015 order (the May 2015 order) granted defendants summary judgment and dismissed plaintiff's amended complaint, but not as to Irizarry. We discuss the judge's reasoning below.

On June 1, plaintiff failed to appear at a trial calendar call. The Assignment Judge entered an order (the June 2015 order) dismissing the complaint without prejudice. Plaintiff filed his notice of appeal shortly thereafter. Based on plaintiff's specific representation that he would not proceed against Irizzary alone, we determined all issues were final as to all parties, and appellate review was appropriate. Silviera-Francisco v. Board. of Educ. of City of Elizabeth, 224 N.J. 126, 136 (2016).[3]

Plaintiff's notice of appeal and case information statement (CIS) list three orders from which he seeks review: the September 2014 order; the May 2015 order; and the June 2015 order. We limit our review to only those orders identified by plaintiff. See Pressler & Verniero, Current N.J. Court Rules, comment 6.1 on R. 2:5-1 (2017) ("[O]nly the judgments or orders . . . designated in the notice of appeal . . . are subject to the appeal process and review.").

Counsel states in his CIS that Judge Ciuffani had adjourned the June 1, 2015 trial date, presumably excusing plaintiff's counsel's absence from court on that day. There is no support for the assertion in the record, but, more importantly, plaintiff presents no argument in his brief why we should reverse the order.

[3] Irizzary has not participated in this appeal.

"[A]n issue not briefed is deemed waived." Pressler & Verniero, supra, comment 5 on R. 2:6-2. We affirm the June 1, 2015 order and, based upon plaintiff's counsel's express representations during our finality review and our resolution of the other issues raised on appeal, we dismiss plaintiff's complaint against Irizzary with prejudice.

As to the September 2014 order, plaintiff contends the Law Division judge mistakenly exercised his discretion by not permitting him to amend the complaint and add Irizzary and the individual fire commissioners as defendants. He also argues Judge Ciuffani erred in entering the December 2014 order upon plaintiff's motion for reconsideration by limiting the amendment to only Irizzary.[4]

Rule 4:9-1 requires "'motions for leave to amend be granted liberally' and that 'the granting of a motion to file an amended complaint always rests in the court's sound discretion.'" Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) (citing Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998)). In exercising its discretion, the court should consider "whether the newly-asserted claim would unduly prejudice

[4] As already noted, plaintiff did not seek our review of the December 2014 order. However, for the sake of completeness, we address, in a global sense, the denial of plaintiff's attempts to amend the complaint.

the opposing party, survive a motion to dismiss on the merits, cause undue delay of the trial, or constitute an effort to avoid another applicable rule of law." Bldg. Materials Corp. of America v. Allstate Ins. Co., 424 N.J. Super. 448, 485 (2012) (citing Kimmel v. Dayrit, 154 N.J. 337, 343 (1998)).

Before the Law Division judge, plaintiff offered no rational explanation why he did not seek to amend the complaint to include the individual commissioners as defendants sooner in the litigation. Before us, plaintiff argues he delayed naming them because he did not want to pursue discovery against them until he knew Irizarry's identity. The argument lacks any merit. R. 2:11-3(e)(1)(E). It is beyond peradventure that permitting plaintiff to file the proposed first amended complaint, naming six new defendants and asserting brand new causes of action against them, would have caused extensive delays in litigation that had already been pending for nearly two years. We affirm the September 2014 order.

Lastly, asserting a variety of arguments, plaintiff challenges the grant of summary judgment to defendants in the May 2015 order. "An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) (citing W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012); Henry v. N.J. Dep't of Human Servs.,

204 N.J. 320, 330 (2010)). We "identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Ibid. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2(c)).

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Brill, supra, 142 N.J. at 540.]

We then decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 231 (App. Div.), certif. denied, 189 N.J. 104 (2006). In this regard, "[w]e review the law de novo and owe no deference to the trial court . . . if [it has] wrongly interpreted a statute." Zabilowicz v. Kelsey, 200 N.J. 507, 512 (2009).

Plaintiff asserts no specific argument regarding dismissal of the defamation and IIED counts of the second amended complaint, except to state defendants' obstinate refusal to supply Irizarry's name warranted additional time to complete discovery. This contention permeates plaintiff's brief.

"[A] respondent to a summary judgment motion, who resists the motion on the grounds of incomplete discovery is obliged to specify the discovery that is still required." Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 538 (App. Div. 2009) (citing Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007)), certif. denied, 203 N.J. 93 (2010). Judge Ciuffani aptly noted that after discovery was extended in December 2014, plaintiff "failed to propound any written discovery upon [defendants] or notice a single deposition of any witness or representative of [defendants]." The judge noted that any discovery as to the late-added Irizarry would not yield information supporting plaintiff's claims against defendants because Irizarry only had knowledge of the events of the traffic incident that led to the Notice. See DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 341 (App. Div. 2013) (reasoning that although discovery "should be completed before the court entertains summary judgment, that general practice need not be observed in cases where it is readily apparent that continued discovery would not produce any additional facts necessary to a proper disposition of the motion"). We agree entirely with Judge Ciuffani's analysis.

In the first count of the complaint, plaintiff alleged defendants violated his due process rights because the Company's

bylaws set forth the sole disciplinary procedure for its members, and the bylaws could not be "circumvent[ed]" by the Board's reliance on any statute. He further claimed two commissioners had disqualifying conflicts of interest. Plaintiff sought reinstatement, damages and counsel fees.

In his written statement of reasons that accompanied the May 2015 order, Judge Ciuffani reasoned plaintiff's due process argument was moot, because plaintiff was pursuing reinstatement through the administrative disciplinary hearing, which fully comported with due process. He noted that, before consenting to the transfer of the litigation to the Law Division, plaintiff agreed that he sought no further equitable relief.

In addition, Judge Ciuffani concluded the Company's bylaws did not apply to the Board's disciplinary action against plaintiff. Citing the language of the bylaws, the judge concluded they controlled only allegations of misconduct made by one member of the Company against another member. Here, where the Board sought to impose discipline based upon a civilian complaint, N.J.S.A. 40A:14-70.1(b) controlled. Judge Ciuffani reasoned "the Board exercised their statutorily granted authority to control and supervise [plaintiff] by suspending him . . . pending the outcome of the administrative hearing." According to the judge, the "Board

[was] under no obligation to abide by the procedures and policies set forth in the . . . Company bylaws."

Plaintiff argues the judge erred in dismissing the first count of the complaint as moot. He contends that regardless of whether the relief was legal or equitable in nature, his due process rights were violated because the bylaws were the exclusive means to impose discipline, and the administrative hearing did not comport with the bylaws.

Because appeals are taken from orders and final judgments and not from decisions or the rationale that supports them, we need not address whether plaintiff's claims were moot. Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001). We agree with Judge Ciuffani's analysis regarding the underlying basis for plaintiff's due process claims and the judge's conclusion that plaintiff could not succeed as a matter of law.

By their express terms, the Company's bylaws are binding on "each and every member of the Company." Furthermore, Article XIV — Section 3 states, "A charge of misconduct may be made against any officer or member by any member in writing, to the President [of the Fire Company]." The bylaws thereafter set forth a procedure before a "Trial Committee," the preparation of a report and the disciplinary procedure following the Committee's verdict. However, in this case, Judge Ciuffani reasoned that the charge of

conduct unbecoming a member was not made by another member of the Company. Rather, the Board brought the charge based upon plaintiff's alleged unbecoming conduct toward a civilian.

The Board is a statutory corporate body, created by the municipality in accordance with certain procedures and vested with broad powers. N.J.S.A. 40A:14-70. The Board must approve any petition that seeks to form a volunteer fire company within the fire district. N.J.S.A. 40A:70.1(a). Each fire district is required to maintain a webpage on the municipality's website that posts the district's "mission and responsibilities[,]" its budget and "rules, regulations, and official policy statements[,]" notice of its public meetings and other significant fiscal and operational information. N.J.S.A. 40A:14-70.2. In this case, the Board adopted a handbook that outlined, among many other things, the informal and formal disciplinary procedures it would follow.

"The commissioners of a fire district shall have the powers, duties and functions within said district to the same extent as in the case of municipalities, relating to the prevention and extinguishment of fires and the regulation of fire hazards." N.J.S.A. 40A:14-81. And, "[t]he members of the [C]ompany shall be under the supervision and control of the [Board] and in performing fire duty shall be deemed to be exercising a governmental function[.]" N.J.S.A. 40A:14-70.1(b). That statute

reserves only one specific power to the membership of a company: "the appointment or election of the chief of the volunteer fire company shall remain the prerogative of the membership of the fire company as set forth in the company's certificate of incorporation or bylaws." Ibid.

Plaintiff contends this comprehensive statutory scheme approved by the Legislature and amended over decades is nevertheless subservient to the disciplinary process outlined in the bylaws. We need not address the specific claims because they all lack merit. R. 2:11-3(e)(1)(E).

Affirmed. We direct the Law Division to enter an order dismissing plaintiff's complaint against Irizzary with prejudice.