

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0152-16T3

ROSALIE COHEN,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY,

Defendant-Respondent.

Submitted January 8, 2018 – Decided January 29, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No.
L-0036-14.

Rosalie Cohen, appellant pro se.

Christopher S. Porrino, Attorney General,
attorney for respondent (Melissa H. Raksa,
Assistant Attorney General, of counsel; Ashley
L. Costello, Deputy Attorney General, on the
brief).

PER CURIAM

This matter returns following a remand to the trial court
we ordered in our unpublished opinion in February 2016. See Cohen
v. State of New Jersey, No. A-4838-13 (App. Div. Feb. 26, 2016).

In her present appeal, pro se plaintiff contests the trial court's July 15, 2016 order dismissing her lawsuit against defendant State of New Jersey as untimely under the applicable two-year statute of limitations, N.J.S.A. 2A:14-2. For the reasons that follow, including the Supreme Court's recent opinion in Elazar v. Macrietta Cleaners, 230 N.J. 123 (2017), we vacate the trial court's dismissal order and remand this matter a second time, with a direction for an evidentiary hearing to explore equitable tolling issues.

We incorporate by reference and do not repeat the factual background previously described in our 2016 opinion. Briefly, plaintiff and her husband are the parents of E.C., who was born in May 1993. The Division of Child Protection and Permanency removed E.C. from his parents' care on April 8, 2010, based on allegations of abuse or neglect. At the time of his removal, E.C. was about a month shy of his seventeenth birthday.

Eventually the allegations of abuse or neglect by the parents proved to be unfounded, and the Division's case against them was closed. In the meantime, the Division placed E.C. in a resource home, where the form of Judaism practiced there was disapproved by E.C.'s parents. E.C. absconded from that initial resource home. He was found out of state and was returned by the Division to a different licensed resource home, in which Judaism was not

practiced at all. By August 2010, E.C. ran away from that second home, and has apparently had no contact with his parents since that time. E.C. turned eighteen in May 2011, and thus is no longer a minor.

After E.C.'s parents filed the requisite tort claims notice, plaintiff brought this civil action against the State in the Law Division in January 2014. In essence she contends that the Division acted negligently and otherwise improperly in its handling of the matter respecting her son, allegedly violating numerous federal and state statutes, regulations, and Division policies. In March 2014, the trial court granted the State's pre-answer motion to dismiss the complaint under Rule 4:6-2(e), finding that plaintiff's pro se complaint failed to state a claim upon which relief may be granted.

In our February 2016 unpublished opinion, we reversed the trial court's Rule 4:6-2(e) dismissal order, concluding that the complaint, if viewed indulgently under the generous pleading standards of Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989), sufficiently pled claims of negligence under the Tort Claims Act and violations of alleged ministerial duties. Cohen, slip op. at 5-6. However, we affirmed the trial court's dismissal of plaintiff's claims grounded upon federal civil rights laws, 42 U.S.C. § 1983, and the New Jersey Civil Rights Act,

N.J.S.A. 10:6-2. Cohen, slip op. at 4. We also instructed that on remand the State could renew its motion to dismiss the complaint as untimely under the statute of limitations, since that particular issue had not been reached by the trial court. Cohen, slip op. at 6.

On remand the State moved to dismiss the complaint as time-barred, arguing that plaintiff's alleged causes of action had accrued more than two years before she filed suit on January 2, 2014. Plaintiff countered that her lawsuit was timely because her claims did not accrue until she became aware that the Division made contact with her son without informing the authorities of such contact. In particular, the parents' pre-suit tort claims notice asserted that she and her husband did not learn until January 2012 from a private detective that the Division was allegedly aware of her son's whereabouts as of August 2010, but failed to alert law enforcement. She contends that she appropriately filed her complaint in the Law Division within two years of learning this information.

While the current appeal was pending, the New Jersey Supreme Court issued its opinion in Elazar on July 26, 2017. In its opinion, the Court clarified that the equitable tolling (or "discovery rule") principles of Lopez v. Swyer, 62 N.J. 267 (1973), equally apply to claims against governmental entities such as the

State when they have been sued under the Tort Claims Act. Elazar, 230 N.J. at 127-28. The Court instructively declared that "[w]hen a plaintiff is injured by a third party and has no reason to believe that another party, specifically a public entity, is responsible for the injury, then the discovery rule applies to toll the accrual date for triggering the notice-of-claim requirement." Id. at 140. "The discovery rule should be applied with reasonableness as to whether a diligent plaintiff would have or should have realized that a public entity was involved at all." Ibid. Consequently, the Court remanded the case for an evidentiary "Lopez hearing" to explore those fact-dependent issues regarding the extent of the plaintiff's knowledge. Id. at 142.

The same procedure should be applied here, in light of Elazar. We recognize that the text of plaintiff's complaint does not state when plaintiff and her husband first became aware of the Division's alleged inattentiveness to their son's disappearance, or mention the private detective. However, their tort claims notice provided some substantiation of their point of awareness and the pertinent time line. A Lopez hearing is necessary on remand to explore these issues, with the expectation that the trial court will make associated credibility findings that bear upon the statute-of-limitations and accrual issues. We intimate no views about the appropriate outcome of that assessment. We

also need not address whether post-accrual events may be included in plaintiff's claims under notions of a continuing wrong; that question need not be resolved until the date of accrual itself is ascertained on remand, and the nexus between that date and the dates of later events is better illuminated.

In light of our ruling, and the scant development of the factual record thus far, we need not address whether the trial court correctly rejected plaintiff's argument that she has implied private rights of action under the child welfare statutes and regulations. Those issues of implied duties and rights are best suited for reconsideration by the trial court on a fuller record and after appropriate discovery, if the lawsuit is determined to be timely. Nor do we consider here issues of causation, and whether, for example, plaintiff's son would have separated from his parents in any event even if the Division had acted differently.

Vacated and remanded for an evidentiary hearing.

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


CLERK OF THE APPELLATE DIVISION