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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4785-15T4

LAURENCE FURLOW,

Plaintiff-Appellant,

v.

THE CITY OF NEWARK, THE NEWARK
POLICE DEPARTMENT, POLICE
DIRECTOR SAMUEL DIMAIO and
POLICE CHIEF SHEILA A. COLEY,

Defendants-Respondents.

Argued December 19, 2017 – Decided January 12, 2018

Before Judges Yannotti, Carroll and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-8916-
12.

Bette R. Grayson argued the cause for
appellant (Grayson & Associates, LLC,
attorneys; Bette R. Grayson and Brian P.
Matousek, on the briefs).

Michael A. Cifelli argued the cause for
respondents (Florio Kenny Raval, LLP,
attorneys; Michael A. Cifelli, of counsel and
on the brief; Maxine J. Kutner, on the brief).

PER CURIAM

In this opinion, we address the dismissal of an amended complaint filed in the Law Division by plaintiff Lawrence Furlow against defendants City of Newark (City), the Newark Police Department (NPD), Newark Police Director Samuel DiMaio, and Newark Police Chief Sheila A. Coley.¹ In pertinent part, plaintiff alleged the City violated N.J.S.A. 40A:14-147 and N.J.A.C. 4A:2-2.5(a)(1) by failing to timely file and serve him with the 2012 Preliminary Notices of Disciplinary Action (PNDAs) that were the basis for his removal from the NPD. Plaintiff also asserted a claim against defendants under the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2, contending he had been harassed, coerced, and threatened during the City's investigation of his alleged misconduct.

The trial court found plaintiff should have raised any claim that the City filed the disciplinary charges beyond the time prescribed by N.J.S.A. 40A:14-147 in a timely appeal to the Civil Service Commission (CSC), and the court lacked jurisdiction to address that claim. The court did not explain its reasons for dismissing plaintiff's CRA claim.

On appeal, plaintiff argues the trial court erred in dismissing his entire amended complaint and denying his motion for

¹ In the complaint, plaintiff's name alternately appears as Laurence Furlow, and DiMaio's name is alternately spelled DeMaio.

summary judgment. For the reasons that follow, we affirm in part and reverse and remand in part.

I.

In a prior opinion, we affirmed the final administrative decision of the CSC that denied plaintiff's appeal of his removal as untimely. In re Lawrence Furlow, No. A-4121-12 (App. Div. June 30, 2015). We restate the facts from our prior opinion to lend context to the issues raised in the present appeal:

The following allegations are taken from the 2012 Preliminary Notices of Disciplinary Action (PNDAs) that were the basis for [plaintiff's] dismissal. [Plaintiff] was a police officer with the City of Newark Police Department (NPD). On December 3, 2002, [plaintiff] arrested a suspect for possession of a handgun knowing the charge was false; took money from the suspect for his personal gain; failed to submit the money into Property/Evidence; and falsified the police report. On April 18, 2003, [plaintiff] took money from another suspect for his personal gain, and failed to submit the money into Property/Evidence. [Plaintiff] admitted both thefts to the NPD Internal Affairs Department in August 2004, and signed a plea agreement promising to cooperate in an investigation of police corruption. However, in 2009 and 2012 [plaintiff] falsely testified in court that he was coerced into making his 2004 confession.

The City originally initiated disciplinary proceedings by serving [plaintiff] with [an] October 1, 2004 PNDA. On October 11, 2004, a Final Notice of Disciplinary Action (FNDA) notified

[plaintiff] that he was suspended indefinitely without pay effective October 1, 2004.

On or about September 30, 2004, [plaintiff] was indicted on charges of conspiracy, N.J.S.A. 2C:5-2, official misconduct, N.J.S.A. 2C:30-2, and theft, N.J.S.A. 2C:20-3. After trials in 2009 and 2012, both resulting in hung juries, all criminal charges were dismissed on June 5, 2012.

On August 3, 2012, the City served appellant with two PNDAs relating to the 2002 and 2003 incidents, his 2004 admission, and his allegedly false testimony in 2009 and 2012. Each PNDA charged him with conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); other sufficient cause, N.J.A.C. 4A:2-2.3(a)(11); and violations of NPD rules and regulations. After a hearing where [plaintiff] was represented by counsel, the City issued a FNDA terminating his employment effective October 1, 2004. He was personally served with the FNDA on September 18, 2012, and again by registered or certified mail on October 15, 2012. His attorney was not served. The FNDA advised [plaintiff]: "You have the right to appeal WITHIN 20 DAYS FROM RECEIPT of this form." After detailing the procedure to file an appeal, the FNDA advised [plaintiff]: "ANY APPEAL POSTMARKED AFTER THE 20 DAY STATUTORY TIME LIMIT WILL BE DENIED."

[Plaintiff] appealed to the CSC on February 25, 2013. On April 3, 2013, the CSC denied his request for a hearing, finding his appeal was untimely.

[Id. (slip op. at 1-3) (footnote omitted).]

In affirming the CSC's decision, we noted:

In his appellate brief, [plaintiff] claims that the City failed to file and serve its 2012 PNDAs within the time periods set in N.J.S.A. 40A:14-147 and N.J.A.C. 4A:2-2.5(a)(1), and that the 2012 PNDAs did not fully disclose the disciplinary action sought against [plaintiff] and contained other procedural errors. The CSC properly did not address those claims, finding they had "no bearing on the requirement that he file a timely appeal" under N.J.S.A. 11A:2-15. Similarly, we may not reach his appellate claims. The [CSC] is "without power to accept untimely appeals," and we are not empowered to extend the time limitation. [Mesghali v. Bayside State Prison, 334 N.J. Super. 617, 621 (App. Div. 2000)]. The CSC therefore properly denied [plaintiff's] request for a hearing of his appeal.

[Id. at 7).]

In a footnote, we added: "Even if, as [plaintiff] argues, N.J.S.A. 40A:14-147 acts as a statute of limitations, it is 'not self-executing.'" Ibid. (citing Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 500 (2006)).

II.

On December 7, 2012, plaintiff filed his initial complaint in the Law Division, along with an order to show cause seeking emergent injunctive relief. Specifically, plaintiff sought: (1) to enjoin the prosecution of the disciplinary charges; (2) dismissal of the FNDA dated October 15, 2004; (3) dismissal of the PNDAs dated July 12, 2012, and July 13, 2012; and (4) immediate reinstatement to his former position of Newark police officer.

The court conducted a plenary hearing on February 1, 2013, at which Newark Police Sergeant Beatrice Golden testified regarding the filing and service of the 2012 PNDAs and the scheduling of the disciplinary hearing. On February 25, 2013, the court denied plaintiff's application for emergent relief, and granted plaintiff leave to file an amended complaint.

Plaintiff filed the amended complaint on March 13, 2013. Defendants moved to dismiss the amended complaint for failure to state a claim pursuant to Rule 4:6-2(e). Plaintiff opposed the motion, and filed a cross-motion for summary judgment on his claim that defendants violated N.J.S.A. 40A:14-147 by failing to file the disciplinary charges against him within forty-five days after the final disposition of the criminal charges (the forty-five day rule).

On May 24, 2013, the court denied plaintiff's cross-motion, and granted in part defendants' motion. Specifically, the court dismissed counts four through seven of the amended complaint, but denied defendants' motion to dismiss plaintiff's claims that defendants violated: (1) the forty-five day rule (count one); (2) N.J.A.C. 4A:2-2.5(a)(1), which requires that an employee be served within five days following his or her suspension (count two); and (3) plaintiff's civil rights, as protected under the CRA (count three).

On February 25, 2013, while the Law Division action was pending, plaintiff appealed his removal to the CSC. As noted, the CSC denied plaintiff's appeal on April 3, 2013, finding it untimely. On December 13, 2013, the Law Division action was stayed pending plaintiff's further appeal of the CSC's decision, which we affirmed on June 30, 2015.

After the Law Division action was reactivated, plaintiff again moved for summary judgment. Defendants opposed the motion, and filed a cross-motion to dismiss plaintiff's claim that the forty-five day rule was violated. On January 28, 2016, the court denied both motions without prejudice, and set a schedule for the parties to complete discovery and file dispositive motions.

On April 26, 2016, plaintiff again moved for summary judgment on his claim that defendants violated N.J.S.A. 40A:14-147 by failing to file the disciplinary charges within forty-five days after the final disposition of the criminal investigation. Plaintiff also argued defendants substantially violated N.J.S.A. 40A:14-149 and N.J.A.C. 4A:2-2.5(d) by not conducting a hearing on the charges within thirty days of the PNDA and service of the statement of charges.

Defendant opposed the motion, arguing the court lacked jurisdiction to adjudicate those claims due to plaintiff's failure to raise them at his disciplinary hearing and in his subsequent

untimely appeal to the CSC. Defendants also cross-moved to dismiss those claims on the same basis. On May 27, 2016, the court denied plaintiff's motion and granted defendants' cross-motion to dismiss. The court noted on the order that it "lack[ed] jurisdiction to decide the [forty-five] day rule [issue] raised by [plaintiff] pursuant to N.J.S.A. 40A:14-147." This appeal followed.

III.

Plaintiff argues that the court erred when it dismissed plaintiff's entire complaint, including his CRA claim, in its May 27, 2016 order. Plaintiff contends the CRA claim was not included in defendants' dismissal motion, nor did the court's findings of fact and conclusions of law address it. Plaintiff also argues the court erred in determining it lacked jurisdiction to adjudicate plaintiff's N.J.S.A. 40A:14-147 claim, and in failing to grant plaintiff summary judgment on his claims alleging defendants violated N.J.S.A. 40A:14-147, N.J.S.A. 40A:14-149, and N.J.A.C. 4A:2-2.5(d).

We begin with our standard of review. We apply a de novo standard of review to a trial court's order dismissing a complaint under Rule 4:6-2(e). See Stop & Shop Supermarket Co. v. County of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017). Under the rule, we owe no deference to the motion judge's conclusions. Rezem

Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011). "[O]ur inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). "A pleading should be dismissed if it states no basis for relief and discovery would not provide one." Rezem Family Assocs., LP, 423 N.J. Super. at 113 (citing Camden Cty. Energy Recovery Assoc., L.P. v. N.J. Dep't of Env'tl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999)).

The standard "requires an assumption that the allegations of the pleading are true and affords the pleader all reasonable factual inferences." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 249-50 (App. Div. 2002). The court must search the pleading "in depth and with liberality to determine whether a cause of action can be gleaned even from an obscure statement." Id. at 250.

To avoid a dismissal for failure to state a claim, a plaintiff is not required "to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005) (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)). Ordinarily, dismissal for failure to state a claim is without prejudice, and the court has discretion to permit a

party to amend the pleading to allege additional facts in an effort to state a claim. See Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009).

We review a grant or denial of summary judgment de novo, observing the same standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). Summary judgment should be granted only if the record demonstrates there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We 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." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). If no genuine issue of material fact exists, the inquiry then turns to "whether the trial court correctly interpreted the law." DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citations omitted).

Guided by these standards, we conclude the trial court properly dismissed all claims that defendants violated N.J.S.A. 40A:14-147, N.J.S.A. 40A:14-149, N.J.A.C. 4A:2-2.5(a)(1), and N.J.A.C. 4A:2-2.5(d), by failing to timely file, serve, and conduct

a hearing on the 2012 disciplinary charges. Plaintiff had the ability and opportunity to assert all these statutory and regulatory limitation provisions as defenses at his disciplinary hearing and thereafter in a timely-filed appeal to the CSC, which had primary jurisdiction in the matter. Plaintiff's allegations that he was improperly removed from his classified employment with the City clearly and logically implicated civil service concepts, and N.J.A.C. 4A:2-2.5 is a civil service regulation. The Legislature has vested the CSC with jurisdiction over such civil service issues. See N.J.S.A. 11A:2-1 (creating the CSC); N.J.S.A. 11A:2-6 (empowering the CSC to, among other things, render final administrative decisions on matters concerning the removal of classified employees); see also Glynn v. Park Tower Apartments, Inc., 213 N.J. Super. 357, 363 (App. Div. 1986) (recognizing that "a case over which an agency has jurisdiction which has been filed with a court should ordinarily be transferred to the agency" under R. 1:13-4(a)).

Moreover, by failing to timely appeal to the CSC, plaintiff waived these limitations defenses. See Notte, 185 N.J. at 500 (recognizing that statutes of limitations "are not self-executing" and must be raised by way of an affirmative defense or they are waived). Accordingly, we affirm the dismissal of counts one and

two of the amended complaint with prejudice. See Nostrame v. Santiago, 213 N.J. 109, 128 (2013).

For several reasons, we reach a different result with respect to plaintiff's CRA claim, as set forth in count three of his amended complaint. First, we note that plaintiff did not move for summary judgment on this count, nor did defendants in their cross-motion seek to dismiss it.

Second, the CSC was not authorized to resolve plaintiff's constitutional and tort claims, N.J.S.A. 11A:2-6, as these claims require the development of a fuller record and fact-finding in the Superior Court. See, e.g., Maisonet v. N.J. Dep't of Human Servs., 140 N.J. 214, 227 (1995) (noting that "federal claims arising out of decisions rendered by state and local administrative agencies ordinarily will be heard in the Law Division"); Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 400 (App. Div. 2006) (noting that tort claims "are the type of claims that would have to be heard in a trial court even if they were asserted against a state agency"). Moreover, unlike a court that "can consider all judicial remedies," the CSC has no authority to grant plaintiff a complete damages award, if he is able to establish the merits of his CRA claim, because it is only authorized to award back pay, seniority, benefits, and counsel fees. Muise v. GPU, Inc., 332 N.J. Super.

140, 163 (App. Div. 2000); see also N.J.S.A. 11A:2-22; N.J.A.C. 4A:2-1.5(b).

Third, as counsel for defendants candidly conceded at oral argument, on this record we are unable to discern the court's basis for dismissing the CRA claim. The court erred by failing to make any findings of fact supporting its determination to dismiss this claim. R. 1:7-4. A trial court "must state clearly [its] factual findings and correlate them with relevant legal conclusions, so that parties and the appellate courts [are] informed of the rationale underlying th[ose] conclusion[s]." Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 594-95 (App. Div. 2016) (quoting Monte v. Monte, 212 N.J. Super. 557, 565 (App. Div. 1986)). When that is not done, a reviewing court does not know whether the ultimate decision is based on the facts and law or is the product of arbitrary action resting on an impermissible basis. Monte, 212 N.J. Super. at 565. Thus, in failing to explain its dismissal of the CRA claim, the court did not make the findings of fact and conclusions of law required by Rule 1:7-4(a). See Oslacky v. Borough of River Edge, 319 N.J. Super. 79, 85-86 (App. Div. 1999) (remanding for violation of R. 1:7-4(a) where judge failed to address a portion of plaintiff's claim).

For these reasons, we reverse the dismissal of plaintiff's CRA claim and remand that claim to the trial court for further

proceedings in the normal course. We express no view as to the merits of the claim.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION