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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4498-19**

PHILLIP A. DIXON,

Plaintiff-Appellant,

v.

JPAY, INC., and NEW
JERSEY DEPARTMENT OF
THE TREASURY, OFFICE
OF THE ATTORNEY
GENERAL OF NEW JERSEY,

Defendants-Respondents.

Submitted April 25, 2022 – Decided May 13, 2022

Before Judges Messano and Marczyk.

On appeal from the Superior Court of New Jersey, Law
Division, Mercer County, Docket No. L-0424-18.

Phillip A. Dixon, appellant pro se.

Matthew J. Platkin, Acting Attorney General, attorney
for respondents New Jersey Department of the Treasury
and Office of the Attorney General of New Jersey
(Michael Vomacka, Deputy Attorney General, on the
brief).

Fox Rothschild LLP, attorneys for respondent JPay, Inc. (Michael J. Robinson, IV, of counsel and on the brief).

PER CURIAM

Plaintiff, Phillip A. Dixon, appeals from orders dated March 17, 2020, dismissing his amended complaint against defendants, JPay, Inc., (JPay) and the Office of the Attorney General and the New Jersey Department of Treasury (State). Based on our review of the record on appeal and the applicable legal principles, we affirm the trial court's dismissal of the complaint with prejudice.

I.

We review an order granting a motion to dismiss a complaint for failure to state a cause of action de novo, applying the same standard under Rule 4:6-2(e) that governed the motion court. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). Such review "is limited to examining the legal sufficiency of the facts alleged on the face of the complaint," and, in determining whether dismissal under Rule 4:6-2(e) is warranted, the court should not concern itself with a plaintiff's ability to prove his or her allegations. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989).

Nonetheless, "a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder v. State, Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). "[P]leadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit." Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998).

II.

We derive the following from the limited record. Plaintiff is an inmate housed in New Jersey State Prison. This matter arises out of a contract entered into between the State and JPay in December 2012, whereby JPay agreed to provide an electronic inmate kiosk system (IKS) for the Department of Corrections to allow inmates to send and receive emails, submit electronic grievances to prison officials, and purchase music and games.¹ Plaintiff alleges the IKS services became available in September 2015, at which time plaintiff opened an account. JPay purportedly changed the terms of use for the IKS in

¹ Plaintiff did not provide a copy of the contract on appeal.

August 2017.² Plaintiff asserts he did not agree to the new terms of use, and JPay remotely deactivated his tablet.

Plaintiff filed a complaint asserting various causes of action against JPay and the State. Although not entirely clear, it appears plaintiff sought to advance claims against JPay and the State for fraud, misrepresentation, breach of implied warranty of merchantability, public and private nuisance, illegal "tying," "contract of adhesion," and illegal taking. Both defendants filed motions to dismiss plaintiff's complaint. Plaintiff did not file opposition to the motions, but was permitted to participate at oral argument. The trial court granted both motions, and this appeal followed.

Plaintiff's brief on appeal is not a model of clarity. Nevertheless, plaintiff only appears to challenge certain aspects of the trial court's decision. As to JPay, plaintiff argues he is a third-party beneficiary of the contract between the State and JPay and that JPay violated the implied warranty of merchantability. Plaintiff also contends the trial court improperly dismissed the tortious interference with property or nuisance claims, and further erred by not adequately stating its reasons on the record.

² Plaintiff failed to provide a copy of the original and amended terms of use on appeal.

Regarding the claims against the State, plaintiff argues the trial court erred in dismissing the complaint pursuant to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 to -5. Plaintiff further contends the court did not adequately state its reasoning on the record and improperly dismissed the nuisance claims.³ We are not persuaded by these arguments.

III.

The standard applied by courts to determine "third-party beneficiary status is 'whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts. . . .'" Rieder Cmtys. v. N. Brunswick, 227 N.J. Super. 214, 222 (App. Div. 1988) (quoting Brooklawn v. Brooklawn Hous. Corp., 124 N.J.L. 73, 77 (E. & A. 1940)). The intention of the contracting parties "must be garnered from an examination of the contract and a consideration of the circumstances attendant to its execution." Ibid. "The fact that such a benefit exists, or that the third party is named, is merely evidence

³ Plaintiff also contends the trial court's decision is "baffling" given that neither defendant challenged the truthfulness of the allegations in the amended complaint. The trial court correctly assumed — as did defendants — the allegations of the complaint were true for the limited purpose of an application under Rule 4:6-2. As noted previously, our review "is limited to examining the legal sufficiency of the facts alleged on the face of the complaint," pursuant to Rule 4:6-2(e), and the trial court should not concern itself with a plaintiff's ability to prove his or her allegations. Printing Mart-Morristown, 116 N.J. at 746.

of this intention." Ross v. Lowitz, 222 N.J. 494, 513 (2015). However, an incidental beneficiary does not acquire enforceable rights under the contract. Ibid. Unless evidence of intention can be derived, a third party has no cause of action despite the fact that it may derive an incidental benefit from the contract's performance. Rieder Cmtys. 227 N.J. Super. at 222 (citing Gold Mills, Inc. v. Orbit Processing Corp., 121 N.J. Super. 370, 373 (Law Div. 1972)).

In analyzing plaintiff's third-party beneficiary claim, the trial court relied on this court's ruling in Rieder Communities.⁴ There, we found that property owners who incidentally benefited from a contract between North and South Brunswick could not sue for enforcement or damages for a breach of the contract. Id. at 223. Land developers who were denied sewer permits for housing development projects appealed the dismissal of their applications to enforce the contract which involved an extension of a sewer line and shared uses and costs. Id. at 217-18. The court found that although the developers benefitted from the contract, nothing indicated the property owners "were intended to have

⁴ Plaintiff mistakenly argues the trial court relied on Rieder v. State, Dep't of Transp., 221 N.J. Super. 547 (App. Div. 1987). However, that case was only cited by JPay regarding the standard of review when a court addresses a motion to dismiss for failure to state a claim.

the right to enforce the obligations of the contract or to sue for damages allegedly arising from a breach of the contract." Id. at 223.

Before this court, plaintiff argues he is a third-party beneficiary to the contract between JPay and the State, and the trial court failed to "examine the terms and conditions" of the contract to determine the intent of the parties. However, as JPay correctly argues, plaintiff's amended complaint does not include any language from the contract indicating plaintiff is an intended third-party beneficiary with standing to sue. Plaintiff has not alleged the contracting parties knew he would use a JPay tablet, or anticipated he would purchase JPay services, nor could plaintiff show the contracting parties knew of, or considered, his incarceration during such negotiations. Without providing "evidence of intention," plaintiff has no cause of action against defendants based on the contract between JPay and the State despite deriving an incidental benefit.

Plaintiff further alleges he is entitled to the protections afforded by N.J.S.A. 12A:2-312(1) and that JPay violated the implied warranty of merchantability. However, the allegations here do not implicate N.J.S.A. 12A:2-312(1), or the implied warranty of merchantability under N.J.S.A. 12A:2-314. Specifically, N.J.S.A. 12A:2-312(1) governs contracts for sale and provides there is a warranty from the seller that "(a) the title conveyed shall be

good, and its transfer rightful; and (b) the good shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge." Ibid. To establish a claim for breach of the implied warranty of merchantability, a plaintiff must demonstrate the product was not "fit for the ordinary purposes for which such goods are used[.]" N.J.S.A. 12A:2-314(2)(c). Plaintiff has not alleged JPay did not convey good and marketable title to the tablet he purchased. Here, there is no issue as to the title to the goods, but only plaintiff's access to the use of the product. Further, plaintiff has not argued the tablet sold to him was defective or not fit for its ordinary purpose. Rather, he contends JPay denied him access to the tablet when he refused to consent to the changes in the terms of use for the IKS. Adequately providing support for his reasoning on the record, the trial judge determined plaintiff failed to state a cause of action for these claims under N.J.S.A. 12A:2-312(1) and N.J.S.A. 12A:2-314.

Plaintiff's nuisance claims are also without merit as to both JPay and the State. Our Supreme Court has adopted the Restatement (Second) of Torts, which provides for two approaches of liability in this area, a "public nuisance" and a "private nuisance" theory. See Ross, 222 N.J. at 506 (citing Restatement (Second) of Torts § 40 Introductory Note (Am. Law Inst. 1979)). To state a

claim for public nuisance, a plaintiff must show an unreasonable interference with a right common to the general public. In re Lead Paint Litig., 191 N.J. 405, 425 (2007). A public right must be "common to all members of the general public rather than a right merely enjoyed by a number, even a large number, of people." Ibid. To determine if an interference is unreasonable, courts consider various circumstances including whether the conduct significantly interferes with the public's health, safety, peace, comfort, or convenience, and if the actor has reason to know the conduct has a significant effect upon the public right. Ibid. (citing Restatement (Second) of Torts § 821(b) (Am. Law Inst. 1979)).

Here, plaintiff did not identify any right common to the general public in that there are no facts suggesting the changes to the IKS terms of service have any effect on the general public, or that any public right is implicated. Rather, plaintiff personally did not consent to the new terms of use. Further, plaintiff did not identify any statute, ordinance, or administrative regulation proscribing the conduct, nor did plaintiff identify any long-lasting effect beyond his own inability to use the tablet. The trial court correctly rejected this claim.

Private nuisance is described as an "unreasonable interference with the use and enjoyment of land". Smith v. Jersey Cent. Power & Light Co., 421 N.J. Super. 374, 389 (App. Div. 2011). See Restatement (Second) of Torts § 40

Introductory Note (Am. Law Inst. 1979) (explaining private nuisance "is always a tort against land, and the plaintiff's action must always be founded upon his interests in the land."). Because plaintiff's complaint addresses an electronic tablet, and there are no allegations concerning land, the trial court properly found the complaint failed to allege a viable private nuisance claim.

Finally, plaintiff's contention the trial court erred in dismissing the claims against the State pursuant to the New Jersey Contractual Liability Act is without merit. N.J.S.A. 59:13-5 provides, in relevant part, as follows:

It shall be the responsibility of parties contracting with the State to promptly notify the State in writing of any situation or occurrence which may potentially result in the submission of a claim against the State. Except as otherwise provided in [N.J.S.A. 59:13-6], no notice of claim for breach of contract, either express or implied in fact, shall be filed with the contracting agency later than 90 days after the accrual of such claim.

[T]he claimant shall be forever barred from recovering [if]:

he fails to notify the appropriate contracting agency within 90 days of accrual of his claim except as otherwise provided in [N.J.S.A. 59:13-5] hereof[.]

[N.J.S.A. 59:13-5(a).]

The notice provision is "specifically intended to give state agencies an opportunity to determine the merits of the claims for the possibility of a

settlement, as well as to investigate the claims for the purpose of preparing for trial." Frapaul Constr. Co. v. Transp. Dep't of N.J., 175 N.J. Super. 84, 92 (App. Div. 1980) (citing Hous. Auth. of Newark v. Sagner, 142 N.J. Super. 332, 343 (App. Div. 1976)).

The trial judge determined plaintiff failed to "present his claims as required under the New Jersey [Contractual Liability Act]. Plaintiff has neither alleged or otherwise shown he filed any notice of contract claim as required." The trial judge further noted, "plaintiff's amended complaint points to an August 23, 2017, time period when JPay changed its terms of use. Plaintiff's time to file a notice of claim expired, therefore, on November 23 [2017]. It is now too late for plaintiff to file a late notice of a contract claim."

Plaintiff maintains he did file a proper notice but fails to provide proof of any such notice or when it was filed. Moreover, even if plaintiff satisfied the procedural requirements of the statute by filing a timely notice pursuant to N.J.S.A. 59:13-5, the trial court properly dismissed plaintiff's claim given that plaintiff did not have standing to bring the claims as a third-party beneficiary. Based on the record before the court, we perceive no basis for finding the trial court erred on this issue.

To the extent we have not otherwise addressed plaintiff's arguments, they lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION