SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0046-21

JULIAN LEONE,

Plaintiff-Appellant,

v.

HOWELL TOWNSHIP, HOWELL ZONING BOARD OF ADJUSTMENT, STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CATHERINE R. MCCABE, in her official capacity as Commissioner of the New Jersey Department of Environmental Protection,

Defendants-Respondents.

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Argued June 15, 2023 - Decided August 1, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4517-19.

Anthony J. Brady, Jr. argued the cause for appellant.

Kelsey A. McGuckin-Anthony argued the cause for respondents Howell Township and Howell Zoning Board of Adjustment (Dasti, Murphy, McGuckin, Ulaky, Koutsouris & Connors, attorneys; Kelsey A. McGuckin-Anthony, on the brief).

Chloe Gogo, Deputy Attorney General, argued the cause for respondent New Jersey Department of Environmental Protection (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Chloe Gogo, on the brief).

PER CURIAM

Plaintiff appeals from the June 14, 2021 orders dismissing his complaint against the State defendants[1] with prejudice and granting the Township defendants[2] summary judgment, and the subsequent August 11, 2021 order denying reconsideration. We affirm.

Plaintiff and his wife purchased a single-family home on property in a new residential development in Freehold in December 2015. Because the development is adjacent to a farm, it is subject to a farmland and perimeter buffer and conservation easement (easement), granted by the developer to the

[1] We refer to defendants State of New Jersey, New Jersey Department of Environmental Protection (DEP), and the Commissioner of the DEP as the State defendants.

[2] We refer to defendants Howell Township (Township) and Howell Zoning Board of Adjustment (Board) as the Township defendants.

Township and recorded by deed in Monmouth County in December 2012. The easement was granted as a condition of the final major subdivision approval for the development.

The deed granting the easement stated it was intended

> to protect the property from any type of development or disturbance. It is intended that said property remain in its natural state and [the developer] and its successors and assigns shall be prohibited from constructing anything in said easement area, including fences, sheds or any structures of any kind whatsoever.

The deed further provided the easement is "deemed to be and shall be a continuing covenant running with the land and shall be binding upon and in favor of the successors and assigns of the respective parties hereto."

When plaintiff and his wife took title to the property in 2015, the deed stated the property was "SUBJECT to easements, zoning requirements, and other restrictions of record granted or to be granted," and specifically that the property was "[s]ubject to a [fifty foot] wide Farmland and Perimeter Buffer and Conservation Easement dedicated to the Township . . . as shown on the above referenced filed map."

In 2017, the DEP approved the Township's application to participate in the Green Acres Project under the Green Acres Land Acquisition Act, N.J.S.A. 13:8A-1 to -56, and its regulations, N.J.A.C. 7:36-1.1 to -26.11. Under that

agreement, the Township was granted $750,000 in state funds to build an outdoor recreational area, and the Township was required to "comply with all local, state, and federal laws, rules, and regulations," including "all Green Acres Laws." Any lands held by the Township for conservation were thereafter encumbered by the Green Acres laws, including the easement on plaintiff's property. The Township was not permitted to "convey, dispose of, or divert to a use for other than recreation and conservation purposes any lands held by the [Township] for those purposes at the time of receipt of Green Acres funding unless the [Township] obtain[ed] prior approval from the Commissioner and the State House Commission," in accordance with N.J.A.C. 7:36-26; N.J.S.A. 13:A-47(b); and N.J.S.A. 52:20-1.

After plaintiff purchased his property, he installed an underground irrigation system and a swing set structure on the easement. Plaintiff alleged in his complaint that in September 2018, the Township's Code Inspector informed plaintiff he had to stop cutting the grass in the area of the easement and remove the irrigation system and swing set. Later that month, the Township sent plaintiff a notice of violation of Municipal Code § 188-127, structure on/disturbing an easement.

Thereafter, plaintiff met with the Township's attorney and Land Use Director. According to plaintiff, he informed them of his medical condition—asthma—and requested an accommodation for his disability. The municipal representatives suggested plaintiff file an appeal with the Board as they did not have the power to grant an accommodation. A second violation was issued to plaintiff, and additional property owners in the development also received violation notices in December 2018.

In January 2019, plaintiff and his wife filed an application with the Board for a bulk variance to permit them to mow and water the easement area and maintain the swing set and irrigation system as erected on the easement. Plaintiff requested the accommodations under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 to 12213. He advised he sought to mow and irrigate the lawn area "to control the growth of the grass and weeds so as not to affect his breathing disability." He stated the swing set "was placed in an area where he could see his children and not be exposed to conditions which potentially could affect his health." During the Board hearing, plaintiff acknowledged he could relocate the swing set elsewhere on his property.

The Board presented a letter from the DEP's Director of the Green Acres Program informing the Board of its opposition to plaintiff's application for a

variance permitting the swing set and irrigation system to remain within the easement area. The letter stated:

> The Easement provides that the property is to remain in its natural state and the construction of anything, including structures of any kind whatsoever, is prohibited in the Easement Area. As these improvements were installed after [plaintiff] purchased the property, and they were on notice that "constructing anything," including structures, was prohibited in the Easement Area, the irrigation system and swing set must be removed to avoid an unauthorized diversion of parkland (resulting in a minimum "after the fact" compensation ration of 20:1) and the requirement that the Township seek a partial release of the Easement.

After two days of hearings, in a Resolution dated October 7, 2019, the Board granted plaintiff's application to water and mow the easement but denied his application to permit the swing set and underground sprinkler system to remain on the easement area. The swing set and underground irrigation system had to be moved off the easement, however the easement could be watered from other areas of the yard outside the easement.

The Resolution stated the Board "did not find that retaining the swing set and irrigation system within the farmland buffer/conservation easement met the reasonable and necessary accommodations analysis under the ADA." The swing set did not relate "in any way to [plaintiff]'s ability to breathe properly," and it "[could] be easily moved to an area closer to the residence, and out of the

easement area." Therefore, plaintiff did not demonstrate "the requested accommodations[] [were] reasonable and necessary or otherwise related to [plaintiff]'s full use and enjoyment of his property." Plaintiff did not appeal from the Board's decision.

Instead, plaintiff filed a complaint against defendants alleging violations of the ADA; the Fair Housing Act (FHA), 42 U.S.C. §§ 3601 to 3631; the Rehabilitation Act of 1973 (RHA), 29 U.S.C. §§ 701 to 796I; and the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50.

The State defendants moved to dismiss plaintiff's claims for failure to state a cause of action under Rule 4:6-2(e). The Township defendants moved for summary judgment.

On June 11, 2021, after hearing argument on both motions, the court issued an oral decision granting the motions, memorialized in the June 14, 2021 orders.

In addressing the State's motion to dismiss, the judge found the complaint failed "to explain or assert how the State [d]efendants . . . excluded [plaintiff] from a service, program or activity of the State" as required to establish a claim under the ADA or RHA. The judge further found the FHA was not applicable to the circumstances "because [plaintiff] d[id] not dwell in or on the easement,

but rather maintain[ed] it for use of his children and . . . for their enjoyment." Nor could plaintiff support a claim under the LAD because "the easement [wa]s not a place of public accommodation to which [plaintiff] must be afforded . . . equal access, and . . . the LAD d[id] not even refer to conservation easements or any similar such property being protected under that legislation."

Furthermore, plaintiff had not followed the process required under the Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 to -9. The judge noted plaintiff had not applied "to the State for . . . disposal or diversion in accordance with Green Acres," and "because . . . DEP ha[d] not taken any actions . . . directly affecting [plaintiff] or his property, [any] review of [plaintiff]'s claims [was] premature."

In granting the Township defendants summary judgment, the judge concluded plaintiff "was unable to articulate any valid claims" under the statutes cited in his complaint.

Plaintiff's subsequent motion for reconsideration of both orders was denied on August 11, 2021.

On appeal, plaintiff raises twenty-two points of legal discussion for our consideration. Because the majority of the assertions lack sufficient merit to

warrant discussion in a written opinion, Rule 2:11-3(e)(1)(E), we only address several of the issues.

Our review of the order dismissing the claims against the State defendants is de novo. See Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). We "must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)).

We also review the trial court's grant of a motion for summary judgment de novo, using the same standard as the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). 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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The LAD

Plaintiff contends the LAD applies to land use and is not limited to public accommodations. He also asserts that "[g]overnmental entities are 'public accommodations' and are thus bound by the LAD."

In support of the first argument, plaintiff cites to N.J.S.A. 10:5-12.5, which provides:

> (a) It shall be an unlawful discrimination for a municipality, county, or other local civil or political subdivision of the State of New Jersey, or an officer, employee, or agent thereof, to exercise the power to regulate land use or housing in a manner that discriminates on the basis of race, creed, color, national origin, ancestry, marital status, familial status, sex, gender identity or expression, liability for service in the Armed Forces of the United States, nationality, or disability.

Preliminarily, we note this section of the LAD statute is inapplicable to the State defendants. The State did not directly regulate land use and it is not responsible for the actions and decisions of the Board.

Nor does the provision support a claim against the Township defendants. Plaintiff does not challenge the validity of the easement itself as violative of the LAD. And plaintiff has presented no statutory or case law permitting a cause of action under this provision of the LAD grounded on a municipal land use entity's denial of a variance request.

We turn then to plaintiff's contention that the easement area is a public accommodation. The LAD ensures that "[a]ll persons shall have the opportunity to . . . obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation,

and other real property without discrimination." N.J.S.A. 10:5-4. A "place of public accommodation" includes hotels, retail stores, restaurants, public conveyances, hospitals, and public schools. N.J.S.A. 10:5-5(l). Although the list is not exhaustive, it demonstrates that a conservation easement, designed to protect an area from a place where the public gathers by safeguarding its natural state, would not be included.

Plaintiff's reliance on Est. of Nicolas v. Ocean Plaza Condo. Ass'n, Inc., 388 N.J. Super. 571 (2006), is misplaced. There, this court held the LAD "provide[s] a cause of action for disability discrimination based upon the failure of a condominium association to provide a disabled resident, of a multiple unit condominium building, a reasonable parking space accommodation sufficient to afford her an equal opportunity to the use and enjoyment of her condominium unit." Id. at 575. The Department of Community Affairs (DCA) had "promulgated administrative regulations regulating parking spaces for handicapped people." Id. at 589. Therefore, we found that "a cause of action under LAD can be evidenced by a violation of administrative regulations promulgated by the DCA." Id. at 587.

The plaintiff in Nicolas relied on a different subsection of the LAD than does plaintiff here. Nicolas asserted a violation of N.J.S.A. 10:5-12(g), which

addresses unlawful employment practices and prohibits discrimination by a property owner who has the right to ownership or possession. Id. at 586-87. Plaintiff's claims are based on N.J.S.A. 10:5-12.5, which involves the regulation of land use.

We are satisfied the easement included in plaintiff's deed when he purchased the property is not subject to the LAD and is not a public accommodation. The statute does not reference anything similar to a conservation easement and the area is not one for public use. See Doe v. Div. of Youth & Fam. Servs., 148 F. Supp. 2d 462, 496 (D.N.J. 2001) (holding Division of Youth and Family Services was not a place of public accommodation because "[n]either the State of New Jersey nor its agencies are listed entities in [LAD]"); Blair v. Mayor & Council, Borough of Freehold, 117 N.J. Super. 415, 417 (App. Div. 1971) (concluding volunteer fire department facilities were not a place of public accommodation because they were "maintained for the pleasure and sociability of members of the volunteer fire department" rather than "for the use of the general public of a personal nature").

The FHA

Under the FHA, it is unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because

of a handicap." 42 U.S.C. § 3604(f)(1). A dwelling is defined in 42 U.S.C. § 3602(b) as: "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." The easement area is not a dwelling.

Plaintiff contends the regulations extend beyond dwellings, citing to 24 C.F.R. § 100.204 (2022) which states: "It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas." "Common use areas" are defined as "rooms, spaces or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and passageways among and between buildings." 24 C.F.R. § 100.201 (2022).

We see no applicability of these regulations to the presented circumstances. The easement does not deny plaintiff access to his dwelling. And it is not a common area as defined in the regulation. Moreover, plaintiff

did not allege defendants denied his right to use and enjoy his dwelling in denying the variance application. And, as was found by the trial court, the grant of the variance would impose an undue financial burden on the Township, thus sanctioning the Township defendants' denial of the application.

To pursue a reasonable accommodation claim under the FHA, a plaintiff must establish the requested accommodation is "(1) reasonable and (2) necessary to (3) afford handicapped persons an equal opportunity to use and enjoy housing." Lapid-Laurel, L.L.C v. Zoning Bd. of Adjustment of Twp. of Scotch Plains, 284 F.3d 442, 457 (3d Cir. 2002) (quoting Bryant Woods Inn, Inc. v. Howard Cnty., 124 F.3d 597, 603 (4th Cir. 1997)). If the plaintiff meets their preliminary burden, the burden shifts to the defendant to show unreasonableness. Ibid. The defendant can show unreasonableness by proving "it could not have granted the variance 'without imposing undue financial and administrative burdens,' imposing an 'undue hardship' upon the Township, or requiring 'a fundamental alteration in the nature of the program.'" Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996) (citations omitted).

In her letter admitted before the Board hearing, the DEP Green Acres Director advised that if plaintiff did not remove the irrigation system and swing set, the Township would be subject to an unauthorized diversion of parkland

resulting in the application of the 20:1 compensation ratio. See N.J.A.C. 7:36-26.10(g). As the Township planner explained during the Board hearing,

> when the DEP Green Acres Program looks at a diversion, they don't take the square footage of the disturbance. It would be the easement in its entirety. Because once there is [a] disturbance the DEP feels that the conservation easement is no longer providing the value with which it was intended when it was dedicated.

The trial court found that,

> the [Township's] failure to abide by the restriction of [this] easement in question would subject [it] to Green Acres['] 20 to 1 ratio, meaning that if the Township deviated from the conservation nature of the easement, the Township would have to provide either [twenty] times more land for conservation purposes or compensate the DEP with [fifteen] million [dollars] in compensation . . . .

It cannot be disputed that the financial burden on the Township defendants, if they granted plaintiff's variance application, is astronomical and clearly unreasonably burdensome. Plaintiff cannot sustain his claim under the FHA.

ADA and RHA

The ADA forbids discrimination in the form of "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such

accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

The RHA provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a).

Thus, "[t]he ADA and the [RHA] . . . prohibit all discrimination based on disability by public entities," specifically State and local entities. Dial, Inc. v. City of Passaic, 443 N.J. Super. 492, 504 (App. Div. 2016) (third alteration in original) (quoting Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown Plan. Bd., 294 F.3d 35, 45 (2d Cir. 2002)). The RHA also prohibits discrimination based on a disability by recipients of federal funding. Ibid. (citing 29 U.S.C. § 794).

"'The remedies, procedures, and rights' available under the [RHA] are likewise available under the ADA." Id. at 505 (quoting 42 U.S.C. § 12133). Courts therefore interpret the two statutes "in pari materia." Ibid. (quoting Frame v. City of Arlington, 657 F.3d 215, 223 (5th Cir. 2011)). "[T]he standards under the ADA and the [RHA] are comparable," and the RHA "incorporates the

standards of several sections of the ADA, including the section defining 'reasonable accommodation.'" Borngesser ex rel. Est. of Borngesser v. Jersey Shore Med. Ctr., 340 N.J. Super. 369, 381 n.3 (App. Div. 2001) (first citing McDonald v. Pennsylvania, 62 F.3d 92, 95 (3d Cir. 1995); then citing Chisolm v. Manimon, 97 F. Supp. 2d 615, 622 (D.N.J. 2000); and then citing Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997)).

"To state a prima facie case, a plaintiff must show that [they are] a 'qualified individual with a disability'; that [they were] excluded from a service, program, or activity of a public entity; and that [they were] excluded because of [a] disability." Disability Rts. N.J., Inc. v. Comm'r, N.J. Dep't of Human Servs., 796 F.3d 293, 301 (3d Cir. 2015).

"[T]he phrase 'service, program, or activity' under Title II [of the ADA], like 'program or activity' under [the RHA], is 'extremely broad in scope and includes anything a public entity does.'" Furgess v. Pa. Dep't of Corr., 933 F.3d 285, 289 (3d Cir. 2019).

Although it is unclear, plaintiff appears to allege that the service or activity at issue here is "land use" or "zoning," or "one[']s backyard." If we assume plaintiff's reference is to the Board's resolution that partially denied his variance request, that would constitute a service, program, or activity under the

broad interpretation of the statute. See Wis. Cmty. Servs. v. City of Milwaukee, 465 F.3d 737, 750 (7th Cir. 2006) ("As courts have held, municipal zoning qualifies as a public 'program' or service,' as those terms are employed in the ADA, and the enforcement of those rules is an 'activity' of a local government.").

However, plaintiff does not state how he was excluded from this service, or how he was excluded based on his disability. To the contrary, plaintiff was accorded the full breadth of due process regarding his variance application. The Board conducted two hearings during which it heard testimony from plaintiff, the Board's attorney, planner and engineer, the Township's ADA attorney, and the Land Use Director. The Board also presented guidance and instruction from the DEP regarding the impact of the requested variance on the Green Acres agreement. Thereafter, the Board issued a seventeen-page Resolution in which it partially granted plaintiff's variance. Moreover, all of the property owners in the development were subject to the easement and therefore plaintiff cannot show he was excluded from a program or service based on his disability.

Because plaintiff cannot sustain any of the claims alleged in his complaint, the trial court properly dismissed the claims against the State defendants under Rule 4:6-2(e) and granted the Township defendants summary judgment.

Affirmed.