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APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0293-21**

VINCENT K. LOUGHLIN,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF THE
TREASURY, DIVISION OF
PENSIONS AND BENEFITS,
MATTHEW GEBHARD,
Investigator Pension Fraud and
Abuse Unit, KRISTIN CONOVER,
Investigator Pension Fraud and
Abuse Unit, and JOHN SLOTH,
Head of Investigations, Division of
Pensions and Benefits, Pension
Fraud and Abuse Unit,

Defendants-Respondents.

Argued March 22, 2023 – Decided June 2, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Docket No. L-2030-21.

Vincent K. Loughlin, appellant, argued the cause pro se.

Jeffrey D. Padgett, Deputy Attorney General, argued the cause for respondents (Matthew J. Platkin, Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Jeffrey D. Padgett, on the brief).

PER CURIAM

Plaintiff appeals from the August 27, 2021 orders denying his motion for a declaratory judgment with injunctive relief and granting defendants' motion to dismiss the complaint with prejudice. We affirm.

During his career, plaintiff served as a planning and zoning board attorney to several municipalities.¹ In 2001, he enrolled in the Public Employees' Retirement System (PERS). Therefore, as of December 31, 2011, plaintiff had eleven years credited in the system.

In March 2014, the New Jersey State Department of the Treasury, Division of Pensions and Benefits (Division), notified plaintiff he was eligible to apply for a retirement benefit based on his employment exceeding ten years. Plaintiff applied for the pension the following month.

¹ The municipalities at issue are the Town of Westfield, Scotch Plains Township, and Mountainside Borough.

In June 2014, the Division sent plaintiff a letter informing him that in 2007, the Legislature enacted N.J.S.A. 43:15A-7.2, that "was intended to curtail the participation of professional service providers such as attorneys . . . in . . . [PERS]." The Division further stated that plaintiff's position with "the Town of Westfield [was] ineligible for continued [PERS] membership" as of January 1, 2008. Therefore, his PERS membership account was being adjusted to exclude any salary and service credited to him after December 31, 2007. Any contributions made by plaintiff to the retirement system after that date would be refunded to him.

The letter further notified plaintiff his eligibility for benefits might be affected by a determination that he was an independent contractor as defined by the Internal Revenue Service (IRS). Plaintiff was apprised of his right to appeal the administrative decision to the PERS Board of Trustees (Board).

Plaintiff replied to the letter, stating he wished to "preserve [his] legal rights," and "confirm [his] strong and vehement disagreement with [the] claim and 'decision.'" Plaintiff asserted the letter was a violation of his constitutional rights to due process and fundamental fairness, and he threatened an action under 42 U.S.C. § 1983. He requested the Division withdraw the letter. And he asked the Division to consider his letter to be an appeal to the Board.

In November 2014, the Division sent plaintiff a retirement allowance statement, noting plaintiff's effective retirement date as August 1, 2014, and listing a monthly retirement allowance of \$416.72 and a life insurance benefit. The following month, the Division informed plaintiff the Board had approved his application for "[s]ervice [r]etirement effective August 1, 2014." There was no further communication from the Division and plaintiff collected his monthly pension benefit for the next four years.

However, in August 2018, an investigator for the Division's Pension Fraud and Abuse Unit sent plaintiff a letter advising him again that his PERS membership was under review. The Division requested plaintiff complete a questionnaire to aid it in determining whether plaintiff was an employee or independent contractor as defined by the IRS.

Plaintiff replied in September 2018, stating the Division properly qualified him four years earlier to receive retirement benefits. He did not fill out the questionnaire. The Division sent a second request in May 2019 asking plaintiff again to fill out the form. Plaintiff replied by attaching a copy of his September 2018 letter. He did not fill out the questionnaire.

The Division investigator responded to plaintiff in July 2019, noting that after plaintiff was notified of the investigation in June 2014, he responded with a July 21, 2014 letter of appeal. The Division's letter further stated:

[o]ur records indicate you filed for a PERS retirement on July 20, 2014, the day prior to the date of your [l]etter of [a]ppeal and listed a retirement date of August 1, 2014. When the Division's Retirement Section processed your retirement claim in 2014, the Division had not yet addressed your appeal of its initial determination and the Division did not terminate its review of your PERS account.

The letter explained there was "a significant backlog" of cases that might be affected by the 2007 legislation. The investigator requested for a third time that plaintiff complete the questionnaire to "assist the Division in determining [plaintiff's] eligibility for PERS service credit after 2007."

In responding, plaintiff stated he disagreed with the Division that there was any pending appeal regarding his status as a qualified retiree. He referred to the March 2014 letter where he was advised he was eligible to apply for retirement benefits. Plaintiff reiterated he had been receiving his retirement benefit for five years.

In July 2020, the Division sent plaintiff the questionnaire for a fourth time, noting it was a "final request." Plaintiff replied, stating there was "no appeal pending as to [his] status as a properly retired member of the system." Plaintiff

advised the Division he considered the continuing notices and questionnaires to be "harassing."

Several months later, the Division sent a letter to Westfield with plaintiff copied, informing it of the investigation regarding plaintiff's eligibility for PERS retirement benefits. The town had failed to comply with the Division's prior requests to produce certain documents to assist the Division in its investigation. The letter stated the Division was recommending PERS suspend plaintiff's pension payments until the town complied with the request.

Plaintiff responded to the letter, declaring he found its tone and content "outrageous," and it "maligned [his] reputation and integrity." Plaintiff warned if the Division did not withdraw its letter, he intended to file a complaint seeking damages, "including a claim for willful violation of [his] rights under 42 U.S.C.[] [§] 1983."

The Division replied, advising N.J.S.A. 43:15A-7.2 vested it with the authority to investigate whether plaintiff was eligible to participate in PERS. The letter further noted that the State Comptroller's office notified Westfield in 2011 of plaintiff's "questionable participation in . . . PERS." Thereafter, plaintiff and Westfield "rearranged [plaintiff's] contractual arrangement in order to comply with the dictates of [N.J.S.A. 43:15A-7.2] and [plaintiff] [was] no longer

an active contributing member of PERS." The Division again requested plaintiff complete the questionnaire. Plaintiff replied, reiterating his previously expressed position.

On May 18, 2021, the Division sent plaintiff a fifteen-page letter, advising its investigation concluded with a finding that plaintiff was ineligible to participate in PERS after December 31, 2007. Therefore, plaintiff's membership account would be adjusted to exclude his salary and service credited after that date and he would be refunded any contributions paid during that period. The letter detailed the findings from the investigation and the reasons for its conclusions. Essentially, in applying the IRS standard, plaintiff was deemed an independent contractor and not an employee of the towns with which he had contracts to perform services as a planning or zoning board attorney. As an independent contractor, he was not eligible to participate in PERS.

The Division outlined plaintiff's appeal rights, instructing "[y]ou have the right to appeal this administrative decision to the PERS Board of Trustees. . . . If you wish to proceed with your appeal, send a written statement within [forty-five] days of this notification, outlining in detail the reason for your disagreement with the Division's determination."

Plaintiff filed an order to show cause and verified complaint for declaratory and injunctive relief, asserting his actions were lawful and proper "in applying for the pension award and in accordance with [p]laintiff's rights and prior payments and contributions." He further asserted the reopening of the "unconditional pension award" was barred by res judicata and the statute of limitations.

Plaintiff also contended laches, waiver, and equitable and collateral estoppel applied to support his cause of action due to the length of time since his rights vested in 2011 and because of the unavailability of necessary records. He further contended his constitutional and fundamental rights were violated.

Plaintiff sought a determination that the 2014 pension award "remain[ed] lawfully valid and enforceable by [p]laintiff"; an order "enjoining [d]efendants from any further proceedings or action undertaking or seeking to revoke, reduce, or affect in any way the prior unconditional pension award of . . . PERS to . . . [p]laintiff dated December 10, 2014"; and a permanent injunction against defendants from taking further investigative actions. Thereafter, defendants moved to dismiss the complaint under Rule 4:6-2.

On August 27, 2021, the court heard oral arguments on the order to show cause and dismissal motion. Defendants asserted plaintiff did not exhaust his

administrative remedies; he was required to bring his "arguments to the [B]oard and then to the Office of Administrative Law." Any appeal after that would be to the Appellate Division. Alternatively, defendants contended, if plaintiff did exhaust his administrative remedies, any appeal had to be in the Appellate Division as the entity with exclusive jurisdiction over the action or inaction of state administrative agencies. Plaintiff relied on D.J. Miller & Assocs., Inc. v. State, Dep't of Treasury, Div. of Purchase & Prop., 356 N.J. Super. 187 (App. Div. 2002), to support his claim that the trial court had jurisdiction over the matter because liability could attach under the Tort Claims Act, N.J.S.A. 59:1-1 to 12-3.

In an oral decision issued August 27, 2021, the court granted defendants' motion to dismiss. The court found D.J. Miller was inapplicable to the presented circumstances.

The court further found the 2014 retirement benefits award was not unconditional, because the State had a "continuing investigation obligation" accorded it under "statute and executive order." PERS had the obligation to conduct audits of its members and determine their eligibility in the system. N.J.S.A. 43:15A-54 and 43:15A-7.2 provided defendants with the authority to correct any errors.

The court found plaintiff was apprised of his appellate rights. He had to first exhaust his administrative remedies, and if dissatisfied with the final agency's determination, plaintiff's next avenue for appeal was to this court. Because the trial court lacked jurisdiction, it dismissed the complaint with prejudice. Defendants agreed to the court including a provision in the order tolling plaintiff's appellate rights until August 27, 2021.

On appeal, plaintiff contends the trial court erred in granting defendants' dismissal motion because it had jurisdiction over the allegations of tortious conduct and wrongful acts. Plaintiff further asserts the Division's investigators lacked the authority to reopen his 2014 pension award and the principles of res judicata, collateral estoppel and fundamental fairness prevented the Division from reconsidering the pension award.

Our review of a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 4:6-2(e) is de novo. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). "A reviewing court 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, 237 N.J. at 107). Courts should search

the complaint thoroughly "and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). But "if the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107).

The trial court dismissed the complaint finding it did not have subject matter jurisdiction. Plaintiff disputes the authority of the Division to review his eligibility for a PERS pension after he collected it for several years. In short, plaintiff contests an agency's action. He was informed in the Division's May 18, 2021 letter that he had "the right to appeal th[e] administrative decision to the PERS Board of Trustees." Therefore, plaintiff was on notice of an agency action, he was advised of his right to appeal and was instructed where to pursue the appeal.

However, plaintiff did not pursue an appeal of the Division's determination and, therefore, he did not exhaust his administrative remedies. See Ortiz v. N.J. Dep't of Corr., 406 N.J. Super. 63, 69 (App. Div. 2009) (stating the exhaustion of administrative remedies is required before an appeal can be

taken). As our Supreme Court has stated, "the exhaustion of remedies requirement is a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts." Gripenburg v. Twp. of Ocean, 220 N.J. 239, 261 (2015) (quoting Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975)).

Plaintiff has not demonstrated any exception to the exhaustion of remedies requirement. Moreover, an appeal from a final state agency decision lies with this court, not the trial court. R. 2:2-3(a)(2).

Plaintiff does not contest this rule but instead asserts his complaint did not seek to review an agency action but was instead filed to "stop [d]efendants' harassment of [him], to stop [d]efendants' wrongful interference with [p]laintiff's existing municipal contracts, and to prevent [d]efendants from taking any action regarding [p]laintiff's unconditional pension award." He contends his complaint sounds in tort.

A reading of the complaint refutes that argument. Plaintiff sought an order declaring his 2014 pension award "remain[] lawfully valid and enforceable by [p]laintiff and permanently enjoin[] defendants from any further proceedings or action undertaking or seeking to revoke, reduce, or affect in any way the prior unconditional pension award of the Trustees of PERS to . . . [p]laintiff"

Plaintiff cannot "cloak[]" his claim "under the mantle of . . . tort" to sidestep the administrative appeal process. See Beaver v. Magellan Health Servs., Inc., 433 N.J. Super. 430, 441 (App. Div. 2013). We are satisfied the Law Division properly determined it lacked subject matter jurisdiction.

Because plaintiff has not exhausted his administrative remedies regarding the Division's actions, and the Law Division lacked subject matter jurisdiction, we do not address plaintiff's additional arguments.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION