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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0900-21**

JOSHUA JACKSON,

Plaintiff-Appellant,

v.

**CITY OF PASSAIC
HOUSING AUTHORITY,**

Defendant-Respondent.

Argued November 29, 2022 – Decided January 27, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-2963-21.

Eugenie F. Temmler argued the cause for appellant (Rabner Baumgart Ben-Asher & Nirenberg, PC, and Nathaniel M. Davis, attorneys; Eugenie F. Temmler and Nathaniel M. Davis, on the briefs).

Philip G. George argued the cause for respondent (Eric M. Bernstein & Associates, LLC, attorneys; Philip G. George, of counsel and on the brief).

PER CURIAM

Plaintiff Joshua Jackson appeals from an October 22, 2021 Law Division order denying him permission to file a late notice of claim against defendant City of Passaic Housing Authority (Authority) pursuant to the Tort Claims Act (Act), N.J.S.A. 59:1-1 to -14. Plaintiff filed his notice of claim with the Authority on September 10, 2021, eight days after the September 2, 2021 ninety-day statutory deadline had elapsed. We conclude the trial court did not err in denying the motion to file a late notice of claim because plaintiff failed to show "sufficient reasons constituting extraordinary circumstances" justifying his failure to timely file notice with the Authority and affirm.

Plaintiff alleges on June 4, 2021, he slipped on an unidentified liquid on the stairs between the first and second floors of a building owned by defendant in Passaic. Plaintiff attempted to obtain a notice of claim form from the Authority but was unsuccessful. On approximately August 27, 2021, less than one week before the notice deadline, plaintiff retained counsel. Plaintiff's counsel called the Authority, spoke with two individuals, and asked for a notice of claim form but again was told it did not know what form was being requested. On August 30, 2021, plaintiff's counsel was sent an incident report rather than a notice of claim form. Thereafter, plaintiff's counsel called the Authority's counsel multiple times in efforts to obtain a form but received no response.

An assistant property manager at the Authority, who was one of the individuals plaintiff's counsel spoke to, submitted a certification attesting he received a telephone call from a person who did not state his name. He certified the man he spoke with on the phone stated he was injured on property owned by the Authority and needed to fill out a form. The manager asked the man whether he would like to complete an incident report; the man said yes, and he would be suing the Authority. The man provided the manager with an email address, and the manager emailed the incident form to the man after the call ended. Further, the manager certified he did not receive a request from the man or his counsel for any forms other than the incident form provided. He also certified the man who called never provided his name or the date in which the alleged incident occurred. The manager was never told the incident report form was not the form the man was seeking.

The Authority's counsel also certified he reviewed his telephone records for the period of August 27, 2021 to September 23, 2021, the date range plaintiff's counsel asserted defendant's counsel was called, and received no calls or messages from plaintiff's counsel's office.

On September 15, 2021, plaintiff filed a motion seeking leave to file a late notice of claim pursuant to N.J.S.A. 59:8-9. On October 22, 2021, the trial court gave an oral decision and entered an order denying plaintiff's motion.

The trial court noted there was no dispute the notice of claim was filed eight days past the ninety-day statutory deadline and found plaintiff failed to show sufficient reasons constituting extraordinary circumstances justified the filing delay. See N.J.S.A. 59:8-8 and -9. The trial court rejected plaintiff's argument he justifiably filed the notice late due to the Authority's failure to provide him with a form, which forced him to create his own, because N.J.S.A. 59:8-4 specifically illuminates "exactly what is supposed to be in that claim, and ultimately plaintiff's counsel says . . . that's what he did, only he did it late." The Authority's failure to provide plaintiff with a notice of claim form, even if accepted as true, did not constitute extraordinary circumstances in the trial court's view.

On appeal, plaintiff argues the trial court erred in denying his motion to file a late notice of tort claim because it abused discretion and failed to make necessary findings of fact. Plaintiff contends the trial court erred by failing to consider all the circumstances surrounding plaintiff's motion pursuant to

N.J.S.A. 59:8-9 and failing to "resolve doubts in favor of permitting the plaintiff to have his claims resolved in court."

We review motions to file a late notice of claim under an abuse of discretion standard and will reverse only where the trial court's "exercise of discretion was 'manifestly unjust' under the circumstances." O'Donnell v. N.J. Tpk. Auth., 236 N.J. 335, 344 (2019); Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)). Any doubts about "whether extraordinary circumstances exist 'should be resolved in favor of the application.'" O'Donnell, 236 N.J. at 344 (quoting Feinberg v. Dep't of Env't Prot., 137 N.J. 126, 134 (1994)). However, none of plaintiff's arguments advanced in support of this appeal were raised to the trial court. The only argument plaintiff raised was extraordinary circumstances existed because the Authority failed to provide a notice of claim form. Therefore, we apply the plain error standard of review. See R. 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . .").

The Act states in part, "[e]xcept as otherwise provided by this [A]ct, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." N.J.S.A. 59:2-1(a). Thus, the core of the Act's purpose is to provide immunity to public entities wherever possible; "immunity from tort liability is the general rule and liability is the exception." O'Donnell, 236 N.J. at 345 (quoting D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 134 (2013)); see also McDade v. Siazon, 208 N.J. 463, 474 (2011) (stating the Act is to be "strictly construed to permit lawsuits only where specifically delineated" (quoting Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J. Super. 24, 34 (App. Div. 2000))).

Pursuant to the Act's legislative prerogative of immunity, strict procedures govern claimants in the limited circumstances where immunity is not furnished. First, prior to the filing of a formal complaint, a claimant must provide the public entity with a notice of claim "not later than the [ninetieth] day after accrual of the cause of action," which is ordinarily the date in which the alleged negligent conduct causing the injury occurred. N.J.S.A. 59:8-8; Ben Elazar v. Marcietta Cleaners, Inc., 230 N.J. 123, 134 (2017); Beauchamp v. Amedio, 164 N.J. 111, 117 (2000). If a claimant fails to timely file a notice of claim with the public entity within the ninety-day window, the claim is permanently barred. N.J.S.A. 59:8-8; Jones v. Morey's Pier, Inc., 230 N.J. 142, 154 (2017). "The purpose of

the ninety-day deadline is to 'compel a claimant to expose his intention and information early in the process in order to permit the public entity to undertake an investigation while witnesses are available and the facts are fresh.'" D.D., 213 N.J. at 146 (quoting Lutz v. Twp. of Gloucester, 153 N.J. Super. 461, 466 (App. Div. 1977)).

The ninety-day filing requirement is not completely inflexible and claimants are permitted, in limited circumstances, to make a motion for leave to file a late notice of tort claim. N.J.S.A. 59:8-9; H.C. Equities, LP v. Cnty. of Union, 247 N.J. 366, 370 (2021). The motion must be "supported by affidavits based upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances" for the failure to timely file the motion, and the public entity must not be "substantially prejudiced" by the late notice. N.J.S.A. 59:8-9. Determining whether extraordinary circumstances exist requires the trial court to conduct a "fact-specific" analysis. McDade, 208 N.J. at 477.

Plaintiff argues the trial court erred because it failed to consider all the facts and circumstances surrounding the late claim by failing to consider the notice was only eight days late, plaintiff timely retained counsel, and the lack of

prejudice to the Authority. Plaintiff also contends the trial court failed to resolve all doubts in favor of plaintiff.

We agree with the trial court plaintiff fails to demonstrate extraordinary circumstances exist justifying his failure to file the notice of claim within the statutorily required ninety-day window. Notably, plaintiff does not argue his filing the notice only eight days late or the Authority's failure to provide him with a form constituted extraordinary circumstances or that he substantially complied with the statutory requirements. See H.C. Equities, LP, 247 N.J. at 386. Rather, plaintiff simply states the trial court's analysis failed to consider all the relevant circumstances and resolve all doubts in favor of allowing the claim.

Although plaintiff is correct in stating we must carefully examine cases where permission to file a notice of claim late has been denied and any doubts should be resolved in favor of granting the motion, the case law plaintiff relies upon for support is clearly distinguishable. See O'Donnell, 236 N.J. at 344. Plaintiff argues because the claimants in those cases were able to file their notices months late, and he filed only eight days late, his motion should have been granted. However, the cases cited are replete with unique, extraordinary circumstances justifying a late filing. See, e.g., O'Donnell, 236 N.J. at 351-52

(granting motion to file a late notice where defendant had notice of the suit due to a different claimant timely filing notice and plaintiff's attorney timely serving notice on the State instead of the Turnpike Authority, despite plaintiff properly telling the attorney the Turnpike Authority was the proper party); Beauchamp, 164 N.J. at 114, 122-23 (affirming motion to file a late notice of tort claim where the plaintiff, despite recurring pain following a car accident, was told by her lawyer to not file a notice of tort claim based on previously unclear case law addressing the accrual date of an injury); Mendez v. S. Jersey Transp. Auth., 416 N.J. Super. 525, 534-36 (App. Div. 2010) (permitting late notice where the attorneys, who were hired a month after the accident in question, were unable to recount the events of the accident unless they viewed a videotape capturing the accident, which was not provided to them until four and one-half months after the deadline); R.L. v. State-Operated Sch. Dist. of the Auth. of Newark, 387 N.J. Super. 331, 340-41 (App. Div. 2006) (allowing a late notice of tort claim where plaintiff contracted AIDS because of a sexual relationship with his teacher, learned he had the disease one year after his graduation from the school, and suffered mental distress and anguish); Ventola v. N.J. Veteran's Mem'l Home, 164 N.J. 74, 81-83 (2000) (permitting a late notice where the federal government advised plaintiff the State controlled the veteran's home where the injury

occurred and a State notice of tort claim had to be filed instead of a federal claim); Blank v. City of Elizabeth, 318 N.J. Super. 106, 111-13 (App. Div. 1999) (granting relief where plaintiff was unaware the pipe she fell over and injured herself on belonged to a public entity).

Plaintiff's reliance on these cases is misplaced; although plaintiff's tardiness was minor in length, he still fails to argue or prove extraordinary circumstances preventing his timely filing of notice, as required under N.J.S.A. 59:8-9. Plaintiff was represented by counsel prior to the expiration of the applicable time period. The record suggests the delay in filing was due to lack of due diligence, which our Supreme Court has held is insufficient to establish permissible filing of a late notice. See O'Donnell, 236 N.J. at 349; D.D., 213 N.J. at 157-58. There is no standard "form" that must be filed, as set forth clearly by the rule. To hold the trial court erred in not permitting a late notice of tort claim because plaintiff was not provided a form by the Authority and it was only a few days late would replace the statutory framework "with a standard more in the nature of inadvertence, negligence, inattentiveness or ignorance." D.D., 213 N.J. at 158. "The Legislature's waiver of sovereign immunity remains a limited one and we are not free to expand that waiver beyond its statutorily-established boundaries." Ibid.

Plaintiff has presented no evidence nor cited any case law, statute, or regulation to support his position he should be permitted to file an untimely notice because he was only slightly late. We conclude the trial court did not err in denying the motion and affirm.

To the extent we have not addressed them, any remaining arguments raised by plaintiff lack sufficient merit to warrant discussion in a written opinion. 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