

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1596-21

JOSEPH JOHNSON, JAMES
A. RICHARDSON, SR, and
GEORGE COOK,

Plaintiffs-Appellants,

v.

CITY OF HOBOKEN and
MICHAEL KRAUS,

Defendants,

APPROVED FOR PUBLICATION

August 2, 2023

APPELLATE DIVISION

and

LITE DEPALMA GREENBERG &
AFANADOR, LLC, VICTOR A.
AFANADOR, IMMANUEL O.
ADEOLA, and CARLA DASILVA,

Defendants-Respondents.

Argued May 9, 2023 – Decided July 25, 2023

Before Judges Messano, Gilson, and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law
Division, Hudson County, Docket No. L-2813-21.

Edwin W. Concepcion argued the cause for appellants.

Daniel J. Pomeroy argued the cause for respondents (Pomeroy, Heller, Ley, DiGasbarro & Noonan, LLC, attorneys; Daniel J. Pomeroy and Karen E. Heller, on the brief).

The opinion of the court was delivered by

GILSON, J.A.D.

Plaintiffs Joseph Johnson, James Richardson, and George Cook appeal from a December 22, 2021 order dismissing their amended complaint against defendants Lite DePalma Greenberg & Afanador, LLC (Lite DePalma), Victor Afanador, Immanuel Adeola and Carla DaSilva (collectively, the Lite Defendants). Discerning no merit in plaintiffs' claims or arguments, we affirm.

I.

The relevant facts are not in dispute. In a separate lawsuit, plaintiffs sued the City of Hoboken (Hoboken) and several of its employees claiming racial discrimination in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50 (the LAD Action). Hoboken and the City employees are represented by Lite DePalma in the LAD Action. Afanador and Adeola are attorneys who work at Lite DePalma, and DaSilva is a secretary and legal assistant at the firm.

On June 16, 2021, Lite DePalma filed a motion for summary judgment in the LAD Action on behalf of defendants. In support of that motion, Lite

DePalma submitted numerous documents, some of which contained personal identifiers of plaintiffs, including their Social Security numbers and driver's license numbers. Some documents also included plaintiffs' dates of birth. Lite DePalma also included information about a prior arrest and criminal charges against one of the plaintiffs. The summary judgment motion and its supporting documents were filed in the court's electronic filing system (eCourts).

On July 14, 2021, twenty-eight days after the summary judgment motion had been filed, plaintiffs filed this separate action against the Lite Defendants, Hoboken, and Michael Kraus, an employee of Hoboken. Plaintiffs claimed that defendants had violated their rights of privacy by not redacting their personal identifiers and by submitting the arrest records.

Immediately after being served with the complaint, Afanador, on behalf of Lite DePalma, wrote to the court in the LAD Action. He represented that the personal identifiers had been included inadvertently and requested permission to withdraw the unredacted documents and submit redacted documents. Plaintiffs objected to that request. On July 23, 2021, the court in the LAD Action entered an order directing that the unredacted documents containing the personal identifiers be deleted from eCourts and "redacted/replacement" documents be filed.

Approximately one month later, on August 27, 2021, plaintiffs filed an amended complaint in this action. Plaintiffs alleged that defendants had violated their rights of privacy by filing documents containing their personal identifiers contrary to the directive of Rule 1:38-7. Plaintiffs also contended that defendants had violated one plaintiff's right of privacy by including records of that plaintiff's arrest and criminal charges. Plaintiffs asserted that the charges related to the arrest had been dismissed before the summary judgment motion was filed in the LAD Action.

In their amended complaint, plaintiffs asserted four causes of action: (1) violations of rights of privacy related to their personal identifiers; (2) violation of rights of privacy related to the arrest records; (3) intentional infliction of emotional distress; and (4) negligent infliction of emotional distress. In asserting their first and second causes of action, plaintiffs relied on Rule 1:38-7, the New Jersey Constitution, and the common law as the bases for their rights of privacy claims.

Defendants moved to dismiss plaintiffs' complaint for failure to state viable causes of action. Plaintiffs opposed that motion and the trial court heard argument. On November 17, 2021, the trial court entered an order dismissing the complaint without prejudice against Hoboken and Kraus. Just over a month

later, on December 22, 2021, the trial court entered a separate order dismissing the complaint without prejudice against the Lite Defendants. The court explained the reasons for its rulings on the record on November 17, 2021, and December 22, 2021.

In dismissing the complaint against the Lite Defendants, the trial court reasoned that there was no private cause of action for violations of Rule 1:38-7. The trial court also held that a violation of that Rule cannot be a basis for a civil award for damages. Furthermore, the court found that uploading personal identifiers on eCourts was not a sufficient publication to trigger an invasion of privacy cause of action. While recognizing that the eCourts system can be accessed by the public, the court reasoned that filing documents on the system for a relatively short period of time did not give rise to a claim for invasion of privacy.

In addition, the trial court found that the unredacted personal identifiers had been filed inadvertently and the documents had been deleted and replaced with redacted documents as soon as defendants were made aware of the mistake. Moreover, the court held that plaintiffs could not support claims of violations of the New Jersey Constitution against the Lite Defendants because the Lite Defendants were not state actors.

In dismissing plaintiffs' claims of infliction of emotional distress, the court held that it was not reasonably foreseeable that defendants' action in filing documents on eCourts would cause genuine and substantial emotional distress to a reasonable person. The court also held that defendants' actions were not outrageous and could not support a claim of intentional infliction of emotional distress.

Finally, the trial court questioned why plaintiffs had filed this separate action and why they had not raised their concerns in the LAD Action. Nevertheless, the court decided not to address the entire controversy doctrine because it had dismissed all the claims on other substantive grounds.

Plaintiffs now appeal from the December 22, 2021 order dismissing their claims against the Lite Defendants. Plaintiffs have not appealed from the November 17, 2021 order.

II.

On appeal, plaintiffs make a series of arguments, some of which are repetitive and others of which are not properly raised. In essence, plaintiffs contend that they asserted viable claims of violations of their rights to privacy. They argue that Rule 1:38-7 should be construed to allow a private cause of action. They also assert that uploading documents containing personal

identifiers on the eCourts system is sufficient publication to trigger an invasion of privacy claim. Finally, plaintiffs argue that defendants' actions support their tort claims for intentional and negligent infliction of emotional distress.

Having considered plaintiffs' allegations in the light most favorable to them, and having analyzed the relevant law, we hold that plaintiffs failed to state any viable cause of action. We, therefore, affirm the dismissal of their claims.

A. A Jurisdictional Issue.

Initially, we address a jurisdictional issue. The order dismissed plaintiffs' claims against the Lite Defendants without prejudice. An order entered without prejudice generally allows plaintiffs to move to amend their complaint and is therefore not a final order. Kwiatkowski v. Gruber, 390 N.J. Super. 235, 237 (App. Div. 2007). Plaintiffs did not avail themselves of the right to amend their complaint a second time. Instead, they filed this appeal. Because plaintiffs' time to amend the complaint has now expired, we will treat the December 22, 2021 order as a final order dismissing plaintiffs' amended complaint with prejudice. Accordingly, we will address the substance of the arguments raised on this appeal.

B. Our Standard of Review.

We use a de novo standard when reviewing an order dismissing a complaint for failure to state a claim. State ex rel. Campagna v. Post Integrations, Inc., 451 N.J. Super. 276, 279 (App. Div. 2017). "When reviewing a motion to dismiss under Rule 4:6-2(e), we assume that the allegations in the pleadings are true and afford the pleader all reasonable inferences." Sparroween, LLC v. Township of West Caldwell, 452 N.J. Super. 329, 339 (App. Div. 2017). "Where, however, it is clear that the complaint states no basis for relief and that discovery would not provide one, dismissal of the complaint is appropriate." Ibid. (quoting J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 397 (App. Div. 2010)).

C. The Right to Privacy Claims.

Plaintiffs premise their claims of violations of their rights of privacy on three sources of authority: Rule 1:38-7, the New Jersey Constitution, and the common law. We hold that none of those sources support a violation of rights of privacy claim based on the facts alleged by plaintiffs.

1. Rule 1:38-7.

Rule 1:38-7(a) defines confidential personal identifiers as "a Social Security number, driver's license number, vehicle plate number, insurance

policy number, active financial account number, active credit card number, or information as to an individual's military status." Rule 1:38-7(b) then states that confidential personal identifiers "shall not" be set forth in "any document or pleading submitted to the court unless otherwise required by statute, rule, administrative directive, or court order." Litigants are required to certify that all confidential personal identifiers have been or will be redacted from documents filed in the court action. R. 1:38-7(c).

The procedure for curing the inclusion of confidential personal identifiers is set forth in Rule 1:38-7. That Rule states that a party to a matter or other interested individual may move, on an expedited basis, to replace documents containing unredacted personal identifiers with redacted documents. R. 1:38-7(g).

Rule 1:38-7 does not contain language expressly providing that an aggrieved party can file a private cause of action if personal identifiers are included. A review of the Rule and its purpose convince us that our Supreme Court did not intend to create a private cause of action based on a violation of the Rule. Instead, as already explained, the Rule has a mechanism for redacting confidential personal identifiers if they are filed with the court. See Baxt v. Liloia, 155 N.J. 190, 202-04 (1998) (holding that attorney disciplinary rules do

not create a private cause of action because those "rules serve purposes that are substantially different from those of an individual litigant in a civil action"); Cmty. Hosp. Grp. v. Blume, Goldfaden Berkowitz Donnelly Fried & Forte, P.C., 381 N.J. Super. 119, 125-26 (App. Div. 2005) (refusing to recognize a private cause of action for disclosure of information protected by the Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320).

Plaintiffs acknowledge that Rule 1:38-7 does not contain language providing for a private cause of action. They argue, however, that we should either invalidate the Rule or amend it. That argument is not supported by law or logic, and we reject it. That the Supreme Court decided not to include a private cause of action in Rule 1:38-7, does not make the Rule defective. Instead, the Rule serves an important purpose that would not be advanced by adding a private cause of action. Nor does the Rule need a private cause of action to effectuate its purpose. Moreover, only the Supreme Court can decide to vacate or amend the Rule, and we perceive no grounds for doing either.

Plaintiffs also cite to cases discussing the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and argue that those cases support reading a private cause of action into Rule 1:38-7. See Bozzi v. City of Jersey City, 248 N.J. 274 (2021); Burnett v. County of Bergen, 198 N.J. 408 (2009). Plaintiffs'

reliance on those OPRA cases is misplaced. The facts in those cases are not applicable to plaintiffs' claims. Instead, the OPRA cases addressed whether a custodian of records should be required to release specific records in response to an OPRA request. See Bozzi, 248 N.J. at 277; Burnett, 198 N.J. at 414-15. That inquiry under OPRA is not relevant or applicable to plaintiffs' claims of invasion of their privacy.

2. The New Jersey Constitution.

Plaintiffs do not cite a specific article of the New Jersey Constitution that supports their privacy claims. Although we have recognized that certain privacy rights are protected in the New Jersey Constitution, those protections apply against state actors, not private individuals. See Kinsella v. Welch, 362 N.J. Super. 143, 157-58 (App. Div. 2003). We agree with the trial court that plaintiffs failed to identify a state actor in asserting their claims against the Lite Defendants, and, therefore, any claim predicated on a constitutional violation of a right to privacy is not actionable.

3. The Common Law.

New Jersey recognizes a common law claim of invasion of privacy. See Romaine v. Kallinger, 109 N.J. 282, 297-98 (1988); Castro v. NYT Television, 384 N.J. Super. 601, 610-11 (App. Div. 2006). In defining the parameters of a

claim of invasion of privacy, New Jersey follows the Restatement (Second) of Torts. See Castro, 384 N.J. Super. at 610-11; Figured v. Paralegal Tech. Servs., Inc., 231 N.J. Super. 251, 256-57 (App. Div. 1989). The tort of invasion of privacy encompasses four distinct scenarios:

(1) intrusion (e.g., intrusion on plaintiff's physical solitude or seclusion, as by invading his or her home, illegally searching, eavesdropping, or prying into personal affairs); (2) public disclosure of private facts (e.g., making public private information about plaintiff); (3) placing plaintiff in a false light in the public eye (which need not be defamatory, but must be something that would be objectionable to the ordinary reasonable person); and (4) appropriation, for the defendant's benefit, of the plaintiff's name or likeness.

[Rumbauskas v. Cantor, 138 N.J. 173, 180 (1994).]

Plaintiffs have alleged invasions of privacy involving the public disclosure of private facts and publicity that places them in a false light in the public eye. To sustain an invasion of privacy claim under the public disclosure of private facts, a plaintiff must show that the facts were disclosed "to the public at large, or to so many persons that the matter . . . [is] substantially certain to become one of public knowledge." Castro, 384 N.J. Super. at 611 (quoting Restatement (Second) of Torts § 652D cmt. a. (Am. L. Inst. 1981)). "[I]t is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons."

Ibid. (quoting Restatement (Second) of Torts § 652D cmt. a. (Am. L. Inst. 1981)).

Even giving plaintiffs all reasonable inferences, their allegations do not suggest that their personal identifiers were sufficiently published to support a claim of invasion of privacy. Instead, plaintiffs alleged that their personal identifiers were included in documents filed on the eCourts system. It is undisputed that those documents were deleted from that system in less than thirty-four days, and we hold that such a court filing cannot support a claim of invasion of privacy.

D. The Arrest Report.

Plaintiffs claim a violation of a right to privacy because the Lite Defendants included information concerning the arrest and criminal charges against one plaintiff. Arrest reports and criminal charges are not included in the definition of confidential personal identifiers in Rule 1:38-7(a). Although it is conceivable that the publication of an arrest report could give rise to a private cause of action, the facts alleged by plaintiffs do not support a claim.

To sustain an invasion of privacy claim for false light publicity, "a fundamental requirement . . . is that the disputed publicity be in fact false, or else at least have the capacity to give rise to a false public impression as to the

plaintiff." G.D. v. Kenny, 205 N.J. 275, 308 (2011) (quoting Romaine, 109 N.J. at 294) (holding that a plaintiff could not sustain invasion of privacy claim premised on the publication of since-expunged criminal history).

Like the personal identifiers, the arrest report was filed on eCourts. Plaintiffs did not demonstrate that the arrest report was false; rather, they contended that by the time the report was filed the underlying criminal charges had been dismissed. Accepting that allegation, it does not make the arrest report false. We need not explore whether under certain circumstances the filing of an arrest report could support a claim of invasion of privacy, it is sufficient to hold that the facts pled by plaintiffs do not support a viable cause of action.

E. The Claims of Emotional Distress.

To prove a claim of intentional infliction of emotional distress, a plaintiff must show that: (1) defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the conduct proximately caused plaintiff's emotional distress; and (4) the emotional distress was "so severe that no reasonable [person] could be expected to endure it." Ingraham v. Ortho-McNeil Pharm., 422 N.J. Super. 12, 19-20 (App. Div. 2011) (alteration in original) (quoting Buckley v. Trenton Sav. Fund Soc'y, 111 N.J. 355, 366-67 (1988)). To establish a claim of negligent infliction of emotional distress,

plaintiff must show that: (1) defendant owed a duty to plaintiff; (2) defendant breached that duty; (3) plaintiff suffered severe emotional distress; and (4) defendant's breach proximately caused plaintiff's emotional distress. Dello Russo v. Nagel, 358 N.J. Super. 254, 269 (App. Div. 2003) (citing Decker v. Princeton Packet, Inc., 116 N.J. 418, 429 (1989)). Both intentional and negligent infliction of emotional distress require a showing of severe emotional distress.

Plaintiffs have pled no facts supporting a finding that the Lite Defendants owed them a duty or that defendants breached a duty causing them severe emotional distress. Plaintiffs also failed to plead any facts that support a claim that the Lite Defendants' conduct was extreme and outrageous. In short, plaintiffs have failed to plead facts supporting any claim for emotional distress.

F. Plaintiffs' Other Claims.

Plaintiffs also make arguments concerning the interactions between attorneys at Lite DePalma and the law clerk for the judge in the LAD Action. Initially, we note that plaintiffs' allegations are vague and do not disclose any clearly improper conduct. More fundamentally, those claims are not properly part of this appeal because they arose in the separate LAD Action. To the extent that plaintiffs had concerns about the interaction between a law clerk and

attorneys from Lite DePalma, those concerns should have been raised with the judge overseeing the LAD Action.

Finally, to the extent that we have not addressed other arguments raised by plaintiffs, it is because those arguments lacked sufficient merit to warrant a discussion in a written opinion. See 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