SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1699-21

JOSEPH DROSSEL,

Plaintiff-Appellant,

v.

MAYOR and COUNCIL, BOROUGH OF FRANKLIN, JOHN POSTAS, and STEVEN ZYDON,

Defendants-Respondents.

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Submitted February 7, 2023 – Decided June 21, 2023

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-0040-20.

George T. Daggett, attorney for appellant.

Lavery, Selvaggi, Abromitis & Cohen, attorneys for respondents (James F. Moscagiuri, of counsel and on the brief; William H. Pandos, on the brief).

PER CURIAM

Plaintiff Joseph Drossel filed a complaint against defendants Borough of Franklin (the Borough), its "Mayor and Council," and two specifically-named council members, John Postas and Stephan P. Zydon, Jr., alleging defendants had terminated his employment as the Borough's zoning officer in violation of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14.[1] A judge granted summary judgment to defendants, finding plaintiff had not engaged in a whistle-blowing activity that is protected by CEPA. Plaintiff appeals from the summary-judgment order and a subsequent order denying his motion for reconsideration. We affirm.

I.

We discern the material facts from the summary-judgment record, viewing them in a light most favorable to plaintiff, the non-moving party. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021).

Plaintiff began his first job with the Borough, working as a police officer after he graduated from the academy in 1978. In 1989, he resigned from that job and went to work as a police officer for Sparta Township. He retired from the Sparta police department in 2004. Sparta Township then hired plaintiff as a

[1] Plaintiff named "Steven Zydon" as a defendant. According to Zydon, his name is "Stephan P. Zydon, Jr."

full-time zoning code enforcement officer. During his deposition, plaintiff initially testified that job ended when he was "laid off" with a "bunch" of other people in 2009 due to "budgetary reasons." After being shown a copy of a complaint he had filed against Sparta, he conceded he had filed a lawsuit against Sparta in which he made allegations "very similar" to the ones he made in his lawsuit against the Borough. He claimed he had been terminated after enforcing a complaint on a business where the mayor of Sparta kept an unregistered vehicle. According to plaintiff, the parties settled that lawsuit. He then began to work full-time as a student resource officer at Sparta High School.

In March 2012, plaintiff obtained part-time employment as the zoning officer for the Borough while he continued to work full-time at the high school. As the zoning officer, plaintiff was responsible for enforcing the Borough's zoning ordinances. Plaintiff held that part-time position for over three years, working approximately twenty-nine hours each week. On September 25, 2015, plaintiff entered a three-year employment contract with the Borough to serve as the zoning officer on a full-time basis. He was required to work a minimum of thirty-seven and a half hours per week. He stopped working at the high school. While he was working for the Borough, he also was acting as the zoning officer for the Borough of Hamburg (Hamburg) because the Borough and Hamburg had

a shared-service agreement. Of the thirty-seven and a half hours he was required to work, he spent four to five hours working for Hamburg. The three-year term of plaintiff's contract with the Borough ended on October 1, 2018. After the term ended, plaintiff continued to work without a contract for several months.

On September 12, 2015, plaintiff issued a summons to defendant Postas in connection with broken stairs at a barber shop located at his house. Postas was then a member of the Borough's council. Before Postas was a council member, plaintiff issued zoning-violation notices to Postas's brother.

In an October 11, 2018 letter, plaintiff notified defendant Zydon, who was not then a member of the council, that the parking of a commercial vehicle on his property was a violation of Land Development Code 161-32D(5), which prohibited the storage of commercial vehicles exceeding a certain weight in a residential zone. Plaintiff asked him to abate the violation in two weeks. On October 26, 2018, plaintiff issued a summons to Zydon after he had failed to abate the violation. Zydon ultimately pleaded guilty. Zydon was a member of the Borough's planning board from 2013 to 2018. In 2018, he successfully ran to be a member of the Borough's council. George Drossel, plaintiff's brother, was one of the candidates Zydon defeated in the primary election. Zydon was sworn in as a member of the council on January 1, 2019.

At some unspecified time, plaintiff sent Nicholas Giordano, who was then mayor of the Borough, a violation notice in connection with unregistered vehicles he had on his property. Giordano abated the violation. Plaintiff also sent violation notices and a summons to the son of council member Gilbert Snyder because he had been operating a landscape business on "nonconforming property." Snyder's son later obtained a variance.

Defendants Postas and Zydon were members of the Borough's finance committee, along with another council member, Stephen Skellenger. In the beginning of 2019, the finance committee discussed ways to reduce the Borough's budget to address a "budgetary shortfall of approximately $36,000" without having to raise taxes. The finance committee identified two potential ways to reduce the budget: return the zoning officer's position to part-time status or cut funding to the Borough's Recreation Committee for a project it was undertaking at a local park. According to Zydon, he argued in favor of keeping the full-time status of the zoning officer; Postas and Skellenger, however, convincingly argued the Borough did not need a full-time zoning officer, similar municipalities in Sussex County had part-time zoning officers, and the public parks project would be more beneficial to the community. The finance

committee ultimately recommended to the council that the zoning-officer position be returned to a part-time status.

In a March 19, 2019 letter, Postas, Snyder, and Zydon, as members of the Borough's personnel committee, advised plaintiff that due to budget cuts, the zoning-officer position would be part-time, effective April 16, 2019. At a March 26, 2019 council meeting, Postas stated "[w]e have noticed some reductions in the work load since making the position full time" and "comparisons with other surrounding towns show most do not employ a full-time zoning officer." The council members who were present voted unanimously to make the zoning officer position part time. Zydon and Giordano were not present at the meeting and did not participate in the vote.

In an April 12, 2019 memorandum, plaintiff advised the Borough administrator he was resigning as of April 16, 2019, because the council had made the zoning officer position part time. After plaintiff resigned, the Borough's zoning-officer position remained a part-time position. Plaintiff looked for a full-time zoning officer position but found only part-time zoning-officer positions. Plaintiff continued to work for Hamburg as its part-time zoning officer.

On January 17, 2020, plaintiff sued defendants, alleging they had retaliated against him by reducing his hours after he issued summonses to Postas and Zydon for zoning-ordinance violations. In count one of the complaint, plaintiff alleged he qualified as a whistleblower pursuant to CEPA, citing N.J.S.A. 34:19-3(a) and (c). In count two, he alleged that because he had "performed the requirements of his employment, his employment conditions were drastically changed."

During his deposition, plaintiff testified that no one had told him his hours were being reduced in retaliation for his enforcement actions. The only explanation he received was that the reduction was due to budgetary concerns. He testified, however, that he had had "many conversations with different people stating that they heard that they're trying to get rid of me." Plaintiff did not recall the names of anyone with whom he had had those conversations but again asserted that he had had "several conversations with several people."

A week before the discovery end date, defendants moved for summary judgment, arguing plaintiff had failed to establish a CEPA violation because his claim was based not on a "workplace activity" but a "private issue" because Postas and Zydon had been "cited in their individual capacity." Plaintiff

opposed the motion. The motion judge heard argument on January 7, 2022, and placed his initial findings on the record.

On January 13, 2022, the judge entered an order and written decision granting summary judgment to defendants and dismissing the case with prejudice. The judge held N.J.S.A. 34:19-3(c) did not apply because plaintiff had not presented any facts indicating he had objected to or refused to participate in any activity, policy, or practice of the employer.[2] The judge found N.J.S.A. 34:19-3(a) did not apply because plaintiff's alleged whistleblowing activity did not implicate his employer but instead "involved . . . [two] or [three] persons who at various times sat on the [c]ouncil in their individual capacity as private citizens." The judge denied plaintiff's subsequent motion for reconsideration, concluding a reasonable factfinder could not find a CEPA violation based on the facts alleged by plaintiff.

On appeal, plaintiff argues the judge erred in failing to recognize that plaintiff's "workplace" was the entire Borough, treating the motion as a summary-judgment motion and not a motion to dismiss under Rule 4:6-2,

[2] Plaintiff does not contend on appeal the judge erred in finding he had not pleaded any facts falling within N.J.S.A. 34:19-3(c). Because he did not brief that issue on appeal, we deem it waived. See N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) (finding "[a]n issue that is not briefed is deemed waived on appeal").

dismissing the complaint with prejudice, and finding plaintiff had not established a CEPA claim. Unpersuaded by those arguments, we affirm.

II.

We review a trial court's summary-judgment decision de novo, applying the same standard used by trial courts. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). We "must '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.'" Meade v. Twp. of Livingston, 249 N.J. 310, 327 (2021) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

"Summary judgment should be granted . . . 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). "The 'trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013) (quoting Manalapan Realty, LP v. Twp. Comm. of Manalapan,

140 N.J. 366, 378 (1995)). We will uphold a trial court's decision to deny a motion for reconsideration unless the decision was an abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

CEPA was enacted "to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." Sauter v. Colts Neck Volunteer Fire Co. No. 2, 451 N.J. Super. 581, 588 (App. Div. 2017) (quoting Mehlman v. Mobil Oil Corp., 153 N.J. 163, 179 (1998)). To establish a prima facie case under CEPA, a plaintiff must demonstrate:

> (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(c); (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
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> [Lippman v. Ethicon, Inc., 222 N.J. 362, 380 (2015) (quoting Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003)).]

Once a plaintiff establishes the four CEPA elements, the burden shifts to a defendant to "advance a legitimate, nondiscriminatory reason for the adverse conduct against the employee." Klein v. Univ. of Med. & Dentistry of N.J., 377

N.J. Super. 28, 38 (App. Div. 2005); see also Allen v. Cape May Cty., 246 N.J. 275, 290-91 (2021). "If such reasons are proffered, plaintiff must then raise a genuine issue of material fact that the employer's proffered explanation is pretextual." Klein, 377 N.J. Super. at 39.

Plaintiff cited N.J.S.A. 34:19-3(a) in support of his claim. Under that provision of the statute, CEPA prohibits an employer from retaliating against an employee who "[d]isclose[d] . . . to a supervisor or to a public body an activity, policy or practice of the employer . . . the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . ; or (2) is fraudulent or criminal . . . ." Ibid. Plaintiff based his CEPA claim on summonses he issued to Postas in 2015, Zydon in 2018, Giordano, Postas's brother, and Snyder's son.

When plaintiff issued the summons to Postas, Postas was a member of the council. After plaintiff issued the summons to Postas, the Borough expanded the zoning-officer position to a full-time position. The decision to return the zoning-officer position to a part-time position was made nearly three and one half years after plaintiff had issued the summons to Postas and after the interim decision to make it a full-time position. When plaintiff issued the summons to Zydon, Zydon was not on the council. Although Zydon was a member of the

finance committee, he was not present at the council meeting when the council voted to make the zoning-officer position a part-time position. Giordano was mayor when plaintiff issued the summons to him but was not a member of the finance committee and did not participate in the council's vote.

N.J.S.A. 34:19-3(a) addresses complaints about employers, not the family member of employers; thus, given the alleged facts, the summonses on Snyder's son and Postas's brother cannot be the bases of a CEPA claim. The summonses against Postas, Zydon, and Giordano had nothing to do with anything the Borough had done or with their roles as council members and mayor. The summonses were not based on any Borough-related "workplace" activity by Postas, Zydon, or Giordano.

We agree with the motion judge that a reasonable factfinder could not find a CEPA violation based on that factual record. We recognize CEPA is a remedial legislation that is to be interpreted liberally. Dzwonar, 177 N.J. at 463. CEPA, however, is intended to protect "those employees whose disclosures fall sensibly within the statute . . . ." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 32 (2014) (quoting Est. of Roach v. TRW, Inc., 164 N.J. 598, 613 (2000)). Plaintiff's claims fail to meet that standard.

We also conclude a reasonable factfinder could not find a causal connection between plaintiff's alleged whistle-blowing activity and the decision to return the zoning-officer position to being a part-time position. The only evidence of a causal connection presented by plaintiff was pure speculation and vague conversations with unnamed individuals that did not include any discussion about or reference to plaintiff's alleged whistleblowing activities. Those bald allegations are not enough to establish a prima facie showing of causation under CEPA. See Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 558-61 (2013) (discussing the "kind and quality of proofs that might suffice" to establish a causal link under CEPA).

We perceive no merit in plaintiff's argument the motion judge should have treated defendant's summary-judgment motion as a dismissal motion under Rule 4:6-2 and should have dismissed the complaint without prejudice. Nothing in the record indicates plaintiff made that argument below or otherwise cross-moved or requested leave to amend his complaint. See Fuhrman v. Mailander, 466 N.J. Super. 572, 596 (App. Div. 2021) (noting that appellate courts generally decline to consider arguments that were not presented to the trial court). Defendants clearly brought the motion as a summary-judgment motion

returnable after the discovery end date, and the motion judge properly considered it and decided it as a summary-judgment motion.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION