INEABELLE LUGO, Plaintiff-Appellant,

v.

CARROLL JO KENNEDY and ROBERT E. KENNEDY, and PENNSAUKEN TOWNSHIP BOARD OF EDUCATION, Defendants-Respondents.

No. A-4493-10T1.

Superior Court of New Jersey, Appellate Division.

Argued March 6, 2012.
Decided April 4, 2012.

Michael J. Dennin argued the cause for appellant (Vincent J. Ciecka, P.C., attorneys; Mr. Dennin, on the brief).

Gerald Kaplan argued the cause for respondent Pennsauken Township Board of Education (**Methfessel** & **Werbel**, attorneys; Mr. Kaplan, of counsel and on the brief; Amanda J. Sawyer, on the brief).

Respondents Carroll Jo Kennedy and Robert E. Kennedy have not filed a brief.

Before Judges Carchman, Baxter and Maven.

NOT FOR PUBLICATION

PER CURIAM.

Plaintiff Ineabelle Lugo appeals from a Law Division order dismissing her complaint against defendant Pennsauken Board of Education (BOE) with prejudice. The dismissal was based upon plaintiff's failure to file a timely notice of claim as required by N.J.S.A. 59:8-8 of the Tort Claims Act (TCA or Act), N.J.S.A. 59:1-1 to 12-3, as well as plaintiff's failure to institute suit against the BOE within two years of the happening of the accident as required by N.J.S.A. 2A:14-2.

On appeal, plaintiff asserts that because she undertook a reasonable investigation to determine whether defendant Carroll Jo Kennedy (Kennedy) was within the course of her employment at the time of the accident, and such investigation disclosed no facts warranting such a conclusion, the judge erred by dismissing with prejudice plaintiff's complaint against BOE. We agree with the motion judge's determination that plaintiff's investigation of Kennedy's status at the time of the accident was not sufficient to justify a relaxation of the requirements of the TCA, and was likewise insufficient to entitle plaintiff to the benefit of the discovery rule articulated in Henry v. New Jersey Department of Human Services, 204 N.J. 320, 336-37 (2010). We affirm.

I.

On June 6, 2007, plaintiff was traveling westbound on Springfield Avenue in Pennsauken when the vehicle being operated by Kennedy pulled into the path of plaintiff's vehicle, causing a collision. When a Pennsauken police officer responded to the scene and interviewed Kennedy, she did not volunteer the fact that she was, at the time of the accident, a nurse employed by BOE and was in the course and scope of her employment as a school nurse traveling from Roosevelt School on her way to Pennsauken High School.

On June 19, 2007, thirteen days after the accident, plaintiff's attorney sent Kennedy a letter, asking her to advise him of the name of her insurance carrier, and also asking her to provide her insurance carrier with a copy of counsel's letter. The following inquiry was set forth at the bottom of the June 19, 2007 letter:

> I WAS IN THE COURSE OF MY EMPLOYMENT WHEN THE ACCIDENT OCCURRED? YES___ NO___

Kennedy did not respond to that question.

After receiving no answer from defendant Kennedy to the inquiry about whether Kennedy was in the course of her employment when the accident occurred, plaintiff's counsel did not send her a follow-up letter. Moreover, although plaintiff's counsel was aware that Kennedy was insured by AIG — having received correspondence from AIG supplying the name of the claims representative — counsel never asked the claims representative to ascertain the answer to the vital question.

On May 20, 2009, seventeen days before the expiration of the two-year statute of limitations, plaintiff filed suit against Kennedy, her husband Robert Kennedy, and "John Does 1 through 10" as fictitious defendants "who owned, manufactured, leased, maintained, operated, possessed, were agents of, employed, directed, drove, entrusted, repaired, serviced, supervised or controlled the vehicle which was involved in the collision described herein." The complaint also alleged that various John Doe defendants operated the vehicle "so carelessly, recklessly, [and] inattentively" as to cause the accident with plaintiff's vehicle.

On a date not specified in the record, plaintiff propounded interrogatories on Kennedy, which Kennedy answered on August 17, 2009, two years and two months after the accident. In her responses, Kennedy specified that AIG was her insurance carrier. When asked whether she "admit[ted] agency," Kennedy answered "no." None of the interrogatories directly asked her whether at the time of the accident she was in the course of her employment.

Not until Kennedy was deposed on August 19, 2010, more than three years after the happening of the accident, did plaintiff learn that Kennedy was employed by BOE and was in the course of her employment, and enroute to Pennsauken High School when the collision occurred.

On August 27, 2010, more than three years and two months after the happening of the accident, plaintiff served on defendant BOE the notice of tort claim required by N.J.S.A. 59:8-4, notifying BOE that its employee Kennedy, while in the course of her employment, caused a motor vehicle accident in which plaintiff sustained serious injuries. On October 1, 2010, the judge granted plaintiff leave to file an amended complaint adding Pennsauken BOE as a defendant. Shortly thereafter, BOE moved to dismiss plaintiff's complaint on the grounds that she failed to file the notice of tort claim, and institute suit, within the time limitations established by the TCA.

At the conclusion of oral argument, Judge Kassel granted BOE's motion, reasoning that plaintiff was not entitled to the benefit of the tolling the statute of limitations, or a suspension of her obligation to file the notice of tort claim under the TCA, unless she conducted a reasonable investigation of defendant's employment status, and plaintiff had not done so. The judge held that when Kennedy failed to respond to plaintiff's June 19, 2007 inquiry about whether she was in the course of her employment at the time of the accident, plaintiff had an obligation "to follow-up" when plaintiff did not respond. The judge observed that many lawyers do not do so, "but this is the risk that they take.... [I]f you sent her the letter... and you [didn't] follow-up, or you have no record of a follow-up, I have to assume then there was no follow-up. That's... insufficient investigation." However, because it was unclear at the time of the motion argument on February 4, 2011, whether there had been any "follow-up," the judge adjourned the motion to afford plaintiff the opportunity to so demonstrate.

At the motion hearing on February 18, 2011, upon learning that plaintiff had not sent Kennedy a second letter, or made any other effort to ascertain whether Kennedy was in the course of her employment at the relevant time, the judge granted BOE's motion. The judge stated:

> All that was done prior to the two-year statute of limitations was that [plaintiff's counsel's] office sent a form letter to... the defendant driver, Carroll Jo Kennedy, asking her if she was driving the vehicle on behalf of her employer at the time of the accident. And, if so, the identity of the employer....
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> From what I understand, [the June 19, 2007 letter] was never sent back.
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> ....
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> [Plaintiff has] an obligation to do due diligence before the expiration of the statute of limitations. And that would include situations like this where if they don't get the information from the tortfeasor... prior to the expiration of the statute of limitations, then, frankly, they can't wait for the statute to expire. They've got to file suit and put the defendant driver under oath and ask those questions before the expiration, because if they don't, then they may have this very situation.

After granting BOE's motion to dismiss plaintiff's complaint, the judge signed a confirming order on February 18, 2011. He denied plaintiff's motion for reconsideration on April 1, 2011.

On appeal, plaintiff argues that prior to the taking of Kennedy's deposition on August 19, 2010, she had no reason to suspect, much less believe, that Kennedy was driving her vehicle for the benefit of her employer, defendant BOE, at the time of the accident. Plaintiff argues that she was "entitled to benefit from the `Fictitious Defendant Rule' because [she] proceeded with due diligence to ascertain whether... defendant Kennedy was a public employee in the course and scope of her employment." She further asserts that the motion judge's conclusion that she did not conduct a reasonable investigation of Kennedy's status "created an impossible standard for handling a customary [routine] automobile accident case." She maintains that "[t]he standard is not whether [her attorney] used extreme diligence or went [over] and above what all attorneys do[,]" but rather "what the average attorney would do in the same or similar situation." According to plaintiff, her attorney "did more than what most attorneys do."

Plaintiff points to the following facts to support her contention that her attorney "conducted a reasonable investigation": Kennedy did not tell the investigating police officer that she was operating her vehicle within the course and scope of her employment; Kennedy was operating her own vehicle, which was not marked with any identification to suggest that she was working for a public entity; Kennedy did not present any identification so indicating; nothing on the police report would have alerted plaintiff or her attorney that Kennedy was operating her vehicle during the course and scope of her employment; Kennedy did not respond to plaintiff's June 19, 2007 letter, and the only response plaintiff received was from Kennedy's personal insurance carrier, AIG, notifying plaintiff's counsel that AIG was handling the claim; Kennedy's answer to plaintiff's complaint did not assert that Kennedy was working at the time of the accident; Kennedy's interrogatory answers did not so indicate; and "the only time [plaintiff] could and did find out [Kennedy] was working was at [Kennedy's] deposition."

BOE argues that plaintiff's investigation of Kennedy's status was woefully inadequate because other than sending one letter, to which plaintiff received no response, plaintiff "did nothing." BOE urges us to affirm the dismissal of plaintiff's complaint.

II.

A plaintiff filing a claim against a public entity such as Pennsauken BOE is obliged to present that claim in accordance with the provisions of the TCA. N.J.S.A. 59:8-3. The Act provides that "[a] claim for injury or damages... against a local public entity shall be filed with that entity." N.J.S.A. 59:8-7. The Act establishes specific time frames within which a plaintiff is required to submit the notice of claim to the public entity defendant. In particular, N.J.S.A. 59:8-8 specifies that a plaintiff must provide the public entity with notice of a claim relating to a cause of action for bodily injury "not later than the ninetieth day after accrual of the cause of action." N.J.S.A. 59:8-8 further provides:

> The claimant shall be forever barred from recovering against a public entity if:
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> a. He failed to file his claim with the public entity within 90 days of accrual of his claim except as otherwise provided in section 59:8-9[.]

Concerning the late filing of a notice of tort claim,

N.J.S.A. 59:8-9 provides:

> A claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this act, may, in the discretion of a judge of the Superior Court, be permitted to file such notice at any time within one year after the accrual of his claim provided that the public entity or the public employee has not been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon motion supported by affidavits based upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act or to file a motion seeking leave to file a late notice of claim within a reasonable time thereafter; provided that in no event may any suit against a public entity or a public employee arising under this act be filed later than two years from the time of the accrual of the claim.

If a plaintiff serves a notice of tort claim upon the public entity more than ninety days after the accrual of the claim, and does not seek permission from the court to do so, the notice of claim "is a nullity." Priore v. State, 190 N.J. Super. 127, 130 (App. Div. 1983), overruled on other grounds by Moon v. Warren Haven Nursing Home, 182 N.J. 507, 513 (2005).

Relying on the Court's decision in Henry, supra, 204 N.J. at 336-37, plaintiff argues that her failure to file the required notice of tort claim within ninety days of the happening of the accident was excused because plaintiff could not have known, within the first ninety days after the accident, that Kennedy was in the course of her employment. Plaintiff asserts that the "discovery rule," id. at 337, operates to "delay[] the accrual of the action until [a] plaintiff discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action[.]" Ibid. (citation and internal quotation marks omitted). Again relying on Henry, plaintiff maintains that a claimant in her circumstances "need only allege facts that tend to show that a `reasonable person' could not have previously discovered a basis for a cause of action with the exercise of `ordinary diligence' and intelligence." Id. at 336 (citation and internal quotation marks omitted).

Plaintiff's reliance on the Court's decision in Henry is misplaced. As the Court observed in Henry, the discovery rule operates to delay the accrual of the cause of action only in circumstances "where a plaintiff is unaware of his or her injury until after the limitation period would otherwise expire or where the damage was apparent, but the plaintiff was unable to attribute the cause to another." Ibid. This is not such a case. Here, plaintiff was aware of her injury during the ninety-day period after the accident and, unlike the plaintiff in Henry, was "[]able to attribute the cause to another." Ibid. Moreover, the discovery rule is generally inapplicable to a motor vehicle accident case. See Iaconianni v. N.J. Tpk. Auth., 236 N.J. Super. 294, 297-98 (App. Div. 1989) (declining to apply the discovery rule to a motor vehicle accident case, and noting that "the cases discussing toxic torts and the discovery rule are unique"), certif. denied, 121 N.J. 592 (1990). The discovery rule is unavailable to plaintiff in the present circumstances.

There is yet a second reason why we conclude that the dismissal of plaintiff's complaint against BOE was correct. As Judge Kassel correctly held, plaintiff did not act with reasonable diligence in investigating whether Kennedy was in the course of her employment at the time of the collision. While we do not disagree with plaintiff's assertion that there were no facts immediately apparent that would have alerted her to Kennedy's employment status, that did not relieve plaintiff of her obligation to conduct a reasonable investigation of that issue.

Under the discovery rule, the cause of action accrues as soon as "the injured party discovers, or by an exercise of reasonable diligence . . . should have discovered that he [or she] may have a basis for an actionable claim." Lopez v. Swyer, 62 N.J. 267, 272 (1973) (emphasis added). As a result, it is not sufficient for a plaintiff to take the position, as plaintiff does here, that there were no facts alerting her to a defendant's true status, where, as here, the plaintiff has not conducted the reasonable investigation that Lopez requires. In fact, plaintiff conducted no investigation.

Instead, she merely sent one letter on June 19, 2007, inquiring about Kennedy's employment status. When Kennedy did not respond, plaintiff took no further action. Plaintiff did not send a follow-up letter. Plaintiff did not retain an investigator to question Kennedy on that subject. Plaintiff did not ask the AIG claims representative whether Kennedy was in the course of her employment at the time of the accident. Any one of these steps could have enabled plaintiff to ascertain Kennedy's employment status within the first ninety days after the accident. We concur in Judge Kassel's conclusion that plaintiff did not conduct a reasonable investigation of Kennedy's employment status, and, for that reason, was not entitled to the benefit of the fictitious defendant rule or to the tolling of the time requirements set forth in N.J.S.A. 59:8-8 and 59:8-9.

In light of our conclusion that plaintiff was not entitled to the tolling of those time requirements, N.J.S.A. 59:8-9 required the dismissal of plaintiff's complaint, as she did not file the notice of tort claim within ninety days of the happening of the accident, did not demonstrate the "extraordinary circumstances" required by N.J.S.A. 59:8-9 and did not file her cause of action against BOE within two years of the happening of the accident, which is the outermost time limit for filing suit against a public entity. N.J.S.A. 59:8-8(b). Were we to accept plaintiff's argument that she was not required to file a notice of tort claim until ninety days had elapsed after the taking of Kennedy's deposition, a public entity's exposure would be potentially infinite. Here, the deposition occurred more than three years after the accident occurred. We cannot countenance such potentially unlimited liability exposure on the part of a public entity. The TCA requires otherwise. Priore, supra, 190 N.J. Super. at 130.

Finally, because plaintiff never filed a motion for leave to file a late notice of claim, as required by N.J.S.A. 59:8-9, the court would have lacked the authority to permit such late filing in any event. Priore, supra, 190 N.J. Super. at 130.

Affirmed.