NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0990-15T2

EDAN BEN ELAZAR and EDNA BEN ELAZAR,

Plaintiffs-Appellants,

v.

MACRIETTA CLEANERS, INC. d/b/a SWAN CUSTOM CLEANERS and d/b/a COIT SERVICES, MACRIETTA REALTY, CO., COIT SERVICES OF CENTRAL NEW JERSEY INC., ESTATE OF MAX STAUBER, HENRIETTA STAUBER, ALAN W. STAUBER, NORMAN A. SOBIN, STEVEN D. LASKER, ESTATE OF WILLIAM B. ROCKER, LYNN SCHONBRAUN and CAROL RUBIN as personal representatives of the ESTATE OF JOAN ROCKER NEWMAN, SWAN CLEANERS AND DYERS, INC., CAROLYNN LAUNDRY, INC., TOWNSHIP OF CRANFORD, a New Jersey municipal corporation,

Defendants-Respondents.

Argued May 25, 2016 – Decided July 6, 2016

Before Judges Ostrer, Haas and Manahan.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3247-12.

Stuart J. Lieberman argued the cause for appellants (Lieberman & Blecher, P.C., attorneys; Mr. Lieberman, of counsel and on the briefs; Michael G. Sinkevich, on the briefs).

Bryan D. Plocker argued the cause for respondents Lynn Schonbraun and Carol Rubin, personal representatives of the Estate of Joan Rocker Newman (Hutt & Shimanowitz, P.C., attorneys, join in the brief of respondents Macrietta Cleaners, Inc., Macrietta Realty Co., Estate of Max Stauber, Henrietta

Stauber, Alan W. Stauber, Norman A. Sobin and Steven D. Lasker).

Elizabeth Ann Kenny argued the cause for respondent Township of Cranford (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Robert P. Donovan, of counsel and on the brief; Ms. Kenny, on the brief).

Szaferman, Lakind, Blumstein & Blader, P.C., attorneys for respondents Macrietta Cleaners, Inc., Macrietta Realty Co., Estate of Max Stauber, Henrietta Stauber, Alan W. Stauber, Norman A. Sobin and Steven D. Lasker, individually and jointly (Nathan M. Edelstein, on the brief).

PER CURIAM

By leave granted, plaintiffs Edan and Edna Ben Elazar[1] appeal from the summary judgment dismissal of their personal injury complaint against Cranford Township (Cranford or the Township). Plaintiffs alleged they suffered various medical injuries as a result of chemical vapors that infiltrated their electronics repair shop. The chemicals emanated from leaking underground storage tanks (USTs). While the tanks themselves belonged to the dry cleaner next door to plaintiffs' shop, they were buried in adjoining municipal property with the Township's permission.[2]

[1] For convenience, we will refer to the plaintiffs by their first names, and mean no disrespect in doing so.

[2] Plaintiffs have also sued Macrietta Cleaners, Inc., and various other individuals and business entities related to the dry cleaner (dry cleaner defendants). Those claims remain pending before the trial court, and we do not address them. We shall not attempt here to delineate among the various dry cleaner defendants and their respective actions. In referring to the "dry cleaner" in this opinion, we intend to refer to one or more of the dry cleaner defendants.

The trial court found that plaintiffs' September 4, 2012, notice of tort claim was untimely, as plaintiffs' claim accrued no later than January 2011, when the dry cleaner's environmental consultant wrote to plaintiffs about the contamination and clean-up efforts.

Plaintiffs contend that their notice of tort claim should be deemed timely based on application of the discovery rule, and to avoid a manifest injustice. Having considered plaintiffs' arguments in light of the record and applicable principles of law, we affirm.

I.

In 1946, the Township permitted the dry cleaner to locate fuel oil and solvent tanks on municipal land "in a lane directly adjacent" to the cleaner's property.[3] Contamination was discovered after the tanks were removed in 1998. The New Jersey Department of Environmental Protection (NJDEP) was notified, and cleanup activities began. They continued after the dry cleaner ceased operations in 2008. In late 2010, the dry cleaner's environmental consultant, Viridian Environmental Consultants (Viridian), began testing indoor air at properties adjoining the cleaner, including plaintiffs' shop.

On January 14, 2011, Viridian's senior project manager, Jerry Haug, wrote to the Cranford Health Department, with a copy

[3] For purposes of reviewing the motion, we consider facts undisputed if not disputed by plaintiffs. See R. 4:46-2(b). We recognize that the dry cleaner defendants dispute some of the facts asserted by the Township, particularly regarding their responsibility and actions. We need not address those disputes here.

to plaintiff "Edan Ben-Alazar [sic], Fine Electronics" to report that indoor air pollution at plaintiffs' place of business posed a health threat. The "re" line stated, "Notification of an NJDEP Immediate Environmental Concern (IEC) Condition at Fine Electronics, 38 North Avenue E." The letter recounted that Viridian "conducted Vapor Intrusion sampling . . . at buildings within a specified distance from known contamination at" the dry cleaner property. The letter reported:

> Results showed that the indoor air sample collected in the basement of the Fine Electronics establishment contained 57 ug/m^3 tetrachloroethene (PCE) which exceeds NJDEP's IEC screening level of 30 ug/m^3. Per the NJDEP's guidance, "when the screening levels are exceeded, it is not considered acceptable because a long-term health risk exists when breathing the contaminated indoor air".
>
> [(Emphasis added).]

Haug wrote that sampling of the air on Fine Electronics' main floor was required to determine what mitigation measures were appropriate.

On March 11, 2011, Haug wrote directly to Edan and Edna to report the results of Viridian's sampling and remediation efforts. He reported again that the chemicals found in the air, which emanated from the dry cleaner, posed a health risk.

> Previous air sampling in the basement of your building on Dec. 22, 2010 reported the chemical compound tetrachloroethene (PCE) at a concentration of 56.6 ug/m^3, a level which exceeds the [NJDEP's] Immediate Environmental Concern (IEC) level of 30 micrograms per cubic meter (ug/m^3). This result was reported to the NJDEP on Jan. 14, 2010.

Haug reported that Viridian installed, on behalf of the dry cleaner, a portable device in plaintiffs' basement "in order to

prevent and/or reduce any potential long term health hazards." Haug also disclosed some of the chemicals found in the indoor air probably emanated from the substances that plaintiffs used in their own business. Haug suggested installation of a stronger air stripping system. He invited plaintiffs to call him for more information.

The plaintiffs opened their shop in 1988. From the beginning, plaintiffs detected a chemical smell from the dry cleaner. Edna told Edan, "I can't breathe. It's weird. The smell is not right." Over the years, both plaintiffs had respiratory symptoms. Starting in the 1990s, Edan suffered from shortness of breath, cough, and chest pains. Edna has asthma and respiratory symptoms. Although she could not pinpoint when they began, she indicated they occurred sometime after she moved to New Jersey. She never suffered such symptoms in Israel, where she lived until 1986, or in Los Angeles or Chicago, where she lived before moving to New Jersey.

Edna admitted, "It probably did occur to me that it [the chemical odors] could hurt my health." Asked to attribute his chronic symptoms, Edan testified, "In the beginning I didn't know, until Viridian came in and checked the air there, we understand what happened. It was highly contamination [sic] there, very high."

The record evidence creates no genuine issue that upon receiving Viridian's March 2011 letter — if not upon receiving the January 2011 letter — plaintiffs were aware that the indoor air pollution from the cleaners posed a health risk to them.

Neither party spoke English as their first language. Edan was born in Iran, and stated he could read English "so-so." Edna stated she relied upon her husband and son to read to her. Nonetheless, they admitted they understood the import of the letters.

Edan recalled receiving the March 2011 letter. Although he did not recognize the January 2011 letter when confronted with it in deposition, he stated that after receiving the "first letter," he began to search for a lawyer "because I seen [sic] we really get caught in the problem we have with the underground contamination with the shop and all our injury." He recalled receiving a letter that reported his shop had "very high contamination," but he did not "know which one it was." Edan also testified that Haug read one of the letters to him during one of his many visits to the property. "I show him. I said, [']What is this?['] They said they are too high." Edna recalled a conversation with her son about a letter from Viridian. She stated, "I probably asked him, 'What does it say?' And he said, 'Basically, the place is contaminated.'"

In January 2012, Edan's pulmonologist found that contamination from the dry cleaner exacerbated his asthma. Another physician reported on March 5, 2012 that workplace contamination "may well be" the cause of his illness.

Edan testified that it was difficult to find counsel. Plaintiffs ultimately retained counsel in March 2012. In a delayed response to an Open Public Records Act (OPRA) request with the NJDEP, counsel received documents in July 2012 that

disclosed that the dry cleaners' USTs were located on Township property. The notice of claim, dated September 4, 2012, asserted that the occurrence "which gave rise to this accident" took place on June 26, 2012, but referred to medical treatment on March 5, 2012. The first complaint, filed September 14, 2012, did not specifically name the Township as a defendant, but it named various fictitious parties. The first amended complaint, filed September 4, 2013, named the Township.

After a period of discovery, the Township moved to dismiss plaintiffs' complaint on the ground that they failed to file a timely notice of claim. The trial court granted the Township's motion on September 15, 2015.

II.

We exercise plenary review of the trial court's grant of summary judgment, and apply the same standard that governs the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). We determine whether the motion record shows a genuine issue of material fact, viewing the evidence in a light most favorable to the non-moving party, and whether the movant is entitled to judgment as a matter of law. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995); R. 4:46-2(c). A court must determine "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). Absent a genuine factual dispute, the issue presented

is legal, which we review de novo. Henry, supra, 204 N.J. at 330.

The legal principles governing a tort claim against a public entity are well settled. In order to pursue a claim against a public entity, a plaintiff must file a notice of claim within ninety days after the claim accrued. N.J.S.A. 59:8-8. If the plaintiff misses that deadline, he or she may seek leave of court "within one year after the accrual of his claim provided that the public entity . . . has not been substantially prejudiced thereby." N.J.S.A. 59:8-9. The motion must be supported by competent evidence demonstrating "sufficient reasons constituting extraordinary circumstances for" the delay. Ibid. The late notice must be filed "within a reasonable time" after the ninety-day period expires. Ibid.; Wood v. Cty. of Burlington, 302 N.J. Super. 371, 380 (App. Div. 1997) (nine month delay deemed unreasonable). A late notice without leave of court is a "nullity." Rogers v. Cape May County Office of Public Defender, 208 N.J. 414, 427 (2011). A claimant "shall be forever barred from recovering against a public entity" if he or she fails to file a notice of claim within ninety days of accrual, or is permitted to file a late claim under N.J.S.A. 59:8-9. N.J.S.A. 59:8-8(a).

To determine whether a plaintiff has complied with these deadlines, the court must determine the threshold question of when the cause of action accrued. Beauchamp v. Amedio, 164 N.J. 111, 118 (2000). The next and separate task "is to determine whether a notice of claim was filed within ninety days." Ibid.

The third and "distinct" task is to "decide whether extraordinary circumstances exist justifying a late notice." Id. at 118-19.

Accrual generally coincides with when an injury would be actionable against a private party, id. at 116; that is, "the date of the incident on which the negligent act or omission took place." Id. at 117. However, accrual may be tolled by the discovery rule, where the victim "either is unaware that he has been injured, or although aware of an injury, does not know that a third party is responsible." Ibid.; see also McDade v. Siazon, 208 N.J. 463, 474-75 (2011). "The discovery rule tolls the commencement of the ninety-day notice period only '[u]ntil the existence of an injury (or, knowledge that a third party has caused it) is ascertained.'" McDade, supra, 208 N.J. at 475 (quoting Beauchamp, supra, 164 N.J. at 122). The key is "whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another." Ibid. (quoting Caravaggio v. D'Agostini, 166 N.J. 237, 246 (2001)).

The Court has recognized that persons injured by toxic substances often do not learn they were injured until long after the tortious act, and it may be unclear that the injury or disease was caused by tortious exposure, as opposed to some other cause. Lamb v. Global Landfill Reclaiming, 111 N.J. 134, 144 (1988). Thus, in the toxic tort context, accrual occurs when a plaintiff "discovered or should have discovered, by exercise of reasonable diligence and intelligence, that the physical condition of which he complains was causally related to his

exposure to chemicals" of a third party. Ibid. (quoting Vispisiano v. Ashland Chem. Co., 107 N.J. 416, 427 (1987)).

The fact that a plaintiff may not be aware of the "true identity" of the tortfeasor does not delay accrual, so long as the plaintiff knew or reasonably should have known that a third party was at fault. McDade, supra, 208 N.J. at 478-79 (plaintiff's cause of action accrued when he knew he was injured by an exposed pipe, not when he discovered the pipe was owned by a public entity). The discovery rule "does not delay the accrual of a cause of action when the plaintiff knows about the injury but cannot determine the tortfeasor's identity." O'Neill v. City of Newark, 304 N.J. Super. 543, 553 (App. Div. 1997) (quoting Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 274 (App. Div. 1997)) (cause of action accrued when plaintiff injured himself as a result of a collapsed staircase, and was not tolled until the plaintiff discovered that a public entity owned the building). Likewise, accrual is not delayed when a plaintiff knows he or she has been injured, but does not fully appreciate the nature of the injury. See Beauchamp, supra, 164 N.J. at 119 (stating the fact that the victim did not realize the permanence of her injury did not affect date of accrual).

Turning to plaintiff's September 2012 notice of claim, plaintiffs did not apply for permission to file a late notice of claim pursuant to N.J.S.A. 59:8-9 on the grounds that extraordinary circumstances justified a late claim. Rather, plaintiffs contend their September 2012 notice was timely. We disagree.

Plaintiffs admit that they suffered respiratory illness for many years. Edna had long suspected that chemical vapors from the adjoining dry cleaner may have been a cause. Then, the USTs behind the dry cleaner were removed. Indoor air monitoring devices were placed in their shop on behalf of the dry cleaner. Thereafter, plaintiffs received the January and March 2011 letters reporting that contamination arising from the basement posed a health risk. At that point, if not sooner, it was reasonable for them to conclude not only that they had suffered an injury, but that a third party was at fault.

Plaintiffs contend that there was no reason for them to suspect that a public entity permitted a private business to place underground storage tanks on public property, thereby involving it in the contamination. However, as noted above, accrual does not depend on identifying the third party at fault. Furthermore, we note that counsel was able to identify the Township's involvement in roughly four months. In sum, plaintiffs cause of action accrued no later than March 2011. As they failed to file their notice of claim within ninety days thereafter, and they failed to seek leave to file a late notice of claim, their claim is barred.

Notwithstanding the clear import of the Tort Claims Act, plaintiffs contend that dismissal of their complaint should be set aside to avoid a manifest injustice. However, plaintiffs cite no facts to establish a "rare case of manifest injustice in which equitable estoppel might be invoked based on [a] claim that defendants ha[ve] misled plaintiffs about [a] material issue."

D.D. v. Univ. of Medicine & Dentistry of N.J., 213 N.J. 130, 156 (2013) (citing McDade, supra, 208 N.J. at 480). We are not otherwise free to expand the waiver of sovereign immunity based on general notions of manifest injustice. The Tort Claims Act must be strictly construed to further its purpose. McDade, supra, 208 N.J. at 474.

Affirmed.