

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3702-11T2

BRIAN RABB,

Plaintiff-Appellant,

v.

CHILDREN'S PLACE RETAIL STORES,
INC., d/b/a THE CHILDREN'S PLACE,
jointly, severally and in the
alternative,

Defendant-Respondent.

Submitted January 7, 2013 - Decided June 18, 2013

Before Judges Parrillo and Maven.

On appeal from the Superior Court of New
Jersey, Law Division, Atlantic County,
Docket No. L-8462-11.

Faia & Frick, P.C., attorneys for appellant
(Carmen R. Faia, on the brief).

Little Mendelson, P.C., attorneys for
respondent (William P. McLane, of counsel
and on the brief; Neha Dalal, on the brief).

PER CURIAM

Plaintiff Brian Raab, a former employee of defendant
Children's Place Retail Stores, Inc. (Children's Place), appeals
from the February 7, 2012 order granting summary judgment in

favor of Children's Place and dismissing his complaint filed pursuant to the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. We are satisfied that where discovery is not complete, and conflicting certifications indicate a genuine issue of material fact concerning plaintiff's termination date, granting summary judgment was not appropriate. Accordingly, we reverse and remand for further proceedings.

Upon reviewing an order granting summary judgment, we employ the same standard as the trial court and consider the evidence in the light most favorable to plaintiff in order to determine whether Children's Place is entitled to summary judgment as a matter of law. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The facts adduced from the motion hearing record are as follows.

Plaintiff filed his complaint on August 26, 2011, alleging that his employment with Children's Place commenced on or about November 9, 2007, and that he was wrongfully terminated on August 28, 2009. In its motion for summary judgment dated November 18, 2011, Children's Place asserted that plaintiff's employment was terminated effective August 20, 2009, and that plaintiff failed to file his complaint within the two-year statute of limitations applicable to LAD cases, citing to Bolinger v. Bell Atlantic, 330 N.J. Super. 300, 305 (App. Div.

2000). See Montells v. Haynes, 133 N.J. 282, 286 (1993) ("The statute of limitations for all claims asserted under the LAD is two years."). Children's Place submitted a certification from Francine Gattini, Director of Payroll, stating that the Associate Time Sheet showed that plaintiff's last work day was August 20, 2009; his last paycheck reflected all hours worked up to August 20, 2009; plaintiff's job history report shows that he was terminated on August 20, 2009; and by August 25, 2009, Children's Place had filled plaintiff's position as a stock supervisor.

In opposition, plaintiff, who is African American, claimed he was terminated on August 28, 2009, after complaining of racial discrimination in the workplace. Plaintiff averred that he was subjected to racially offensive comments and jokes, and the store manager "singled [him] out and picked on [him] because of [his] race." Further, he claimed he was unfairly disciplined based on his race, namely that he was placed on probation unjustifiably and his "evaluations were intentionally skewed." He asserted that he complained about the store manager's conduct to the district manager during a visit to the store, but to no avail. Rather, plaintiff stated that the district manager and store manager made arrangements to replace him prior to his actual termination.

Plaintiff also claimed that on August 28, 2009, when he reported to work, the store manager questioned him regarding "an incident that had occurred on the register about a week or more earlier." It was at this time that the store manager "fired" him and told him to leave the premises. Based on the foregoing, plaintiff argued that his termination date was August 28, 2009. Furthermore, plaintiff argued that the court should not rely on Gattini's certification as it was not based on her personal knowledge, contrary to Rule 1:6-6.

The judge granted summary judgment to Children's Place finding that (1) the employment records established that plaintiff was terminated on August 20, 2009; (2) the running of the statute of limitations for a LAD claim is triggered on the last day for which the employee is paid; and (3) plaintiff failed to file his complaint timely.

On appeal, plaintiff contends that the trial court erred in finding that the complaint was not filed within two years from the accrual date of the cause of action; accepting as an undisputed fact an uncertified and unauthenticated computer printout of alleged company records; and granting summary judgment when discovery was yet to be completed and when a genuine issue of material fact exists concerning the date of termination. As to the last contention, we agree.

Our review is de novo. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 427 (App. Div. 2004). We owe no deference to the trial judge's conclusions of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We begin by considering plaintiff's contention that Children's Place's motion for summary judgment should have been denied as premature because the motion was considered before discovery was completed.

A party may file a motion for summary judgment as early as twenty days from the service of the complaint. R. 4:46-1. However, summary judgment is generally "inappropriate prior to the completion of discovery." Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003). We seek to provide "every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498-99 (App. Div. 2012) (citations omitted). Where an opposing party cannot file fully responsive supporting papers because critical facts are within the moving party's knowledge, the motion for summary judgment should be denied in order to permit the opposing party an opportunity to complete discovery. Id. at 499 (citation omitted).

If a party challenges the motion on the basis that discovery is incomplete, then he or she must demonstrate that "there is a likelihood that further discovery would supply the necessary information," J. Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J. Super. 170, 204 (App. Div. 1996), that would "establish a missing element in the case." Mohamed, supra, 424 N.J. Super. at 498. The party must also show, "with some specificity, the nature of the discovery sought and its materiality to the issues at hand." Ibid. (citing In re Ocean County Comm'r of Registration, 379 N.J. Super. 461, 478 (App. Div. 2005)).

Plaintiff contends that a genuine issue of material fact exists concerning his date of termination, and without discovery, he is deprived of the opportunity to obtain information that would support his claims and contradict the evidence that Children's Place provided. Discovery would afford plaintiff the opportunity to review Children's Place employment records and other relevant corporate documents that relate to the claim regarding his termination date, and hence, the triggering event of the statute of limitations. Further, plaintiff argues that he should be given an opportunity, through discovery, to depose certain key employees, including the

district manager and store manager regarding his racial discrimination claim.

Upon the filing of the complaint, the case was designated on the Case Management Track Three and given 450 days to complete discovery. Rule 4:5A-1 to -2; Rule 4:24-1. However, Children's Place brought this action for summary judgment within ninety days, and discovery had not yet begun. The trial court acknowledged plaintiff's argument that the matter was not ripe for consideration because discovery was incomplete; nevertheless, the judge granted the motion. Absent proper discovery concerning the essential facts, the LAD cause of action and the accrual date of plaintiff's claim remain in dispute. Based on the early posture of this case, we conclude that summary judgment and dismissal of the complaint with prejudice was premature.

Next, we turn briefly to the court's determination that the last day plaintiff was paid triggered the statute of limitations. The trial judge relied on Zacharias v. Whatman PLC, 345 N.J. Super. 218 (App. Div. 2001), certif. denied, 171 N.J. 444 (2002), and ruled that:

[A]pplying Zacharias to the facts of this case, the statute of limitations began running on August 20, 2009, regardless of whether plaintiff received notice of his termination after that date. Although [p]laintiff recalls being discharged on

August 28, 2009, [d]efendant's business records refute this contention. In summary, [p]laintiff cannot ignore the fact that payroll records indicate that the last day for which he was paid was August 20, 2009. Accordingly, [d]efendant's request for summary judgment against [p]laintiff is granted because the facts of the case indicate that [p]laintiff was terminated in August 20, 2009, making his August 26, 2011 [c]omplaint untimely.

In Zacharias, we applied the Supreme Court's rationale in Alderiso v. Med. Ctr. of Ocean County, 167 N.J. 191 (2001), which analyzed the statute of limitations for claims under the New Jersey Conscientious Employee Protection Act¹ (CEPA) to LAD claims. Id. at 227. The Court in Alderiso held that the discharge occurred on the last date for which the employee was paid, and the statute of limitations began on the first day of unemployment. Alderiso, supra, 167 N.J. at 204. Zacharias applied that same rule to LAD cases. Supra, 345 N.J. Super. at 227. These two cases are distinguishable given that in each case, the last day the employee was paid was after he or she had received notice of termination. Zacharias and Alderiso do not address the circumstances present here, where plaintiff's last day of pay is prior to the alleged termination date.

Here, the record, as developed thus far, does not inform as to whether plaintiff was notified that he was terminated on

¹ N.J.S.A. 34:19-1 to -8.

August 20, 2009 or August 29, 2009. Children's Place's position that the statute of limitation runs from the last date plaintiff was paid - August 20 - is at odds with plaintiff's claim that his last day of work was August 28, when he was first notified that he was no longer an employee of Children's Place and told to leave the store. Children's Place's reliance on plaintiff's last day of pay as the triggering event may be inapposite, as a matter of law, with our focus on the date that plaintiff is actually harmed by defendant's conduct. In Holmin v. TRW, Inc., 330 N.J. Super. 30, 46 (App. Div. 2000), aff'd., 167 N.J. 205 (2001), we held that, for purposes of the statute of limitations, the cause of action accrues not from the date one is told he is terminated but rather from the date of actual termination, "measured from the date [the] plaintiff was damaged by the defendant's wrongful act." In the matter at hand, it is evident that without additional facts and a more developed record, we cannot discern when or if plaintiff was harmed by Children's Place, or whether the last day of pay truly represents the date plaintiff was terminated. As such, granting summary judgment based on the holding in Zacharias and Alderiso, at this juncture, is unsupported by this record.

Given that discovery was not completed and genuine issues of material fact exist as to the circumstances concerning the

LAD claim and the accrual date of the cause of action, we are left with the inescapable conclusion that summary judgment was premature and improvidently granted.

In light of this determination, we need not consider plaintiff's remaining contention that the court improperly relied on uncertified and unauthenticated payroll records.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION