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O&Y v. Old Bridge

Brief in Opposition to D.^{vs} Twp.^{vs}
of Old Bridge and Town Council's
Motion for Summary Judgment

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY
DOCKET NO. L-32516-80

O & Y OLD BRIDGE DEVELOPMENT CORP.,

Plaintiff,

vs.

THE TOWNSHIP OF OLD BRIDGE, et als.

Defendants.

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Civil Action

BRIEF IN OPPOSITION TO DEFENDANTS TOWNSHIP OF OLD BRIDGE
AND TOWNSHIP COUNCIL'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF FACTS

Plaintiff, a property owner in Old Bridge Township brought this suit challenging the Old Bridge Township 1978 Land Development Ordinance and the fee schedules of the Township Municipal Utilities Authority and Sewerage Authority, as well as policy decisions made by some or all defendants in planning (or failing to plan) for water supply and sewer facilities to serve future development.

The fact that the course of exclusionary conduct complained about was deliberate (i.e. that it constituted a "conspiracy") is relevant in this case because defendants are under two specific court mandates. See Oakwood at Madison and Urban League of Greater New Brunswick v. Mayor and Council of Carteret, et. al., 142 N.J. Super 11 (1976).¹ Plaintiff intends to show not only that the effect of defendants' actions make impossible the construction of an adequate supply of least cost housing and violate specific court mandates, but that this action was intentional and will continue unless specific corporate relief is granted in this case.² Plaintiff

¹ Ordinarily, in an exclusionary zoning suit, the issue of whether the municipal course of conduct is intentional or non-intentional is irrelevant. See Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975) pages 170 through 174 and particularly footnote 10. In that case the court concluded that the exclusionary conduct was obviously intentional and that the motives, i.e. "selfish and parochial fiscal interest, existed throughout the state "in developing municipality after developing municipality".

² The Supreme Court has indicated in Oakwood at Madison, supra, page 548 - 551 and footnote 50, that not every builder-plaintiff who wins an exclusionary zoning suit is entitled to specific corporate relief but that the right to such relief "generally rests in the discretion of the court, to be exercised in the light of all attendant circumstances". Plaintiff contends that the history of this municipality's deliberate disregard of previous court orders is an "attendant circumstance" which should be weighed in considering plaintiff's request for specific relief.

will show, and this court's own records will document, that the builder-plaintiff in the Oakwood at Madison case has to this date been unable to put a spade in the ground because they have been unable to get sewer facilities and water from defendants, Old Bridge Municipal Utilities Authority and the Old Bridge Township Sewerage Authority. After litigating for over seven years on the zoning issues and after having obtained specific corporate relief in the form of court ordered building permits this builder was forced to commence litigation against the Utilities Authority. (See Oakwood at Madison v. Old Bridge Municipal Utilities Authority, Docket # L-28916-77 P.W.) in order to obtain water service and reasonable connection fees. Although that case was recently settled by consent judgment resulting in a revision of the water fee schedules and allocation of water supply for that builder-developer only, the builder-developer's problems with the sewage authority continued. Plaintiff would like the opportunity to prove that the sewerage and water authorities are not merely independent second and third lines of defense against all large development in Old Bridge, but that all agencies of municipal government are acting together in the deliberate furtherance of one conspiracy.

Defendant Old Bridge Township Council by this motion for summary judgment seeks a dismissal of the Tenth Count of Plaintiff's Complaint which alleges that the Township Council conspired with the other named defendants to preserve exclusionary land patterns and prevent the provision of least-cost and governmentally subsidized housing in accordance with the New Jersey Supreme Court mandate of the Oakwood at Madison v. Township of Madison decision. In support of its motion for summary judgment, the Township Council has filed two certifications, including the certification

of E. Fletcher Davis, Township Planner and the certification of Sonja Fineberg, Councilwoman. The certification of E. Fletcher Davis makes the following relevant assertions:

1. That he was instructed by the attorney, township manager, mayor and council to ensure that the new land development ordinance complied with the court orders.
2. That he was never approached directly or indirectly by any of the defendants and asked, told or instructed not to comply with the court decisions or to try and avoid them.
3. That no one had ever approached him to try and influence him to draft any part of the Ordinance in such a way that it would be exclusionary.
4. That the "record will show" that the Ordinance was adopted "substantially" as he proposed it with no restrictive provisions added by any defendants.

The certification of Councilwoman Fineberg asserts the following relevant facts:

1. That she personally met with and spoke with the Township Planner to let him know that it was important that the new Ordinance meet all court directives and guidelines.
2. That the Council decided after the Urban League decision that it should comply with the decision rather than appeal it.
3. That she never met with any member of the named defendants nor had any discussions concerning violation or circumvention of court orders.

4. That when she and fellow Council members discussed the Ordinance they did so with the view, desire and intent to make sure it was not exclusionary or in violation of any court order.

On the basis of these certifications, defendant Township Council demands summary judgment on the conspiracy count of the Complaint. Plaintiff respectfully requests this Court to deny this motion for summary judgment since Defendant's certifications raise substantial issues of material fact and Plaintiff should have the opportunity to pursue discovery concerning its conspiracy claim before this Court considers a motion for summary judgment thereon.

4. That when she and fellow Council members discussed the Ordinance they did so with the view, desire and intent to make sure it was not exclusionary or in violation of any court order.

On the basis of these certifications, defendant Township Council demands summary judgment on the conspiracy count of the Complaint. Plaintiff respectfully requests this Court to deny this motion for summary judgment since Defendant's certifications raise substantial issues of material fact and Plaintiff should have the opportunity to pursue discovery concerning its conspiracy claim before this Court considers a motion for summary judgment thereon.

POINT I

SUMMARY JUDGMENT ON THE CONSPIRACY
COUNT OF PLAINTIFF'S COMPLAINT
SHOULD BE DENIED

In order to prove the conspiracy cause of action claim in its Complaint, Plaintiff must show:

1. two or more participants;
2. an object to be accomplished;
3. a meeting of minds or agreement on the object
or course of action;
4. one or more overt acts;
5. damages

Hills Dredging Corp. v. Risley, 18 N.J. 501 (1955)

A. A Material Issue Of Fact Exists Concerning The Conspiratorial Agreement

Although agreement among conspirators is an essential element of conspiracy, illegal conspiracies are often formed without simultaneous action or agreement. Interstate Circuit v. U.S. Tex., 59 S.Ct. 467, 306 U.S. 208, 83 L. Ed. 610. No formal agreement between the parties to do the act charged is necessary; it is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the offense charged, although such agreement is not manifested by any formal words or written instrument. U.S. v. Paramount Pictures, New York, 68 S.Ct. 915, 334 U.S. 131, 92 L. Ed. 1260.

A conspiracy may be proven by either direct or circumstantial evidence. State v. Carbone, 10 N.J. 329 (1952); State v. Seaman, 114 N.J. Super 19 (App. Div. 1971), cert. den 404 U.S. 1015, 30 L. Ed. 2d 662, 92 S.Ct. 674. Proof of a conspiracy is generally a matter of inference deduced from the acts of the party, and when the total effect of the proofs indicate sufficiently the existence of a conspiracy, the case must go to the jury. State v. General Restoration Co., 42 N.J. 366 (1964).

Defendant Township Council claims that summary judgment should be granted in its favor because no illegal conspiracy has ever existed among defendants. In support of this position the Township Council offers the certifications of its Planning Director and of one Council member. The Township Planning Director's certification indicates that he was never asked to avoid any court decisions and that the "record will show" that the Ordinance adopted was "substantially" the Ordinance which he had proposed. The Certification of Councilwoman Fineberg asserts that she instructed the Planning Director to make the land development ordinance comply with court orders and that she personally never met with any other defendant for the purpose of making the land development ordinance exclusionary. For the following reasons, these certifications fail to eliminate all issues of material fact regarding the existence of an illegal agreement between some or all Council members and any other defendant.

The 1978 Old Bridge Township Land Development Ordinance was adopted pursuant to authority granted by the state legislature in the Municipal Land Use Law (N.J.S.A. 40:55-1 et seq.). Sections 62 and 64 of the M.L.U.L.

require the governing body to refer a proposed ordinance to the planning board for the board's recommendations and comments. If the planning board fails to submit its report within 35 days, the governing body may then proceed to adopt the proposed ordinance (See N.J.S.A. 40:55D-26). With or without a report from the planning board, the governing body has the final and ultimate power concerning the specific provisions of any land development ordinance.

Accepting as true the Township Planning Director's assertions that he was never directed by any Township Council member to make the land development ordinance exclusionary or violate any court order, it is still possible that the Township Council could have modified the draft of the Ordinance that he had prepared prior to its adoption pursuant to N.J.S.A. 40:55D-62. The Planning Director's certification to the effect that the "record will show" that the ordinance was adopted "substantially" as he proposed it creates an issue of fact, to wit, did the Township Council modify the proposed ordinance in a way which made it more exclusionary. Plaintiff is seeking the answer to this question through interrogatories served on April 15, 1981. Additionally, both certifications fail to eliminate the possibility of a meeting between the Township Council or any of its members and any of the other defendants for the purpose of discussing and creating a policy of not planning for future sewer and water facility needs of development allegedly permitted under the land development ordinance.

For the above-mentioned reasons, a genuine issue of material fact exists concerning the conspiratorial agreement among defendants.

B. Plaintiff Should Have The Opportunity To Pursue Discovery

N.J. Court Rule 4:46-5 requires the court to deny or stay a motion for summary judgment when it appears that the adverse party cannot present the facts which are essential to justify his opposition. In the case of Monmouth Lumber Co. v. Indemnity Insurance Co. of North America, 21 N.J. 439 (1956), the New Jersey Supreme Court held that on a motion for summary judgment the court should be critical of the moving papers but not those in opposition, and should deny summary judgment until discovery proceedings are had to enable the responding party to obtain the material necessary to justify its opposition; accord, Judson v. People's Bank of Westfield, 17 N.J. 67 (1954); Bilotti v. Accurate Forming Corp., 39 N.J. 184 (1963).

Plaintiff in the within action, like virtually every other party against whom a conspiracy has been exercised, does not at this time have specific knowledge of the terms of any agreement between defendants, the names of individuals involved, the dates of their meetings, or substance of their conversations therein. Plaintiff served interrogatories concerning conspiracy on April 15, 1981 and will pursue other discovery at an appropriate time in order to obtain as much direct evidence on the conspiratorial agreement as possible. But it is the essential nature of a conspiracy that more often than not, the only type of evidence available to prove such conspiracy is circumstantial evidence. Even if Plaintiff at the close of its case at trial would have no more than circumstantial evidence to show the existence of an agreement among defendants, it would be sufficient to justify a verdict in their favor. Board of Education, Asbury Park v. Hoek, 38 N.J. 213 (1962);

Lewis Kamm, Inc. v. Flink, 113 N.J.L. 582 (E. & A. 1934); State v. Carbone, 10 N.J. 329 (1952); State v. General Restoration Co., 42 N.J. 366 (1964).

C. The Tenth Count Of Plaintiff's Complaint Alleges Sufficient Facts Concerning The Conspiracy

Plaintiff strongly disagrees with the assertion at page 4 of the Township Council's Brief that "only conclusions that there is or was a conspiracy are in the Complaint". Examination of the Tenth Count of the Complaint shows that it states:

1. The identity of participants in the conspiracy; see Tenth Count, paragraphs 2, 3, 4, 5 & 6;
2. The object to be accomplished; see Tenth Count, paragraphs 2, 3, 4, 5 & 6;
3. The agreement or meeting of the minds; see Tenth Count, paragraph 2;
4. One or more overt acts; see Tenth Count, paragraph 1 which incorporates other Counts including:
 - a. Second Count - alleges preparation and adoption of illegal Land Development Ordinance by Planning Board and Township Council;
 - b. Sixth Count - alleges adoption of illegal and cost-generative fee schedule by Sewerage Authority;
 - c. Eighth Count - alleges adoption of illegal and cost-generative fee schedule by Municipal Utility Authority
 - d. Ninth Count - alleges failure to provide for future water supply needs by Municipal Utility Authority.

5. Damages; see Tenth Count, paragraph 1 incorporating the allegations regarding damages of preceding counts.

As indicated above, Plaintiff does not presently have knowledge of specific facts concerning the agreement between defendants and is faithfully pursuing the discovery process to obtain as much of this information as possible. Since a jury verdict for Plaintiff based upon circumstantial evidence showing the existence of an agreement among defendants would be sustained, we submit that Plaintiff need not set forth any direct evidence of the agreement in its pleading in order to withstand a motion for summary judgment.

This Court is not bound by the restrictive pleading rule adopted by the Third Circuit federal courts as stated in Sixth Camden Court v. Township of Evesham, 420 F.Supp. 709 (D.C.N.J. 1976). The District Court in the Evesham case held that plaintiffs in civil rights cases brought in the Third Circuit are required to plead facts with specificity in their complaint in order to "weed out frivolous and insubstantial civil rights cases from among the large volume of cases which are brought under the civil rights act so that the doors of the federal courts might stay open to legitimate claims".

The Third Circuit has balanced the hardship of this restrictive pleading rule by liberally permitting amendments to complaints. In the case of Rotolo v. Borough of Charleroi, 532 F.2d 920 (C.A. 3, 1976) the Court of Appeals reversed a decision of the District Court which held that plaintiff's Complaint lacked specificity and could not be amended; the

Court of Appeals justified a liberal amendment rule on the grounds that the federal courts should be kept open to legitimate civil rights claims.

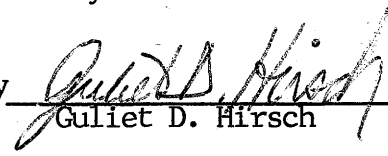
Although Plaintiff in the within action believes it has pleaded sufficient facts to apprise each defendant of its claim, it will, after completion of the discovery process, move to amend its complaint to incorporate any facts discovered. Even if this court were to adopt the restrictive Third Circuit civil rights pleading rule, Plaintiff should still have the right to amend its Complaint prior to dismissal.

CONCLUSION

For the aforementioned reasons, Plaintiff respectfully requests this court to deny the Township Council's motion for partial summary judgment on the conspiracy count of the complaint.

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