

ML - Old Bridge

16 - June - 81

Brief in support of Motion by Defendants, Township
of Old Bridge and Township Council of the
Township of Old Bridge and in Opposition to
Plaintiff's Motion

pg. 10

ML000510B

O & Y OLD BRIDGE DEVELOPMENT CORP.,
Plaintiff,
-vs.-
THE TOWNSHIP OF OLD BRIDGE,
et als.,
Defendants.

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

BRIEF IN SUPPORT OF MOTION BY DEFENDANTS, TOWNSHIP
OF OLD BRIDGE AND TOWNSHIP COUNCIL OF THE TOWNSHIP
OF OLD BRIDGE AND IN OPPOSITION TO PLAINTIFF'S
MOTION

LOUIS J. ALFONSO, ESQ.
Attorney for Defendants,
Township of Old Bridge and
Township Council of the
Township of Old Bridge
325 County Highway 516
Old Bridge, New Jersey 08857
(201) 234-2230

On the Brief; Louis J. Alfonso, Esq.

ARGUMENT

POINT I

SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE TOWNSHIP OF OLD BRIDGE AND THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE REGARDING PLAINTIFF'S CONSPIRACY COUNT AND CLAIMS.

A civil conspiracy is a combination of two (2) or more PERSONS to do an UNLAWFUL or CRIMINAL ACT or to do a lawful act BY UNLAWFUL MEANS or for an UNLAWFUL PURPOSE. BAKER V. RANGOS, 324 A2d 498 (PA. Supp. 1974). It is submitted that a public entity such as a Township or the governing body such as a Township Council are not "persons" within the meaning of conspiracy because of their limited functions and artificial nature and because the persons who engage in a conspiracy would be acting outside the scope of their authority and hence, the action would be ultra vir[^]s and a public entity is not liable for the ultra vires acts of its employees who allegedly engage in a conspiracy. Additionally, the Tort Claims Act, 59:2-4 and 59:2-10, recognize the fact that a public body should not be liable for various classes of torts and grant immunity.

In O'CONNOR V. HARMS, 111 N.J. Super. 22 (AD^f70) the Appellate Division at page 26 noted that "a public corporation such as a city or other public body, by reason of its being an artificial legal entity created by law to perform limited government functions, cannot entertain malice, as a public corporation!" A public body may be held answerable in some cases for the tortious ^{*}act[<] of its officers and employees. But where "malice" is an [@]S9#ntl#l Ingredient [@]f the tort, a city or

comparable public agency is not vicariously liable for the personal malice of the city's officers or employees in performing their public duties". The Court at page 27, then cited a number of supporting cases.

In the case at bar, a conspiracy is alleged and it is alleged that the public entity purposely conspired to ignore or not follow Court Orders and conspired to deny plaintiff or others the right to build low cost or least cost housing. These actions are contrary to law and if engaged in by a public official would be ultra vires. Just as a public body can not be liable where malice is involved, it should also not be liable where unlawful acts are alleged or unlawful means are used. As stated in 57 Am Jur. 2d 77, a municipal corporation is not liable in a civil action for damages to persons or property resulting from tortious acts which are outside the powers conferred on the municipality by its charter or other legislative enactment, since a municipality cannot confer upon its officers and agents lawful authority to represent it beyond its corporate powers, the rule of non liability applies to the ultra vires acts of such officers or agents whether the acts are directed by the municipality or are done without express direction or corporate sanction, Am. Jur. then cited numerous cases including BARNES V. DIST. OF COLUMBIA, 91 U.S. 540? SCOTT V. TAMP, 55 So. 983, etc.

At 57 Am. Jur. 2d 312, the rule is also stated that since a municipality is a public agency, it can and should plead the defense of ultra vires. This is true, it went to say because

the real party is the general public and not the officers who were allegedly derelict in their duty when the unlawful or improper act was committed. At 57 Am. Jur. 2d 88 in citing WAUGH V. PRINCE, 115 A 612, it was noted that a Town is not liable for the unauthorized and illegal acts of its officers even when acting within the scope of their duties.

In this case, the two defendants are public bodies and their duties as noted in O'CONNOR, Supra., are as authorized by law. They cannot as public bodies engage in a conspiracy for the reasons stated. Additionally, by way of analogy under 43 U.S.C. 1983, a distinction is drawn between a "person" and a public body or city. (See YUMICH V. COTTER, CA. ILL. 1971, 452 F2d 59 and BUSH V. ROBINSON, CA. PA. 1971, 442 f2d 393). That line of cases notes that a public body or city has limited powers, is different from a private corporation and is not a "person" within 43 U.S.C. 1983. Those cases permit any action against the individual members of a public body in a conspiracy to deny civil rights action but not the entity itself. Here too it is submitted that a public entity cannot be a "person" as can engage in a conspiracy. It does not have the right to violate laws or itself commit improper acts and such acts would be ultra vires.

Specific reference to a public body not being liable in a conspiracy is found in Corpus Juris Secundum, 15A C.J.S. 17, Conspiracy, at page 652. In C.J.S., it is stated that a municipal corporation, acting in its sovereign capacity, cannot be a conspirator and cannot be held liable for a conspiracy under the Federal Civil Rights Act (discussed above). C.J.S. cites

AGNEW V. CITY OF COMPTON, CA. CAL., 239 F2d 226, Cert. Denied, 77 So. Ct., 8/68; STEEL HILL DEVELOPMENT, INC. V. TOWN OF SAN BORTON, DC. NH., 335 F. Supp. 947; STEEL HILL DEVELOPMENT, INC. V. TOWN OF SAN BORTON, DC. NH., 392 F. Supp. 1144; and SCHOONE V. OLSEN, DC. WIS., 427 F. Supp. 724.

In STEEL HILL DEVELOPMENT, INC., 335 F. Supp., at page 950, the Court noted that the reason why a cause of action cannot be maintained against a Town for a conspiracy under the Civil Rights Act is because "a municipality acting in its sovereign capacity cannot be a conspirator". Therefore, as stated above, in the case at bar, it is improper to join the two public bodies as defendants in a conspiracy action since their functions are determined by State statute and they are creatures of the legislature and not "PERSONS"¹¹. As public bodies they enforce law, not ignore it and any act alleged disobeyed is ultra vires and there is no liability ^{OF} ~~is~~ the said public bodies.

Also under 59:2-4, a public entity is not liable for an injury caused by adoption of a failure to adopt a law or failure to enforce any law. Under 59:2-10, a public entity is not liable for the act or omission of a public employee constituting a crime, actual fraud, actual malice or wilful misconduct. The conspiracy acts complained of fit squarely under these sections and hence, there is also immunity of these defendants under these specific provisions of the Tort Claims Act.

POINT II

THE DAMAGE CLAIMS OF PLAINTIFF SHOULD BE
DISMISSED FOR PLAINTIFF'S FAILURE TO
COMPLY WITH THE NEW JERSEY TORT CLAIMS
ACT, N.J.S. 59;8-1, ET SEQ.

As the Certification of the Township Clerk shows, plaintiff has never filed a claim with the municipality as required under 59:8-1, et seq. In each of its claims, plaintiff seeks counsel fees and costs and "such other relief as the Court deems just"¹¹. Under REALS V. WAYNE TP., 132 N.J. Super. 100 (1975), the Court held that the filing of a Complaint does not constitute notice under the Tort Claims Act. Since no notice has been filed as to the conspiracy claim, this claim should be dismissed or in the alternate, it should be ordered that plaintiff is not entitled to damages on said claim.

POINT III

COUNTS ONE AND TWO OF THE COUNTERCLAIM SHOULD
BE PERMITTED TO BE AMENDED TO ADD THE SEVEN
MEMBERS OF THE TOWNSHIP COUNCIL AS PARTIES.

Plaintiff's conspiracy action is brought against the * Township Council, which is a public body. That body has filed a Counterclaim consisting of a number of Counts. The Counts note that the body is composed of seven (7) council persons. It is these council persons who allege that they were damaged by plaintiff's action in Counts One and Two.

As the prior Certification of council persons, Fineberg and Stone, show, the council members were very upset that the charges were made and know these charges adversely effected them. In the line of cases cited^Ajkthe plaintiff, there is nothing to preclude members of a public body from bringing an affirmative action. In STATE V. TIME,, INC., (1971) LA. APP. 249 So. 2d 328, it. was decided subsequent to NEW YORK TIMES V. SULLIVAN, (1964), 376 U.S. 254, that the Court noted that the individuals effected have a separate interest and while the individuals could proceed, the state itself might not. In TIMES V. SULLIVAN, itself, there is nothing to preclude an action between individual members of a governing unit when the alleged allegations are more than a vague, general, impersonal attack. In TIMES V. SULLIVAN, Super., it was, of course, decided after a factual trial in the State Courts and remanded, the Supreme Court stated that the paid ad referred to actions of the "police" and the plaintiff, as a city commissioner, who said that he had been ^{labeled} liable was held to be remotely connected to the charge. The Court said in 11 L.E.D. 2d

libelous

686, at page 711, "a number of the alleged ^{^hiabJJjk^}- statements ... did not even concern the police" and "it is plain that these statements could not be reasons read as accusing respondent of personal involvement of the action in question".

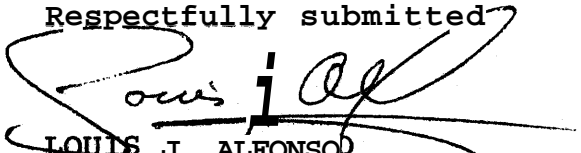
In the case at bar, there are specific charges and allegations that go right at the heart of the actions engaged in by the council. It is alleged that Court Orders were disobeyed and the like. Therefore, there is no remoteness or vagueness. The Supreme Court, at pages 713, 714 in TIMES, does not preclude actions by individuals who are members of the municipal body themselves as to the alleged libel. Therefore, since the seven members of the Township Council and noted in Counts One and Two, and to avoid multiplicity of action and for clarification, it is requested that the Counterclaim be permitted to be treated as a Third Party Complaint ^{*by} said members and/or that an amendment clarifying same be permitted to be filed.

POINT IV

OPPOSITION TO PLAINTIFF'S MOTION

These defendants reply upon the same Brief and Certification previously filed by them.

Respectfully submitted

A handwritten signature in cursive script, appearing to read "Louis J. Alfonso", is written over the typed name and title.

LOUIS J. ALFONSO
Attorney for Defendants,
Township of Old Bridge and
Township Council of the
Township of Old Bridge

LOUIS J. ALFONSO, ESQ.
325 County Highway 516
Old Bridge, New Jersey 08857
(201) 238-2230

Attorney for Defendants, Township of Old Bridge and
Township Council of the Township of Old Bridge

| | | |
|---|---|--|
| O & Y OLD BRIDGE DEVELOPMENT CORP., | : | SUPERIOR COURT OF NEW JERSEY LAW DIVISION |
| | : | MIDDLESEX COUNTY |
| | : | DOCKET NO. L-32516-80 |
| Plaintiff, | : | |
| -vs.- | : | Civil Action |
| THE TOWNSHIP OF OLD BRIDGE, et als., | : | CERTIFICATION |
| | : | |
| Defendants. | : | |

MARY M. BROWN, of full age, hereby certifies as
»

follows:

1. I am the Township Clerk of the Township of Old Bridge and am familiar with the filings made under the New Jersey Tort Claims Act. Neither the plaintiff, O & Y Old Bridge Development Corp., nor anyone acting in their behalf, has filed any Notice of Claim under said New Jersey Tort Claims Act.

2. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: June 16, 1981



MARY M. BROWN