RULS - AD - 1976 - 130

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- NOTICE OF MOTION FOR AN ORDER COMPELLING JAMES MURRAY TO ANSWER

PGS - 31

S-1290

The original of the within Notice of Motion has been filed with the Clerk of the Superior Court in Trenton, New Jersey.

McCARTER & ENGLISH

RULS - AD - 1976 - 130

McCARTER & ENGLISH
550 Broad Street
Newark, NJ 07102
(201) 622-4444
Attorneys for Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-25645-7[illegible]

8-13-76

THE ALLAN-DEANE CORPORATION, a Delaware corporation, qualified to do business in the State of New Jersey, Plaintiff -vs- THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, et al. Defendants	Civil Action NOTICE OF MOTION FOR AN ORDER COMPELLING E. JAMES MURAR TO ANSWER CERTAIN QUESTIONS ON DEPOSITION

TO: MASON, GRIFFIN & PIERSON, ESQS.
Attorneys for Plaintiff
201 Nassau Street
Princeton, NJ 09540

SIRS:

PLEASE TAKE NOTICE THAT on Friday, August 13, 1976, at 9:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, we shall apply to the Court (Honorable B. Thomas Leahy, J.C.C.) at the Somerset County Court House, Somerville, New Jersey,

for an order directing the witness, E. James Murar, to answer the following questions which were propounded to him on oral depositions taken May 25, 1976, and which he was directed by plaintiff's attorney not to answer:

1. (p.28, l.19) "Q. What were the reasons which persuaded Allan-Deane Corporation to attempt to provide for low income housing?"

2. (p.30, l.22) "Q. As nearly as possible, can you fix the time when you received the advices of counsel on this subject?"

3. (p.51, l.24) "Q. My assumption is that you would be reasonably sure that the law suit attacking the entire zoning ordinance of Bernards Township would result in no change whatever in the zoning of the Allan-Deane property regardless of what happened to the zoning in the other parts of the Township and on that assumption my question is could you as the President of Allan-Deane Corporation justify the expense on the part of the corporation embarking upon such a litigation?"

4. (p.60, l.6) "Q. Can you tell me from point of view of your judgment, you being President of Allan-Deane Corporation, what interest Allan-Deane Corporation has in subsidized low cost housing being provided in other parts of Bernards Township but not being made permissible on the Allan-Deane property?"

Defendants, The Township of Bernards, et al also move, pursuant to Rule 4:23-1, for an order requiring plaintiff to pay these defendants the reasonable expenses incurred in obtaining

relief sought in this motion, including attorneys' fees.

In support of the within motion, we shall rely upon the transcript of the deposition of E. James Murar taken May 25, 1976 and upon the brief submitted herewith.

Yours respectfully,

McCARTER & ENGLISH
Attorneys for Defendants, the Township of Bernards, et al.

By NICHOLAS CONOVER ENGLISH
Nicholas Conover English
A Member of the Firm

STATE OF NEW JERSEY)
) SS:
COUNTY OF ESSEX)

MICHAEL SOZANSKY, being duly sworn according to law, upon his oath deposes and says:

1. I am employed by McCarter & English, attorneys for defendants, The Township of Bernards, et al.

2. On August 4, 1976, I personally mailed, by certified mail, return receipt requested, postage prepaid, a copy of the within Notice of Motion for an Order Compelling E. James Murar to Answer Certain Questions on Deposition to Mason, Griffin & Pierson, Esqs., attorneys for plaintiff, P.O. Box 391, 201 Nassau Street, Princeton, NJ 08540, and to John F. Richardson, Esq., attorney for the Somerset County Planning Board, 1 East High Street P.O. Box 1034, Somerville, NJ 08876.

Sworn to and subscribed)
before me this 4th day)
of August, 1976.)

/s/ Michael Sozansky
Michael Sozansky

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 15 1977

McCARTER & ENGLISH
COUNSELLORS AT LAW
550 BROAD STREET
NEWARK, N. J.
07102

AREA CODE 201
622-4444

August 4, 1976

Re. The Allan-Deane Corporation
v. The Township of Bernards, et al.
Docket No. L-25645-75 P.W.

Clerk of Somerset County
Court House
Somerville, NJ 08876

Dear Sir:

We hand you herewith copies of the following:

1. Notice of Motion for an Order Compelling James E. Murar to Answer Certain Questions on Deposition.

2. Notice of Motion to Determine the Sufficiency of Plaintiff's Answers or Objections to Defendants' First Request for Admissions.

The originals of these Notices of Motion have been filed with the Clerk of the Superior Court in Trenton.

Will you please list these motions in Judge Leahy's calendar of motions on Friday, August 13, 1976 and deliver the briefs to him?

Very truly yours,

McCarter & English

NCE:hk
Encs.

S-1290

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-25645-75 P.W.

THE ALLAN-DEANE CORPORATION, a Delaware corporation, qualified to do business in the State of New Jersey,

Plaintiff

-vs-

THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, et al.

Defendants

Civil Action

BRIEF FOR DEFENDANTS, BERNARDS TOWNSHIP, ET AL IN SUPPORT OF A MOTION FOR AN ORDER COMPELLING E. JAMES MURAR TO ANSWER CERTAIN QUESTIONS ON DEPOSITION

McCARTER & ENGLISH
Attorneys for Defendants, The Township of Bernards, et al.
550 Broad Street
Newark, NJ 07102
(201) 622-4444

The purpose of the within motion is to enable the defendants, Bernards Township, et al. to obtain discovery of matters deemed relevant by this court in its ruling on defendants' motion to dismiss the complaint herein.

By way of background, these defendants' motion to dismiss the complaint was argued before Judge Leahy, sitting in this court, on May 11, 1976. A transcript of that argument has been prepared, and references will be made to it.

A reading of the transcript will disclose that one of the arguments advanced by these defendants was that plaintiff had no standing to attack the validity of the entire Bernards Township zoning ordinance on the alleged ground that it failed to comply with the decision of the New Jersey Supreme Court in Southern Burlington County N.A.A.C.P. v. Township of of Mt. Laurel, 67 N.J. 151 (1975). In denying the motion without prejudice Judge Leahy stated (Tr. 60-9):

> " * * * the Court states for the record, and openly acknowledges that it is very aware that this type of suit is expensive to prepare for, to present, et cetera, and for that reason the motion is not frivolous.
>
> "Basically, as I see it, the plaintiff can seek and is seeking either or both of the following rulings from the Court. The first would be that the zoning as is on plaintiff's tract is confiscatory, rendering the tract unusable and demanding relief.
>
> "The second is that affirmative relief should be granted by the Court in order to cause the providing of the type of housing referred to

in the Mt. Laurel decision to cause the social, general social good of increased housing for those portions of the population of the State that are in such desperate need for housing.

"Now, if the first of those, the confiscatory aspect is the only purpose of the suit, much of the relief requested and of the claims asserted in the Complaint would be totally irrelevant and would amount to an unwarranted consumption of time on the part of the Court. This is why I kept questioning to make sure that there was a representation in the pleadings and by counsel that the second aspect of the suit was real.

The defendant is obviously 150% convinced that that aspect is not real, but the Court has an assertion before it that it is real. It may be naive on the Court's part, but for the Court to be cynical and unbelieving and to deny hope would be a terrible thing for society. The Court must always hope that there may well be a corporation in existence that is willing to act in large part for the social good.

"With that thought in mind, I feel that the motion is therefore premature at best, and the motion will be denied without prejudice, however, to its renewal in whatever appropriate form you may choose if after exercise of discovery rights defense counsel believes that it has been established that there is no real intention on the part of plaintiff to serve the general public good by providing housing of the types found worthwhile by the Supreme Court of this State in its Mt. Laurel decision.

"If a further investigation of plaintiff's plans and intentions should demonstrate that there is no substance to that issue, the Court will not hesitate to listen again to the essence of the argument that was presented this morning."

The deposition of Mr. Murar, who is the President of the plaintiff corporation was taken on May 25, 1976, in part to obtain discovery of the matters referred to by the Court.

As stated by Judge Leahy, the issue boils down to the good faith of plaintiff in its alleged interest in providing subsidized public housing as part of its proposed development and accordingly, it would seem indisputable that that is an issue properly to be pursued on discovery.

Moreover, the necessity and importance of pursuing the interrogation of Mr. Murar on the inquiries which plaintiff's attorney has blocked are highlighted by other matters which have become a part of the record in this case on discovery or otherwise.

On February 10, 1976, plaintiff made a presentation to the Bernards Township Planning Board and submitted to the Board at that time a document setting forth the plaintiff's proposed plan of development of its property. This plan was prepared by Rahenkamp, Sachs & Wells. That document will be searched in vain for any reference to subsidized low income housing. Nevertheless, in the argument before this Court on May 11, 1976, Mr. Hill, the plaintiff's attorney, stated (Tr. 48-15):

> " * * * cases involving Bernards Township are the clearest example that I know of of governing bodies and planning boards clearly determined to defy the law and drag their feet, and I think the Court will have to face what is clearly one of the major second generation Mt. Laurel problems of what do you do with a municipality that won't comply.
>
> THE COURT: The assurance that I have that your client is the vehicle for reaching that issue is, I understand now, your February 1976 plan?

MR. HILL: That is correct, your Honor."

Again, on the argument on May 11, 1976, the plaintiff's attorney stated to the court (Tr. 43-17):

> "MR. HILL: Allan-Deane is in the business of developing real estate for a profit. We do have, and getting into the substance of the case, a consultant on subsidized housing."

Discovery has revealed that plaintiff's consultant on subsidized housing is Alan Mallach, who has testified on deposition on July 27, 1976 that he was first engaged by the plaintiff as such consultant in April, 1976.

Further, in the argument before the court on May 11, 1976, the plaintiff's attorney stated (Tr. 27-6):

> "MR. HILL: Your Honor, I have advised my client that for the purposes of standing, their standing to bring this action through a large extent depends upon their willingness to provide some low or moderate income housing in the Allan-Deane tract."

In his deposition on May 25, 1976, Mr. Murar acknowledged that the plaintiff's interest in low income housing was based at least in part, on advice of counsel. He stated (Tr. of Deposition 28-13):

> "As our plans were being further developed in 1975, the latter part of 1975 in terms of furthering the balance of the community and on advice of counsel we determined that low income should also be included to provide for all ranges and opportunities of housing."

As against this background, it seems relevant and important to inquire into the reasons which persuaded Allan-Deane Corporation to attempt to provide low income housing

and also to fix the time when the corporation received the advices of counsel on this subject.

On the present state of the record, it was at some point in time after the Rahenkamp proposal for the development of plaintiff's property had been developed that the idea of plaintiff providing subsidized low income housing first emerged, and that such emergence was due, at least in part, to Mr. Hill's advice to his client that its standing to bring the action which raises Mt. Laurel issues depends upon plaintiff's "willingness to provide some low or moderate income housing in the Allan-Deane tract." The fact that plaintiff did not engage Mr. Mallach as its consultant on subsidized housing matters until some weeks after the filing of the original complant herein is also significant.

As Judge Leahy recognized in his oral opinion dismissing defendants' motion to strike the complaint, if it should appear that plaintiff had no real and substantial interest in whether or not Bernards Township provided for subsidized low and moderate income housing in areas other than plaintiff's own property, then it would appear that plaintiff's motive or reason for raising Mt. Laurel issues in its complaint was simply to harass the Township with, perhaps, the hope that the Township would fold up and give plaintiff what it wanted. The record thus far supports a conclusion that plaintiff is attempting to apply maximum pressure on the Bernards Township defendants.

Plaintiff's presentation to the Bernards Township Planning Board on February 10, 1976 included a totally undisguised threat of litigation. Plaintiff has furnished counsel for Bernards Township defendants with a transcript of the Planning Board meeting on February 10, 1976. In that transcript, Ralph S. Mason, Esq., senior partner in the law firm representing plaintiff in this litigation, stated (p. 36-4):

> "The Allan-Deane Corporation, a fully owned subsidiary of Johns-Manville, formally applied to the Planning Board for a zoning change on November 1, 1971. After many months of informal discussions with members of the Planning Board and at the time of the application, November 1, 1971, a proposed development plan, including a rezoning of the area for PUD was submitted. We repeat our request for an immediate adoption of the PUD ordinance.
>
> "The Board indicated in November of 1971, that it would consider Allan-Deane's proposals but requested the time to study the application in the context of the overall comprehensive planning, which was then in progress. The Master Plan and the Natural Resource Inventory has been completed and Johns-Manville's property remains in a three-acre single family zone."

He further stated (p. 39-7):

> "Now, in view of the long history of Allan-Deane's application before this Board, the prevailing climate of opinion and the time involved in prosecuting an action, such as this, to successful conclusion through the Courts, we have been directed by our client to commence litigation by March 11, 1976, if the PUD Ordinance has not been adopted."

He further stated (p. 39-23):

> "Now, these remarks are made only to show our clear resolve to pursue this matter, if we are again put off or denied. There's a limit to human and even corporate patience, and after five long years, that limit has been reached."

At the same hearing, Mr. Murar, the plaintiff's President, stated to the Planning Board (p. 40-17):

> "I want to comment to you that the company thoroughly supports the comments of Mr. Mason, just concluded with. We are resolved in our plans, in support of this plan. We believe in it and we plan to move forward on it and this is our commitment."

At the argument before this court on May 11, 1976, the plaintiff's attorney, Mr. Hill, stated (Tr. 13-9):

> "Now, in this particular matter, I can represent to the Court that our client is determined to pursue it, since the investment here is very substantial. The property is owned outright by Allan-Deane, and they view development as being impossible under the present zoning, and they are determined to litigate this to its conclusion."

[The comment that Allan-Deane views development as being impossible under the present zoning is an interesting one in view of the fact that the present zoning was that which was in effect at the time plaintiff purchased the land. In a deposition taken in connection with the case of Allan-Deane Corporation v. Bedminster, the plaintiff's then President, Arthur C. Smith, admitted that the plaintiff knew that the zoning of the lands which it bought in Bernards Township was, at the time of purchase, three acres.]

In order to ascertain whether plaintiff has a real and substantial interest in whether or not subsidized low income housing is permitted in Bernards Township outside of plaintiff's own property, or whether the issue has been raised

by plaintiff simply as a weapon with which to belabor and harass the defendants, -- which was indicated by Judge Leahy to be a proper issue for discovery, -- it is required that Mr. Murar be directed to answer the last two questions referred to in the within Notice of Motion.

Accordingly, these defendants respectfully submit that the within motion be granted, and that Mr. Murar be directed to answer the questions referred to in the Notice of Motion.

These defendants also move for an order requiring plaintiff to pay these defendants the reasonable expenses incurred in obtaining the relief sought in this motion, including attorney's fees. Such a motion is sanctioned by Rule 4:23-1. That rule provides:

> "4:23-1. Motion for Order Compelling Discovery
>
> "A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
>
> "(a) Motion. If a deponent fails to answer a question propounded or submitted under R. 4:14 * * * the discovering party may move for an order compelling an answer * * *.
>
> "(c) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion to pay to the

moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

Respectfully submitted,

McCARTER & ENGLISH
Attorneys for Defendants, The Township of Bernards, et al.

By Nicholas Conover English
Nicholas Conover English
A Member of the Firm

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-25645-75 P.W.

THE ALLAN-DEANE CORPORATION, a Delaware corporation, qualified to do business in the State of New Jersey, Plaintiff -vs- THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, et al. Defendants	Civil Action ON MOTION OF DEFENDANT, BERNARDS TOWNSHIP, FOR AN ORDER COMPELLING E. JAMES MURAR TO ANSWER CERTAIN QUESTIONS ON DEPOSITION

REPLY BRIEF

McCARTER & ENGLISH
Attorneys for Bernards Township
Defendants
550 Broad Street
Newark, NJ 07102
(201) 622-4444

It is hoped that a few words of comment on plaintiff's brief in opposition to defendants' motion to compel Mr. Murar to answer certain questions on deposition will be of assistance to the Court.

First of all, the controversy over the questions directed to Mr. Murar should be put in perspective.

The original complaint herein was filed on March 11, 1976. In lieu of filing an answer, the Bernards Township defendants filed a motion to dismiss the complaint. The motion was argued before Judge Leahy on May 11, 1976. A stenographic transcript of the argument, and the reply brief of defendants both make it clear that an important point at issue is the bona fides of plaintiff's allegation in Paragraph 29 of the First Count of the Complaint that "Allan-Deane is prepared and has offered to work with the Township of Bernards, or some other sponsoring agency, to assure that a substantial portion of the multi-family homes constructed on the property would be eligible for rent subsidies in order to help Bernards Township to provide fully for its fair share of the regional housing need at all income levels". (The same paragraph appears unchanged in the First Amended Complaint.) The facts and circumstances summarized at pages 3 through 6 of defendants' reply brief filed in connection with the motion to dismiss, as reinforced by the candid admission by plaintiff's attorney at the argument on May 11, 1976 (Tr. 27-6) that he had advised

plaintiff that its standing to bring the action which challenges the entire Bernards Township zoning ordinance for failure to comply with Mt. Laurel "depends upon their willingness to provide some low or moderate income housing in the Allan-Deane tract", certainly raises a question in reasonable minds whether Paragraph 29 of the First Count of the Complaint is anything more than a tactical maneuver in a law suit. The question seems to have troubled Judge Leahy, who felt bound on a motion to dismiss to accept the allegation as true, and hence he denied the motion without prejudice.

On May 18, 1976, Bernards Township adopted Ordinance 385, which is an amendment to its zoning ordinance, and which authorizes the construction of up to 531 dwelling units in what are called balanced residential complexes, two-thirds of which units shall be committed to a mixture of low and moderate income housing. Low income housing was to be defined in Ordinance 385 as determined by the approximate state and federal housing agencies, and was stated to be not more than $8,100 of annual income for a family of four at the time of the adoption of the ordinance. Moderate income housing was similarly defined with an indicated ceiling of $12,950 of annual income for a family of four.

In its First Amended Complaint, filed May 21, 1976, plaintiff attacked the validity of Ordinance 385 on the ground that it did not satisfy Bernards Township's fair share of

housing needs in accordance with the requirements of Mt. Laurel. (The Fifth Count of the First Amended Complaint added the Somerset County Planning Board as a party, and attacked the validity of the County Master Plan.)

In their answer to the First Amended Complaint, the Bernards Township defendants assert in the 27th Separate Defense that plaintiff has no real and substantial interest in whether or not the Bernards Township zoning ordinance is "exclusionary".

In the 28th Separate Defense, these defendants allege that plaintiff has no standing to raise such issues.

In the 29th Separate Defense, these defendants specifically allege that plaintiff's offer, set forth in Paragraph 29 of the First Count of the First Amended Complaint, is a sham, and has been injected into the within action in order to harass the defendants.

Such being the issues defined in the pleadings, it is submitted that discovery of facts which may shed light on the reasons underlying plaintiff's offer as expressed in Paragraph 29 of the First Count, is relevant and proper.

Incidentally, plaintiff does not disagree with our conception of the issues. On page 2 of its brief, plaintiff states "the only issue is whether plaintiff has a real intent to provide low income housing on its property." Since that is concededly an issue in the case, discovery relevant to that

issue is proper.

On pg. 1 of its brief, plaintiff complains of the statement in defendants' brief that plaintiff's proposal for an open space community prepared by Rahenkamp Sachs Wells and Associates, Inc. contains no reference to subsidized low income housing. Plaintiff concedes that the term "subsidized" was not used in that proposal. The Rahenkamp proposal (which has been marked D-76 for Identification on depositions already taken herein) says, on pg. 2:

> "The proposed community was planned with several objectives in mind. * * * The second objective is to create a balanced community which meets the diverse needs of the regional housing market, included the need for low and moderate income opportunities. Accordingly, there will be a variety of housing types and prices: multi-family and single-family-attached dwellings for young couples and retired 'empty-nesters', larger, single-family-attached and detached dwellings ranging from modest to luxurious to accommodate the full cycle of family growth."

While the quoted statement is not entirely clear, it would seem that the phrase "included the need for low and moderate income opportunities" refers to "diverse needs of the regional housing market" and not to the "balanced community". Moreover, on pp. 26 and 29 of that proposal, it is stated that the sale price of the least expensive dwelling units will be $30,000. Accepting the frequently used rule of thumb that a family can afford to purchase a house costing two or two and one-half times its annual income, the plaintiff's proposed housing would

not be available for families earning less than $12,000 to $15,000. Such housing would not qualify for low income housing and would barely qualify, if at all, for moderate income housing.

With all due respect to plaintiff's contentions, it is submitted that the first two questions directed to Mr. Murar do not infringe upon the attorney-client privilege. As to the first question, the privilege would not be violated if Mr. Murar were to answer that the reasons were those suggested by counsel. Since the substance of those reasons would not be disclosed, such answer, if true, would not reach into forbidden territory. If there were other reasons, in addition to those suggested by counsel, they could be stated without violating the attorney-client privilege.

With respect to the second question, since it is admitted that plaintiff did receive the advice of counsel, there would seem to be no invasion of the privilege by fixing the time when such advice was received. The question of timing is important as bearing upon whether the provision of subsidized housing on the Allan-Deane tract is an integral part of plaintiff's proposed development (and we submit that the Rahenkamp proposal does not establish that it was) or whether it is no more than a tactical maneuver dreamed up by counsel for the purposes of the pending litigation. The question of timing takes added significance in view of the fact that

plaintiff did not retain a consultant on subsidized housing until April 1976, which was several weeks after the complaint herein was filed.

The third question, we submit, is relevant to the issue of the extent to which plaintiff has a real and substantial interest in the zoning of Bernards Township other than its own property. This issue is specifically raised in the 27th Separate Defense. The question does not seek either the opinion of the witness or the contentions of the plaintiff. It would seem self-evident that the President of the plaintiff corporation, by virtue of his office, is in a position to state the reasons to justify a corporate expenditure of funds, and that is really all the question seeks.

On pg. 4 of its brief, plaintiff states: "Furthermore, Williams v. Marziano, 78 N.J.Super. 265, 271 (L. Div. 1963) does not allow inquiry into the opinions or contentions of a party during discovery." Plaintiff's reference is no doubt to the following language at 78 N.J.Super. 271:

> "Interrogatory 1(d) requests the condition of the defendant. Inquiry under R.R. 4:16-2 into the opinions or contentions of a party are improper. 2 Schnitzer and Wildstein, New Jersey Rules Service, A IV-659; Schwartz Public Service Coordinated Transport, 64 A.2d 477 (Cty. Ct. 1949). The interrogatory is stricken."

It appears from the court's opinion that this interrogatory was directed to certain hospital records. The text or nature of the interrogatory is not otherwise indicated. Reference to

1 Schnitzer and Wildstein, New Jersey Rules Service, discloses that Rule 4:16-2 dealt with the scope of examination on depositions, which included the statement: "nor shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories, or, except as provided in Rule 4:25-2, the conclusions of an expert." Rule 4:25-2 dealt with the report of mental or physical examinations where the mental or physical condition of a party is in controversy. Examining the reference in the Williams opinion, 2 Schnitzer and Wildstein, A IV-439 to 440; on the latter page it is stated:

> "A party seeking particularizations or details of the allegations of pleadings by his adversary is not eliciting discovery of legal conclusions, but merely factual details (i.e. relevant facts) upon which the allegations of the pleadings are based. Compelling the adverse party to disclose the facts upon which the claim or defense is based, is one of the functions of discovery proceeding. Maraziti v. Corigliano, 29 N.J.Super. 36, 101 A.2d 559 (App. Div. 1953). Thus in Schwartz v. Public Service Coordinated Transport, 64 A.2d 477 (Cty. Ct. 1949), inquiry as to what acts or omissions constituted the 'negligence', 'unlawful acts' or 'assumption of risk' alleged in the answer, was deemed proper."

As indicated in the last quotation, there is nothing in Schwartz v. Public Service Coordinated Transport, 64 A.2d 477 (Cty. Ct. 1949) which supports the sweeping generalization in the Williams opinion.

Indeed, the quoted language from 2 Schnitzer and Wildstein, A IV-440, sustains the propriety of question three.

To assert that question 4 is unclear or confusing is to evade the issue. It is obvious from the transcript that the witness was reluctant to answer this question and that plaintiff's counsel was sensitive about the inquiry. (See Tr. 51-4 to 62-10). With all due respect, we submit that the question is perfectly clear, and that its alleged incomprehensibility is analogous to a diplomatic illness. It is submitted that the witness and plaintiff's counsel understood the question only too well and realized that it went to the heart of the issue which had been recognized by Judge Leahy to be a legitimate one and which has been specifically raised in the 27th, 28th and 29th Separate Defenses.

Questions 3 and 4 are unquestionably relevant and understandable. If these questions appear to plaintiff to be harassing and embarrassing, we submit that such reaction to the questions is in itself indicative of its inability to come forward with any explanation for its new found interest in subsidized housing other than that it was conceived of as a smart tactical maneuver in the pending litigation.

It is respectfully submitted that the plaintiff's brief has advanced no reasons that demonstrate the impropriety of the questions which the Bernards Township defendants desire to be answered by Mr. Murar.

Respectfully submitted,

McCARTER & ENGLISH
Attorneys for Bernards Township
Defendants

By
Nicholas Conover English
A Member of the Firm

S-1290

Recorded Book ____ Page ____

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-SOMERSET COUNTY
DOCKET NO. L-25645-75 P.W.

ALLAN-DEANE CORPORATION,
a Delaware Corporation, qualified
to do business in the State of New
Jersey,

Plaintiff,

vs.

THE TOWNSHIP OF BERNARDS,
in the County of Somerset, et al.,

Defendants.

BRIEF FOR PLAINTIFF, ALLAN-DEANE CORPORATION, IN OPPOSITION TO A MOTION FOR AN ORDER COMPELLING E. JAMES MURAR TO ANSWER CERTAIN QUESTIONS ON DEPOSITIONS.

Mason, Griffin & Pierson
Attorneys for Plaintiff
201 Nassau Street
Princeton, New Jersey 08540
(609) 921-6543

On the Brief
John A. McKinney, Jr.

This Brief is submitted in opposition to the motion of the Defendants, Bernards Township, et al., to compel E. James Murar, President of the Allan-Deane Corporation, and a resident of California, to answer certain questions that Defendants claim are proper discovery. In support of Defendants' erroneous conclusions, a Brief has been submitted by Defendants' attorney, although no Brief is required under the Rules of this Court. Furthermore, the Court should take notice that not a single case is cited in that brief to support a point of law raised by Defendants. Instead, Defendants' Brief is nothing more than a written version of an oral argument that was best saved, if at all, for the return day of the motion. This case will generate an over abundance of materials to be digested by the Court. The needless and wasteful filing of paper which necessitates an answer by Plaintiff is only a device of the Defendants to annoy, oppress and unduly burden both the Court and Plaintiff.

Defendants' Brief is replete with inaccuracies and misstatements. On page three of that document, Defendants claim that Plaintiff's proposal for an open space community prepared by Rahenkamp, Sachs & Wells contains no reference to subsidized low income housing. Although the term subsidized is never directly mentioned, it is as obvious to the Defendants as it is to the Plaintiff and Court that low income housing must include subsidized housing. Low income housing is specifically mentioned in the report. In the cover letter of John Rahenkamp, the planner for Plaintiff states: "Because the price of housing in the community will encompass a broader range than the usual subdivision, the proposed development will help meet the Township's

fair share objectives and do so in a way that encourages community quality." On page two of the report the second objective of the proposed community is "to create a balanced community which meets the diverse needs of the regional housing market, included the need for low and moderate income opportunities."

The above statements show a clearly expressed objective of Plaintiff. There is no reason to inquire into those facts or factors which persuade Allan-Deane Corporation to provide low and moderate income housing in its project. It is clear from the face of the project proposal that it was indeed considered. If the issue is whether or not Plaintiff will provide the type of housing referred to in the Mt. Laurel decision, the question as to when that intent was formed is not relevant. It will be for the Court to determine if that intent is real. Neither is it relevant if the intent was formed after discussions with lawyers, businessmen, judges, stockholders, representatives of low and moderate income groups or representatives of the State of New Jersey. It is enough that it is Plaintiff's intent, as shown on the face of the documents provided to Bernards Township, to provide low and moderate income housing. The only issue is whether Plaintiff has a real intent to provide low income housing on its property. The record clearly indicates that it does. Thus, it is not relevant if Plaintiff's interest in low income housing is based on the advice of counsel. Defendants' continual assertions to the contrary are nothing more than harassment and an effort to waste Plaintiff's time and money so that it will "go away" and leave the "Gentle Burghers" of Bernards Township alone.

Defendants' harassment is evident from its Brief and the transcript of the Murar deposition. The first question clearly involves an attorney-client privilege. Under R. 4:10-2(a), matters privileged cannot be discovered. Under the New Jersey Rules of Evidence, the advices of counsel are without question privileged. Yet, Defendants harassed Plaintiff by asking questions concerning the advice of counsel under the mistaken belief that if an intent to provide low and moderate income housing was based upon the advice of counsel, then that intent would be invalid. Such a position is without logic. Mr. Murar answered questions with regard to the reasons why Allan-Deane will provide low cost housing in its development. Whether or not counsel advised providing this housing is privileged between the attorney and their client and is irrelevant to this case. Mr. English's second attempt to enter the area of privilege (Q: As nearly as possible, can you fix the time when you received the advice of counsel on this subject?") suffers from the same defect.

Defendants' third question concerned Mr. Murar assuming that his lawsuit would result in no change whatsoever in the zoning of the Allan-Deane property. Based on that assumption, could the President of Allan-Deane justify the expenses of such litigation? A justification of expenses have no relevance to the merits of a case? Nor will this question elicit from Plaintiff any facts or details concerning evidence that Allan-Deane might introduce at the trial? It is axiomatic that discovery proceedings are to lead to the discovery of admissible evidence and numerous citation to cases construing R. 4:10-2(a) need not be cited here. This type of question, perhaps of curiosity to an

invester, is not relevant to the case nor would the answer open any avenues of discovery that might lead to the discovery of relevant and material evidence. The question is purely to harass and embarrass Plaintiff's President. Mr. English is well aware that the hypothetical question is objectionable to a non-expert witness. On Page 85 of the deposition of William W. Allen (7/20/76), Mr. English objected to a hypothetical question because he claimed it did not take into account certain premises he felt were critical to the question. The same can be said for Mr. English's question except his hypothetical asks one to assume that he will lose a lawsuit. Furthermore, Williams v. Marziano, 78 N.J. Super 265,271 (L. Div. 1963) does not allow inquiry into the opinions or contentions of a party during discovery.

Defendants' final objection concerns a question that is unclear on its face. Not only did it confuse the attorneys, it also confused the witness. He first asked to have the question read back, then had it read back again, then stated he could not answer it and asked that it be rephrased. Mr. English's refusal to rephrase the question is the root of his problem. The subject matter called for by the objectionable question was earlier elucidated from a clear question. Mr. English asked:

> If the zoning of the Allan-Deane property in Bernards Township were completely satisfactory to the Allan-Deane corporation, what interest would Allan-Deane have in the zoning in the rest of Bernards Township, and will you define what that interest would be, if there is any?
>
> A. We would have a substantial interest.
>
> Q. In what respect?

A. We would be interested as to the effects of that zoning on our property, as I stated before, in terms of the demand for housing and the supply for housing, in terms of what happens in development surrounding the property, in terms of employment basis, in terms of commercial facilities, in terms of development of road improvements.

The property has to be considered a part of the community.

Mr. English's question was meant purely to annoy, embarrass and confuse a witness at the end of a day of production of documents and questioning. This intent is evident from Mr. English's unreasonable refusal to rephrase the question.