

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
LAWRENCE M. LAWSON
ASSIGNMENT JUDGE



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January 9, 2014

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P.O. Box 533
Matawan, New Jersey 07747

Lawrence W. Luttrell, Esquire
Holmdel Corporate Plaza
2137 State Highway 35, 3rd Floor
Holmdel, New Jersey 07733

Re: Residents Against Government Exploitation v
Monmouth County
Docket No: MON-L-1502-13

Dear Counselors,

Enclosed please find the Opinion of this Court along with a corresponding order which has been entered simultaneously herewith.

Very truly yours,

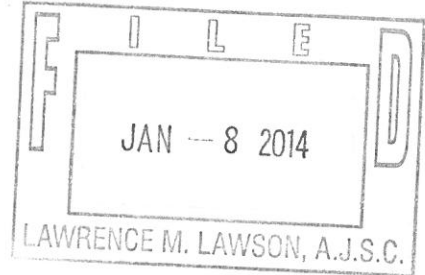
A handwritten signature in blue ink, appearing to read "L. Lawson", written over a horizontal line.

LAWRENCE M. LAWSON, A.J.S.C.

LML:nr

enc

CLEARY GIACOBBE ALFIERI JACOBS, LLC
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 Mitchell B. Jacobs, Esq.
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 Attorneys for Defendant, Monmouth County



RESIDENTS AGAINST GOVERNMENT	:	SUPERIOR COURT OF NEW JERSEY
EXPLOITATION, a New Jersey	:	MONMOUTH COUNTY: LAW DIVISION
non-profit corporation	:	Docket No.: MON-L-001502-13
	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	ORDER
MONMOUTH COUNTY,	:	
	:	
Defendant.	:	
	:	

THIS MATTER having been opened to the Court upon the application of Cleary Giacobbe Alfieri Jacobs, LLC, attorneys for Defendant, Monmouth County, for an Order for summary judgment as to said Defendant; and the Court having considered the papers submitted and the arguments of counsel, if any; and for other good cause shown;

IT IS on this 8th day of January, 2014,

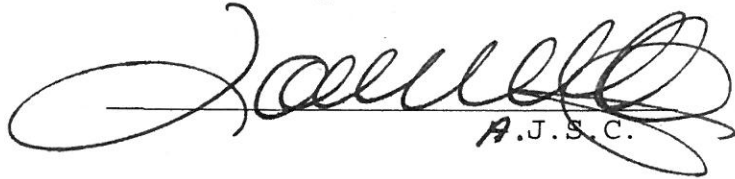
ORDERED that summary judgment be and hereby is granted in favor of Defendant, Monmouth County; and

IT IS FURTHER ORDERED that Plaintiff's Complaint, and any and all crossclaims and/or counterclaims, be and hereby are

dismissed, with prejudice, against Defendant, Monmouth County;
and

IT IS FURTHER ORDERED that a copy of this Order shall be
served on all parties within seven (7) days of the date hereof.

Opposed


A.J.S.C.

NOT FOR PUBLICATION WITHOUT APPROVAL
FROM THE COMMITTEE ON OPINIONS

RESIDENTS AGAINST GOVERNMENT
EXPLOITATION,

Plaintiff,

v.

MONMOUTH COUNTY,

Defendant.

SUPERIOR COURT OF NEW
JERSEY

MONMOUTH COUNTY
LAW DIVISION

DOCKET NUMBER:
MON-L-1502-13

OPINION

Returnable: December 20, 2013

Decided: January 8, 2014

Lawrence W. Luttrell, Esq., Law Offices of Lawrence W.
Luttrell, on behalf of Plaintiff Residents Against
Government Exploitation.

James J. Cleary, Esq., Cleary Giacobbe Alfieri Jacobs LLC.,
on behalf of Defendant Monmouth County.

LAWSON, A.J.S.C.

This action comes before the Court by Defendant
Monmouth County as a Motion for Summary Judgment in the
matter of Residents Against Government Exploitation v.
Monmouth County, Docket No. MON-L-1502-13. Plaintiff has
filed timely Opposition. The Court has reviewed the moving

papers and, counsel having waived oral argument, accordingly makes the following findings of fact and conclusions of law pursuant to R. 1:7-4.

I. Statement of Facts

The factual underpinnings of this case have been examined by this Court previously, notably in its Opinion of July 31, 2013 denying Defendant's Motion to Dismiss. On February 28, 2013, the Monmouth County Board of Chosen Freeholders (hereinafter "the Board") voted to approve a resolution disbursing money from the County's Open Space Trust Fund to acquire a development easement upon real property as part of the County's ongoing farmland preservation program. The real property subject to the resolution was owned by Diamond Developers at Burke Farm, LLC. An earlier Resolution, voted on and approved by the Board on May 12, 2011, had authorized a cost share for the development easement at issue.

At the time of the February 2013 vote and during all relevant times prior thereto, Manalapan Township Committee Member and former Mayor of Manalapan, Andrew Lucas, held an ownership interest in the Property by virtue of his membership in Diamond Developers at Burke Farm, LLC.

Lucas hosted a political fundraiser on October 10, 2011 for the benefit of Freeholder Lillian Burry as well as

Manalapan Township Committee Members Susan Cohen and Don Holland. Burry, Cohen, and Holland were running for re-election in November 2011. Plaintiff relates that the fundraiser, styled as a "bonfire on the farm," was held on the very property which later became the subject of the Board's February 28, 2013 Resolution.

During the public comment period of the Freeholder Work Session, counsel for the Plaintiff requested that Freeholder Burry recuse herself and abstain from voting on the 2013 Resolution on the basis of an alleged conflict of interest resulting from the fundraiser that Lucas had hosted for Burry. Counsel for Plaintiff, however, did not attend the Regular Public Meeting of the Freeholders on the evening of February 28, 2013, wherein the resolution was voted upon and thus did not become aware of the fact that Freeholder Burry voted in favor of approval of the Resolution until March 1, 2013 when the Asbury Park Press published an article reporting the results of the Regular Public Meeting.

On April 16, 2013, Plaintiff Residents Against Government Exploitation filed its Certificate of Incorporation with the New Jersey Department of the Treasury and also filed its Complaint in the instant matter seeking invalidation of the 2013 Resolution authorizing

purchase of the development easement. On July 31, 2013, this Court denied Defendant's Motion to Dismiss. Defendant now brings the instant Motion for Summary Judgment.

II. Applicable Law

A. Suitability of Motion for Summary Judgment

Before it is able to reach the merits of the instant motion, the Court must first determine on what grounds Plaintiff brings a motion for summary judgment in a case which was brought as, and has since been treated for all purposes as, an action in lieu of prerogative writs pursuant to R. 4:69. Motions for summary judgment in actions in lieu of prerogative writs are typically governed by R. 4:69-2, which provides that "[i]f the complaint demands the performance of a ministerial act or duty, the plaintiff may, at any time after the filing of the complaint, by motion supported by affidavit and with briefs, apply for summary judgment." Ibid. This rule has been interpreted to mean that in actions in lieu of prerogative writs which do not meet the above criteria, a general motion for summary judgment as governed by R. 4:46-2(c) is ordinarily inappropriate. See Pressler, Current N.J. Court Rules, comment 1 on R. 4:69-2 (2013). The purpose of barring the majority of motions for summary judgment in such actions is based on an understanding that

a normal action in lieu of prerogative writs, tried in a non-jury plenary trial on the record below, "is essentially akin to a summary judgment motion, and the only function such a motion would serve would be a calendar preference."

Ibid.

The instant motion does not meet the specifications of R. 4:69-2. Most glaringly, it is brought by Defendant whereas R. 4:69-2 provides for summary judgment as a remedy for the plaintiff alone. Moreover, Plaintiff's complaint is not one that "demands the performance of a ministerial act or duty," a remedy previously known as mandamus. Ibid. While Plaintiff alleges that "[t]he purpose of the action is to seek a what [sic] was formally [sic] known as a writ of mandamus compelling a public official to properly carryout [sic] her ministerial duties" (Pl.'s brief, p. 10), such a remedy appears nowhere in Plaintiff's Complaint and indeed *could* not appear in the Complaint, as Freeholder Burry had already determined not to recuse herself and had in fact voted on the matter at issue well before Plaintiff formed and filed the instant case. Rather, the only relief sought by Plaintiff in its one-count Complaint is a "judgment invalidating the February 28, 2013 Resolution by the Monmouth County Board of Chosen Freeholders to purchase the development easement on the Property along with any

other relief this Court deems just." Such a demand could not be argued to seek mandamus relief, which is a proper remedy only "to compel specific action when the duty is ministerial and wholly free from doubt, and . . . to compel the exercise of discretion, but not in a specific manner." Loigman v. Township Committee of the Tp. of Middletown, 297 N.J. Super. 287, 299 (App. Div. 1997). Plaintiff's Complaint, in contrast, cites no specific action or exercise of discretion to compel and therefore cannot properly be categorized as a mandamus action.

Despite the instant matter not meeting the requirements of R. 4:69-2, the Court nevertheless finds that summary judgment is an appropriate form of relief available to Defendant here. It is able to reach this conclusion because Defendant has, albeit at this late date, raised for the first time the contention that the instant action is not in actuality one in lieu of prerogative writs at all. (See Def.'s reply brief, p. 4.) The Court agrees. When the Rules of Court concerning prerogative writs were first promulgated, they were created "to allow appropriate citizen challenge in lieu of the old common law writs, e.g. mandamus, quo warranto, and certiorari." Loigman, supra, 297 N.J. Super. at 295. As discussed previously, the only relief Plaintiff seeks is a judgment invalidating the

February 28, 2013 resolution. In addition to not meeting the definition of a mandamus action, such a demand further does not meet the requirements of any of the other former writs covered under R. 4:69-1 et seq. Essentially, the instant Complaint seeks a judgment that is wholly declaratory in nature. As a result, the Court finds that this matter was improperly categorized as an action in lieu of prerogative writs, and is properly a declaratory action subject to the far more liberal summary judgment procedures available in general civil practice and outlined in R. 4:46-2.

B. Standard for Summary Judgment

Motions for Summary Judgment are generally governed by R. 4:46-2(c), which provides that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The Rule further states that "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the

trier of fact.” Id. This Rule follows in significant part the standard set forth by the Supreme Court in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995), which held that in determining whether there exists a genuine issue with respect to a material fact challenged, the court must consider whether the competent evidence, when viewed in the light most favorable to the non-moving party under the applicable evidentiary standard, is sufficient to permit a rational fact finder to resolve the disputed issue in favor of the non-moving party. See also Liberty Surplus Ins. Co. v. Nowell Amoroso, P.A., 189 N.J. 436, 444-46 (2007) (generally applying the Brill standard); Coyne v. State Dept. of Transp., 182 N.J. 481, 490-91 (2005) (same); BOC Group v. Chevron Chemical Co., 359 N.J. Super. 135, 149-50 (App. Div. 2003) (holding that a summary judgment motion should be granted if the evidence is so one-sided that plaintiff must prevail as a matter of law); Canesi ex rel. Canesi v. Wilson, 295 N.J. Super. 354 (App. Div. 1996) (finding summary judgment appropriate in the absence of a genuine dispute over the existence of an element of the cause of action).

C. Existence of Genuine Issues of Material Fact

Defendant contends that it is entitled to Summary Judgment because no genuine issues of material fact exist

in the instant matter. In support of that contention, Defendant relies on a matter of public record, namely the fact that in 2011, prior to Lucas's fundraising event for Burry, the Board had already voted to approve the purchase of the subject development easement. While left unsaid, Defendant's seeming implication is that the latter 2013 vote approving the Resolution to disburse money was a mere formality subsequent to a Board approval which had already occurred, and therefore one in which a conflict of interest could not lie. Defendant asserts *arguendo* that the Complaint should be dismissed summarily because "at most, only the *potential* for a conflict, as opposed to an *actual* conflict existed." (Defendant's Brief in Support of Motion for Summary Judgment at 5 (Emphasis in original).)

The Court will begin by examining Defendant's alternative argument. Our Appellate Division and Supreme Court have weighed in on multiple occasions in recent years regarding the duties of local government officials to avoid taking actions which could be perceived as demonstrating undue favoritism or wrongful "pay-to-play" transactions. See, e.g., Thompson v. City of Atlantic City, 190 N.J. 359 (2007); Wyzykowski v. Rizas, 132 N.J. 509 (1992); Mountain Hill v. Township Committee of Middletown, 403 N.J. Super. 146 (App. Div. 2008). In Thompson v. City of Atlantic City,

the Supreme Court explained in the context of municipal decision-making that

The citizens of every municipality have a vested right to the disinterested service of their elected and appointed officials, whose undivided loyalty must be to serve the public good. Public confidence requires that municipal officials avoid conflicting interests that convey the perception that a personal rather than the public interest might affect decisionmaking on matters of concern. Officials must be free of even the potential for entangling interests that will erode public trust in government actions. Thus, it is the *potential* for conflict, rather than proof of an *actual* conflict or of actual dishonesty, that commands a public official to disqualify himself from acting on a matter of public interest.

Id. at 374 (emphasis added) (internal citations omitted). See also Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960) ("The question is whether there is a potential for conflict, not whether the public servant succumbs to the temptation or is even aware of it."); Mountain Hill, L.L.C. v. Township Comm. of Tp. of Middletown, 403 N.J. Super 146, 196 (App. Div. 2008) ("The question will always be whether the circumstances could reasonably be interpreted to show that [a public official] had the likely capacity to tempt the official to depart from his sworn public duty.") (internal citations omitted). In light of the foregoing, Defendant cannot prevail on its argument that any conflict of interest facing Burry was merely "potential" rather than

"actual." The weight of precedent as described above is plainly inapposite to that contention.

Nevertheless, the Court is unable to find any conflict of interest in the instant matter, either real or apparent. The Board of Freeholders voted to commit to the development easement in question in 2011, nearly two years prior to the disputed vote. As Plaintiff correctly points out, the 2011 Resolution was passed "in order to obtain the commitment from the State of New Jersey to fund its acquisition of development easements." (Monmouth County Board of Chosen Freeholders Resolution 2011-0367.) Freeholder Burry voted in favor of moving forward with the easement on that date, which was prior to the October 2011 fundraiser on the property and prior to the point at which Burry's objectivity could be questioned on that basis. That Burry voted in 2013 in a manner wholly consistent with her vote prior to the fundraiser necessitates the conclusion, even in a light most favorable to Plaintiff, that no rational fact-finder could find a conflict of interest here.

D. Plaintiff's Standing and Existence of a Justiciable Controversy

Even assuming *arguendo* that genuine issues of material fact exist, the Court still finds that Plaintiff has no standing and that no justiciable controversy now exists.

Standing is a threshold justiciability determination of whether the plaintiff is entitled to initiate and maintain an action on the matter before the court. In re Adoption of Baby T., 160 N.J. 332, 340 (1999). R. 4:26-1 provides that every action may be prosecuted in the name of the real party in interest. Ibid. This "real party interest rule is ordinarily determinative of standing to prosecute an action." Pressler, Current N.J. Court Rules, comment 2 on R. 4:26-1 (2013). New Jersey courts generally have set a fairly low threshold for standing, and have afforded litigants the benefits of liberal interpretations of the standing requirements. See Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 81 (App. Div. 2001). Indeed, it has been said that "[t]he New Jersey cases have historically taken a much more liberal approach on the issue of standing than have federal cases." Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 101 (1971).

The litigant must have a sufficient stake in the matter and face "[a] substantial likelihood of some harm" from an unfavorable decision. New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 67 (1980). The litigant must show that "there is a genuine adverseness between the parties in terms of the litigated controversy." Id. at 68. A sufficient stake in

the matter and a genuine adverseness are the basic requirements of standing. Id. at 67. A party need show only a "substantial likelihood" that he or she will experience "some harm" in the event of an unfavorable decision. In re the Adoption of Baby T, supra, 160 N.J. at 340.

Defendant contends that Plaintiff, by virtue of the fact that it did not exist at the time the Board voted on the 2013 Resolution, has no standing to bring the instant suit. In asserting the validity of its group standing, Plaintiff analogizes to the context of Federal practice. The United States Supreme Court has held that a group or association has Federal Article III standing to bring suit on behalf of its members when "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth v. Laidlaw, 528 U.S. 167, 181 (2000) (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)). Yet, in a situation where an association asserts standing as a representative of its members, "the association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the

challenged action of the sort that would make out a justiciable case had the members themselves brought suit." Matter of Association of Trial Lawyers of America, 228 N.J. Super. 180, 186 (App. Div. 1988).

In the instant matter, Plaintiff's four-page Complaint does not at any point allege immediate or threatened harm to itself or its members. Indeed, the Complaint alleges only that the Resolution is invalid, unreasonable, arbitrary, and capricious and demands judgment on that basis. Lacking any clear assertion of how Plaintiff or its constituent members have been injured or face injury as a result of the 2013 Resolution, Plaintiff's Complaint fails to overcome New Jersey's liberal standing requirements.

Moreover, the fact remains that the easement which is at issue in this case has already been purchased, and the money already disposed of. New Jersey courts have consistently held that no justiciable controversy exists, and a case is moot, "when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Betancourt v. Trinitas Hosp., 415 N.J. Super 301, 311 (App. Div. 2010) (internal quotation omitted). Here, the Court has no power to undo a sale involving a seller over whom it has no jurisdiction, nor can the Court return money to the County coffers after it has already

been disbursed. On that basis, a declaratory judgment that the February 2013 Resolution is invalid could have no real impact on Plaintiff or Defendant. As a result, no controversy remains for this Court to decide.

III. Conclusion

Based on the aforementioned reasons, Defendants' motion for summary judgment is hereby GRANTED.