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File No. 20016-03236

PAUL KARDOS **Plaintiff,** **-vs-** **FOX HILLS AT ROCKAWAY CONDOMINIUM ASSOCIATION, INC.** **Defendant.**	**SUPERIOR COURT OF NEW JERSEY** **CHANCERY DIVISION MORRIS COUNTY** **GENERAL EQUITY** **DOCKET NO.: MRS-C-000102-18** Civil Action

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BRIEF IN OPPOSITION TO MOTION OF PLAINTIFF, PAUL KARDOS, TO AMEND THE COMPLAINT

Of Counsel and on the Brief: George Karousatos, Esq.
On the Brief: Daniel J. Giordano, Esq.

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STATEMENT OF FACTS

The Plaintiff filed the Complaint that he seeks to here amend on September 20, 2018. Plaintiff alleged a violation of his Free Speech Right and further alleged violations the New Jersey Condominium Act. Specifically, plaintiff alleged that the Board's decision to raise the speed limit was not a decision which could be made in a "conference or working session[] at which no binding votes are to be taken." N.J.S.A. 46:8B-13(a).

On July 24, 2019, the Court issued a Case Management Order. The Order stated that

> No amendment(s) to the pleadings adding additional parties or additional causes action requiring further discovery shall be permitted after **December 31, 2019**. Any motion to amend need be returnable before this date. Amendment(s) to the pleadings will be permitted thereafter, though, if the same conform to the discovery adduced and the amendment(s) to the pleadings shall not require additional discovery.
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> [(Exhibit "A," Case Management Order, at ¶ 4) (emphasis in original).]

A "firm trial date" was set for April 6, 2020 at 9:00am. (Id. at ¶ 12).

A mediation was conducted, and an agreement was reached in principal on the Condominium Act claim. It was agreed that the parties would submit the Free Speech question to the Court on summary judgment. On March 11, 2020, Defendant filed its Motion for Summary Judgment on the last remaining issue in the case, the Freedom of Speech claim.

On March 9, 2020, the Governor declared a state of emergency on account of the unprecedented global pandemic that was to ravage any semblance of normal operations in this State until this very day. (Attached Exhibit "B," Executive Order No. 103). On March 21, 2020, the Governor issued an Executive Order requiring all New Jersey residents to remain in their home or place of residence unless certain immaterial conditions were met. (Attached Exhibit "C," Executive Order No. 107.). This Order also required all recreational and entertainment businesses, including condominium pools, to close. (Id. at ¶9). The pools remained closed under this Executive

Order through April and May. On June 9, 2020, the Governor issued an Executive Order which would permit pool facilities to open on June 22, 2020. (Attached Exhibit "D," Executive Order No. 153, at ¶ 1).

In the lead up to the June 22nd date at which pools *could* reopen, the Association was asked by its residents whether the pool *would* reopen on that date. As noted in the Plaintiff's brief in support of his motion to amend, a letter was issued by the Board of Directors setting the expectations for the residents that the pool would not reopen on June 22nd or thereafter. (Attached Exhibit "E"). The Board reasoned that it would not open because of the standards required and as outlined in the Executive Order No. 153 were overly-burdensome. These standards included, among other things, the hiring and training of a contact tracing person and an "ambassador" who will monitor, encourage or enforce social distancing. The Board concluded the letter by noting that they would be prepared to answer any questions at the upcoming Quarterly meeting on July 13, 2020.

On July 13, 2020, the Board had its formal and public Quarterly meeting. Again as confessed by plaintiff in his brief in support, the Board voted to suspend the opening of the pool for the remainder of the season. (Attached Exhibit "F"). The following day, the plaintiff filed this motion to amend the complaint suggesting not that the Board suspended the opening of the pool for the season without voting on it (because he could not make such a claim), but that the Board was somehow ratifying a previous "secret vote" which led to the issuance of the letter from the Board on June 22nd setting everyone's expectations. Plaintiff suggests that the Board's vote was "a sham for superficial compliance."

Plaintiff therefore seeks to amend his complaint to add a claim with completely different facts relating to completely different powers (emergency powers and the interplay with emergency

state-wide Executive Orders) and assert a completely different claim under the "legislative intent" on the Condominium Act. This intent is neither quoted, cited to or even vaguely described.

So plaintiff brings a cause of action under the "legislative intent" of the Condominium Act relating to an entirely discrete set of facts about a decision, during an unprecedented pandemic, to close a pool. Despite plaintiff asserting that no additional discovery is required, that clearly is not the case because plaintiff's own papers refer to discovery (the June 22nd letter, for example) which has never appeared in the record that was closed by the Court in accordance with its Case Management Order.

Because the plaintiff's amendment is untimely, because it is futile, and because the amendment is both futile and untimely, his motion to amend should be denied.

LEGAL ARGUMENT

Leave to amend under R. 4:9-1 "shall be freely given in the interest of justice." The rule "'requires that motions for leave to amend be granted liberally' and that 'the granting of a motion to file an amended complaint always rests in the court's sound discretion." Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006) (quoting Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998)). "That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte, supra, 185 N.J. at 501.

Plaintiff's motion to amend is untimely by over six months in accordance with the Court's Case Management Order. Because it is untimely, there would naturally be prejudice to the Defendants as the only issue which remains for this case is the Court's decision on the Motion for Summary Judgment. Because discovery would have to be reopened anew on these new claims with new facts, the Defendants, in relation to the previous claims which await summary judgment, will be prejudiced.

Plaintiff's claims do not exist. Plaintiff claims that the Board's ratification at a public meeting of a necessary and emergent decision violates the legislative intent of the Condominium Act. Were a Court to permit such a claim, any and all plaintiffs' claims, regardless of merit, could be brought as violating some nebulous and uncited "intent." Because a plaintiff is required to state with more specificity than pointing to the intent of a statute in order to raise a claim upon which relief could be granted, this claim plaintiff seeks to raise here is futile.

POINT I

PLAINTIFF'S MOTION TO AMEND SHOULD BE DENIED AS LATE IN ACCORDANCE WITH THE COURT'S CASE MANAGEMENT ORDER.

"[T]he granting of a motion to file an amended complaint always rests in the court's sound discretion." Kernan v. One Washington Park Urban Renewal Ass., 154 N.J. 437, 457 (1998). A deciding court "must be concerned that 'no undue delay or prejudice will result from the amendment.'" Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 475-76 (App. Div. 1994) (quoting Tomaszewski v. McKeon Ford, Inc., 240 N.J. Super. 404, 411 (App. Div. 1990)).

The Court's July 24, 2019 set a specific deadline for not only amendments, but to motions for amendment.

> No amendment(s) to the pleadings adding additional parties or additional causes action requiring further discovery shall be permitted after **December 31, 2019**. Any motion to amend need be returnable before this date. Amendment(s) to the pleadings will be permitted thereafter, though, if the same conform to the discovery adduced and the amendment(s) to the pleadings shall not require additional discovery.
>
> [(Exhibit "B," Case Management Order, at Para. 4).]

As a consequence of this Order, the only question presented is whether additional discovery will be required. The plaintiff's proposed amendment has nothing to do with speed limits. The plaintiff's proposed amendment has nothing to do with Free Speech relating to the distribution of flyers. The plaintiff's claims here arise out of a nucleus of facts which are entirely distinct from those contained in the Complaint that plaintiff here seeks to amend. Indeed, the facts relating to this claim arise out of an unprecedented pandemic, relate to the powers of the Board to act under obvious emergency powers, not to mention the operations of a recreational pool in compliance with the various Executive Orders that were themselves unprecedented exercises of Executive powers. Finally, we are not here even talking about whether the Board should have ratified a

decision by a vote from the Board in public meeting. Instead, the plaintiff is just piggy-backing off of his previous claims to get the Court to tell him that ratification of decisions is permissible.

The point is that this latest claim being derived from an entirely distinct set of facts, requires discovery. Because the Court made clear that such amendments would be impermissible, this motion is late. The plaintiff would suffer no prejudice to his claims, if any, by having to file a new complaint to assert these new claims with these new facts.

It should also be noted that the plaintiff brought a Condominium Act claim and a Free Speech claim. The parties have agreed in principal to a resolution of the Plaintiff's Condominium Act claims and the motion for summary judgment is currently pending before the Court. This is to say that this amendment is not at any preliminary-type stage and instead permitting an amendment here would cause substantial prejudice unless discovery is reopened. But discovery would have to be reopened (as it would in a new action) from the beginning to explore these distinct claims.

Because the Court's Case Management Order establishes that an amendment to the pleadings would result in undue delay if additional discovery was required subsequent to December, 2019, and because Plaintiff seeks to amend six months thereafter, his motion to amend should be denied.

POINT II

BECAUSE THE PLAINTIFF'S CLAIMS ARE FUTILE, HIS MOTION TO AMEND SHOULD BE DENIED.

Notwithstanding the liberality with which motions for leave to amend should be granted, "one exception to that rule arises when the amendment would be 'futile,' because 'the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor.'" Prime Accounting Dep't v. Twp. Of Carney's Point, 212 N.J. 493, 511 (2013) (quoting Notte, supra, 185 N.J. at 501). "Courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. . . There is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256-57 (App. Div. 1997).

Plaintiff is not alleging that a decision regarding the pool closure was made in the absence of a vote of the Board in a public meeting. Indeed, plaintiff confesses that it was. But Plaintiff here has an issue with the concept of ratification. That a decision by a Board must be explored, made and ratified all at a public meeting, even if a decision is required to made in advance of the next scheduled public Board meeting.

Plaintiff seems to therefore concede that his claim only arises out of a vague "legislative intent" violation of the Condominium Act. Since the Plaintiff fails to allege a violation of any Condominium Act provision, his amendment fails to state a claim upon which relief can be granted and because a motion to dismiss a claim based on the "legislative intent" of the Condominium Act would be granted, his claim is futile. Because his claim is futile, his motion to amend should be denied.

POINT III

BECAUSE THE PLAINTIFF'S AMENDEMENT'S MERITS ARE MARGINAL AT BEST AND IT IS UNTIMELY, HIS MOTION TO AMEND SHOULD BE DENIED

"An amendment remains a matter addressed to the court's sound discretion." Town of Harrison Bd. of Educ. v. Netchert, 439 N.J. Super. 164, 178 (Law. Div. 2014). "A motion to amend also is properly denied where its merits are marginal and allowing the amendment would unduly protract the litigation." Ibid. (citing Stuchin v. Kasirer, 237 N.J.Super. 604, 609, (App. Div.), certif. denied, 121 N.J. 660 (1990); see also, Fox v. Mercedes-Benz Credit Corp., 281 N.J. Super. 476, 483 (App. Div. 1995).

As noted above, the merits of Plaintiff's claim are marginal at best. He presents a claim that ratifying decisions at a public meeting violates, not any specific provision of the Condominium Act, but instead just a nebulous empty vase that is "legislative intent." This claim, were it cognizable, would be brought by every litigious plaintiff when something happens that they do not like. They will simply assert that if the conduct does not violate any specific provision of the Condominium Act, because that plaintiff does not like it, it must violate the spirit of the statute, or its purpose.

Additionally, as noted above, the Plaintiff's amendment would unduly protract this litigation. So, if the Court is reluctant to rule that the plaintiff's legislative intent claim is futile, it is in any event marginal at best. And because the amendment would unduly protract litigation, the Plaintiff's motion to amend should be denied.

CONCLUSION

Because the plaintiff's amendment is untimely and futile, his motion to amend should be denied.

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By: _____
~~DANIEL J.~~ GIORDANO, ESQ.

Date: July 29, 2020