

91

FILED
JAN 18 2019
Hon. Robert J. Drannan, RJ Ch.

**ORDER DISMISSING PLAINTIFF'S
COMPLAINT PURSUANT TO RULE
4:6-2(e)**

IT IS on this 18th day of November, 2018

~~ORDERED~~ that the Complaint filed by the plaintiff, Paul Kardos, be and is hereby dismissed with prejudice and with costs to the defendant; and

Opposed
Reasons attached.

Robert J. Brennan, P.J., Ch. J.S.C.

Paul Kardos v. Fox Hills at Rockaway Condominium Association, Inc.

C-102-18

STATEMENT OF REASONS

This matter began on September 20, 2018, with the filing of a complaint by plaintiff Paul Kardos (“Plaintiff”). Plaintiff alleges that Defendant, Fox Hills at Rockaway Condominium Association, Inc. (“Defendant”), has violated his Right to Free Speech as guaranteed by the New Jersey Constitution. Complaint ¶¶ 1-13. Plaintiff further alleges that Defendant has violated the New Jersey Condominium Act, in particular N.J.S.A. 46:8B-13(a). Id. ¶¶ 14-22. Defendant filed a motion to dismiss Plaintiff’s complaint on November 1, 2018. Plaintiff filed opposition on November 9, 2018.

Defendant “is a community organization made up of owners of units in the Fox Hills Condominium located in Rockaway Township, New Jersey.” Id. ex. A. Plaintiff is the owner of a condominium unit and member of Defendant. Id. ¶ 1. Defendant has established rules and procedures for the distribution of flyers within the condominium complex. Id. ¶ 2, ex. A. On Thursday, May 17, 2018, Plaintiff submitted a flyer to Defendant for distribution. Id. ¶ 3, ex. B. Later that same day, Defendant denied Plaintiff’s flyer for distribution. Id. ¶ 4. Plaintiff claims that Defendant refused to distribute his flyer on the grounds that the flyer attacked Defendant’s Board of Directors (the “Board”). Id. Plaintiff asserts Board’s refusal violated his Right to Free Speech under the New Jersey Constitution and requests declaratory and injunctive relief to remedy this alleged violation. Id. ¶¶ 6-12.

In June of 2018, Defendant announced that the speed limit within the condominium complex would be raised from 15 to 25 miles per hour. Id. ¶ 16, ex. D. Plaintiff claims that this action was taken without following proper Board meeting procedures and violated New Jersey’s

Condominium Act. Id. ¶¶ 15-19. Plaintiff requests declaratory and injunctive relief to remedy this alleged violation. Id. ¶¶ 20, 21.

Motion to Dismiss Standard

In considering a motion to dismiss under Rule 4:6-2(e), the court must apply the test set forth in Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 771-72 (1989).

“[O]ur inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint.” Printing Mart, 116 N.J. at 746. The test is essentially, “whether a cause of action is ‘suggested’ by the facts.” Id. A “reviewing court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.” Ibid. “[P]laintiffs are entitled to every reasonable inference of fact.” Id. “The examination of a complaint’s allegations of fact required by the aforesaid principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.” Id.

In reviewing the motion, the court is not concerned with the “ability of plaintiffs to prove the allegations contained in the complaint.” Id. The pleading need only allege sufficient facts as to give rise to a cause of action or prima facie case. Dismissal of the pleading is only appropriate after the pleading has been “accorded ... [a] meticulous and indulgent examination ...” Id. at 772.

While a complaint is entitled to the generous review described above, it is incumbent on a plaintiff to allege facts supporting a cause of action. Nostrame v. Santiago, 420 N.J. Super. 427, 436 (App. Div. 2011). If dismissal of the pleading is appropriate, the dismissal “should be without prejudice to a [...] filing of an amended [pleading].” Printing Mart-Morristown, 116 N.J. at 771-72.

Freedom of Speech Claim

Plaintiff's Freedom of Speech claim is not asserted under the First Amendment of the United States Constitution but under the New Jersey Constitution's Free Speech protections. This is an important distinction for two reasons. First, the Right to Free Speech guaranteed by New Jersey's Constitution is one of the broadest in the nation and it affords greater protection than the First Amendment of the United States Constitution. Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 78 (2014). Second, "the rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well." State v. Schmid, 84 N.J. 535, 559 (1980).

The parties disagree on the proper standard of review to be used in relation to Plaintiff's Free Speech claim. Defendant asserts that the court should apply the test from Schmid, supra. In Schmid, the New Jersey Supreme Court created a three part test for Freedom of Speech claims involving private property. The test takes "into account (1) the nature, purposes, and primary use of such private property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." Schmid, 84 N.J. at 563.

Plaintiff disputes the applicability of the test from Schmid, arguing that the New Jersey Supreme Court's more recent decision in Dublirer, supra, is controlling. In Dublirer, the Supreme Court noted that the test from Schmid is "not a perfect fit for private residential communities." Dublirer, 220 N.J. at 84. Instead, in private residential communities, the Free Speech analysis used focuses "on 'the purpose of the expressional activity undertaken' in relation to the property's use" and "the 'general balancing of expressional rights and private property rights [.]'" Id. at 85

(quoting Schmid, 84 N.J. at 563; N.J. Coalition Against War in the Middle E. v. J.M.B. Realty Corp., 138 N.J. 326, 362 (1994)). Overall, the test from Dublirer is designed “to determine ‘the fairness of the restrictions imposed’ with regard to the residents’ free speech rights.” Id. (quoting Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 192 N.J. 344, 366-67 (2007)).

The test from Dublirer “applies when free speech restrictions are imposed on residents who enjoy property and free speech rights in a common-interest community.” Id. This case involves a homeowner in a private, common-interest community and speech restrictions imposed on that homeowner by a board empowered to promulgate rules and regulations for the community. Given Plaintiff’s private property rights in the condominium complex, the court holds that the analysis from Dublirer is more appropriately applied here than the test from Schmid.

The first part of the Dublirer analysis is to evaluate “the purpose of the expressional activity undertaken’ in relation to the property’s use [.]” Id. It appears that the purpose of Plaintiff’s flyer was to provide his viewpoint on past litigation between Plaintiff and Defendant. Complaint ex. B. Plaintiff’s flyer was subsequent to notices posted by Defendant expressing Defendant’s viewpoint on the same litigation. Id. ex. C. This litigation was a public concern to Defendant’s residents and appears to have resulted in legal costs borne by Defendant’s residents. Id.

Giving Plaintiff’s complaint the indulgent review required at the motion to dismiss stage, the court holds that Plaintiff’s flyer had a permissible purpose. Commenting on litigation that is a matter of public concern to residents of a private, residential community should not be prohibited. This is particularly true given that Plaintiff had previously posted notices about the litigation and referenced Plaintiff’s involvement in the litigation. Id. ex. C. See Dublirer, 220 N.J. at 88

(“Nothing in our case law permits a group in power to attack its opponents yet bar them from responding in the same way.”).

If the sole purpose of Plaintiff’s flyer was to attack the Board, Defendant would have been within its rights to prohibit the flyer. See Id. at 87 (“The Board can adopt reasonable time, place, and manner restrictions to serve the community’s interest.”). Yet, the only attack aimed at the Board members in Defendant’s flyer is to accuse them of lying – and even this attack comments on the parties’ past litigation – litigation that was a matter of public concern for the community. Defendant’s flyer addresses issues related to the parties’ past litigation relevant to the community the flyer is addressed to (primarily, the costs associated with that litigation borne by residents of the community). Complaint ex. B. Viewing the facts in a light most favorable to Plaintiff, Plaintiff’s flyer has a valid purpose. The court holds that at the motion to dismiss stage, the first prong of the Dublirer analysis weighs in Plaintiff’s favor.

The second prong of the Dublirer analysis is to balance expressional rights and private property rights. Dublirer, 220 N.J. at 85. Defendant has the right to review flyers before they are distributed on its private property and to ban flyers on its private property containing hateful or attacking language. See Dublirer, 220 N.J. at 87, Twin Rivers, 192 N.J. 344, 368 (both holding that a homeowner’s association may adopt reasonable time, place, and manner restriction on speech). Defendant’s rules and regulations regarding flyers and their distribution are constitutionally sound and do not constitute an unreasonable restriction on Plaintiff’s Freedom of Speech.

However, the way that these rules and regulations have been applied in this situation, viewing the flyer in a light most favorable to Plaintiff, do constitute an unreasonable restriction. Plaintiff’s flyer is not overtly hateful or attacking. Plaintiff’s complaint asserts that the reason his

flyer was banned was because it attacked the Board members and called them liars. Complaint ¶
4.

Plaintiff's flyer does accuse the Board of lying, but questioning the veracity of statements made in connection with litigation that is a matter of public concern does not constitute a personal attack properly resulting in a restriction of Plaintiff's expressional rights. The questions composed by Plaintiff at the bottom half of his flyer are not hateful and are legitimately related to Defendant's litigation policies. Id. ex. B. Plaintiff had a right to communicate his viewpoints on public litigation and to question Defendant's policies pertaining to this litigation in a manner that does not include hateful or attacking language. Viewing the flyer in a light most favorable to Plaintiff, it appears that Plaintiff validly exercised this right. The court holds that at the motion to dismiss stage, the second prong of the Dublrer analysis weighs in Plaintiff's favor.

Defendant argues that Plaintiff's conduct is bound by Defendant's master deed, bylaws, and rules and regulations. Accordingly, Defendant argues that the parties' relationship is a contractual one and that Plaintiff is subject to the terms of these documents. Defendant does have the power to prescribe rules and regulations for its residents' conduct, but Defendant must exercise this power in a constitutionally sound manner. See Dublrer, generally; Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482 (2012) (both holding that homeowner's association policies violating their residents constitutional rights were unenforceable).

Defendant also stresses that Plaintiff has an available alternative avenue of communication by posting materials in a community clubhouse. Moving Brief p. 4. The plaintiff in Dublrer had a similar alternative. He could post materials on a bulletin board. Dublrer, 220 N.J. at 87. Nonetheless, the Supreme Court held that the Dublrer plaintiff's rights had been unreasonably restricted when a co-op association took away his right to distribute leaflets door to door and

restricted his communication to this bulletin board or mailings. Viewing this matter in a light most favorable to Plaintiff, the court does not find that Plaintiff's available, alternative avenues of communication present grounds for dismissal.

Viewing Plaintiff's complaint in the indulgent manner required at the motion to dismiss stage, the court finds that both factors of the Dublrer analysis weigh in Plaintiff's favor. Defendant's motion to dismiss is **DENIED** as it pertains to Plaintiff's Freedom of Speech claim.

Condominium Act

Plaintiff's complaint alleges that the Board's decision to raise the speed limit in the condominium complex was made without following proper Board meeting procedures and in violation of New Jersey's Condominium Act. The pertinent part of New Jersey's Condominium Act states "If the bylaws provide that any of the powers and duties of the association as set forth in [N.J.S.A. 46:8B-14 and N.J.S.A. 46:8B-15] be exercised through a governing board elected by the membership of the association, or through officers of the association responsible to and under the direction of such a governing board, all meetings of that governing board, except conference or working sessions at which no binding votes are to be taken, shall be open to attendance by all unit owners, and adequate notice of any such meeting shall be given to all unit owners in such manner as the bylaws shall prescribe [.]" N.J.S.A. 46:8B-13(a). Defendant does not deny that the decision to raise the speed limit was made without a meeting, but argues that the decision to raise the speed limit was a "menial decision" not requiring a vote. Moving Brief p. 4-5.

The language of the Condominium Act does not support Defendant's argument. The only Board meetings not required to be open to unit owners are "conference or working sessions at which no binding votes are to be taken [.]" N.J.S.A. 46:8B-13(a). The Condominium Act does not define "conference or working sessions" but at the motion to dismiss stage it would be

improper to assume that the decision to raise the speed limit by over 60%, a decision that affects all of Defendant's residents in some shape or form, is a decision properly made at "conference or working sessions at which no binding votes are to be taken [.]” N.J.S.A. 46:8B-13(a).

Defendant's bylaws provide that the Board may exercise powers as set forth in N.J.S.A. 46:8B-14 (c). Certification in Support of Motion ex. A. Raising the speed limit is a power the Board may exercise pursuant to N.J.S.A. 46:8B-14 (c). N.J.S.A. 46:8B-13(a) provides that if the bylaws of a condominium association allow a governing board to exercise powers set forth in N.J.S.A. 46:8B-14, meetings of that board must be open to unit owners and noticed. Despite these statutory provisions, Plaintiff alleges, and Defendant does not deny, that the Board raised the speed limit without holding an open meeting. Viewing the facts in a light most favorable to Plaintiff, it is clear that Plaintiff's complaint sufficiently alleges a claim for violation of New Jersey's Condominium Act.

Defendant's motion to dismiss is **DENIED** as it pertains to Plaintiff's Condominium Act claim. Defendant's motion to dismiss is **DENIED** in its entirety.

Oral Argument

No oral argument was requested.