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Attorney for Defendant Township of Galloway
File No. 8128-TBR

DONALD J. PURDY Plaintiff, vs. JAMES GORMAN and the TOWNSHIP OF GALLOWAY, j/s/a, Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO.: ATL-L-2869-20 **CIVIL ACTION** **ORDER FOR SUMMARY JUDGMENT**

This matter having been opened to the Court by Thomas B. Reynolds, Esquire of Reynolds and Horn, P.C., on behalf of Defendant Township of Galloway, and the Court having heard oral argument on May 13, 2022 and for the reasons set forth in the Memorandum of Decision of today's date and and for good cause shown,

IT IS ON THIS 18th DAY OF MAY, 2022, ORDERED and ADJUDGED that Summary Judgment is granted, and Plaintiff's Complaint be and hereby is DISMISSED WITH Prejudice, in favor of defendant Township of Galloway.

s/ Stanley L. Bergman, Jr.

STANLEY L. BERGMAN, JR., J.S.C.

Opposed

Edwin J. Jacobs, Jr., Esquire (N.J. Attorney ID# 271401971)
Jordan L. Barbone, Esquire (N.J. Attorney ID# 309182022)
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DONALD J. PURDY

Plaintiff,

vs.

JAMES GORMAN and THE TOWNSHIP OF GALLOWAY, jointly severally and/or in the alternative,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART
ATLANTIC COUNTY

DOCKET NO. ATL-L-002869-20

Civil Action

ORDER

THIS MATTER having been opened to the Court by Jordan L. Barbone, Esquire of the law firm of Jacobs & Barbone, P.A., attorneys for Plaintiff, Donald J. Purdy, upon due notice to and in the presence of Thomas B. Reynolds, Esquire, attorney for Defendant, The Township of Galloway; and the court having heard oral argument on May 13, 2022 and for the reasons set forth in the Memorandum of Decision of today's date and for good cause shown;

IT IS ON THIS 18th day of May, 2022;

ORDERED AND ADJUDGED that Plaintiff's cross-motion to amend complaint is hereby DENIED.

s/Stanley L. Bergman, Jr.
STANLEY L. BERGMAN, J.S.C.

Opposed

[ ] UNOPPOSED

[ ] OPPOSED

SUPERIOR COURT OF NEW JERSEY

COUNTIES OF ATLANTIC AND CAPE MAY

STANLEY L. BERGMAN, JR., J.S.C.
LAW DIVISION-CIVIL PART

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MEMORANDUM OF DECISION
PURSUANT TO RULE 1:6-2(f)

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

CASE: **DONALD J. PURDY**

Plaintiff,

vs.

JAMES GORMAN and the TOWNSHIP OF GALLOWAY, j/s/a,

Defendants

DOCKET #: ***ATL-L-2869-20***

DATE: ***May 18, 2022***

MOTION(S): ***Defendant, Township of Galloway's Motion for Summary Judgment and Plaintiff's Motion for Leave to File an Amended Complaint***

PAPERS CONSIDERED: ***All pleadings and submissions of the parties filed up to and including the date of May 13, 2022***

Having carefully reviewed the moving papers and any response filed, I have ruled on the above captioned motion(s) as follows:

RELEVANT FACTS AND PROCEDURAL HISTORY

These matters come before the court on Defendant, Township of Galloway's ("Township") Motion for Summary Judgment seeking dismissal of plaintiff's complaint and Plaintiff, Purdy's Motion requesting Leave to File an Amended Complaint.

Plaintiff's original complaint filed on August 28, 2020 alleges a cause of action for defamation against Defendant, Gorman at Count I, Civil Conspiracy as against Township at Count II and a *respondeat superior* claim as against Township at Count III.

Plaintiff has now moved requesting leave to file an amended complaint adding a Negligence against Defendant, Galloway Township at proposed Count IV.

The parties have each opposed the other's motion. The discovery end date was May 7, 2022 and there is no trial date set.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary Judgment Standard

Summary judgment must be granted "if 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." R. 4:46-2(c), Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins.Co. of Pittsburgh, 224 N.J. 189, 199 (2016); Henry v. N.J. Dept of Human Servs. 201 N.J. 320, 329 (2010). A judge does not act as the fact-finder when deciding a motion for summary judgment. Judson v. Peoples Bank & Trust Co.,

17 N.J. 67, 73 (1954). The motion judge should never resolve a "dispute on the merits that should have been decided by a jury." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 50 (2012). The court must view the facts from the record, in the "light most favorable to … the non-movant[]." Schiavo v. Marina Dist. Dev. Co., 442 N.J. Super. 346, 366 (App. Div. 2015) (citation omitted).

Pursuant to R. 4:46-2(c), the moving party must "show that there is no genuine issue as to any material fact challenged." In Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), the Court stated:

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill supra, 142 N.J. at 540, (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 214 (1986), Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014)

Under the Brill standard, the court must determine based upon the evidence submitted if there are sufficient facts to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving part[ies]. Townsend v. Pierre, 429 N.J. Super. 522, 525 (App. Div. 2013) (quoting Brill, supra, 142 N.J. at 540). The "essence of the inquiry" is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Mayo, Lynch & Assocs., Inc. v. Pollack, 351 N.J. Super. 486, 494-95 (App. Div. 2002) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

"At this stage of the proceedings, the competent evidential materials must be viewed in the light most favorable to plaintiff, the non-moving party, and [plaintiff] is entitled to the benefit of all favorable inferences in support of [the] claim." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016); R. 4:46-2(c); Bagnana v. Wolfinger, 385 N.J. Super. 1, 8 (App. Div. 2006) (citing R. 4:46-2(c); Brill, supra, 142 N.J. at 540); see also In re Estate of Sasson, 387 N.J. Super. 459, 462-63 (App. Div.), certif. denied, 189 N.J. 103 (2006). Robinson v. Vivirito, 217 N.J. 199, 203 (2014). The trial court must keep in mind 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." R. 4:46-2(c).

"The practical effect of this rule is that neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhagat, 217 N.J. at 38. "To defeat a motion for summary judgment, the opponent must 'come forward with evidence that creates a genuine issue of material fact.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div.), certif. denied, 211 N.J. 608 (2012)), certif. denied, 220 N.J. 269 (2015). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted). "'(U)nsubstantiated inferences and feelings' are not sufficient to support or defeat a motion for summary judgment." Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011) (quoting Oakley v. Wianecki, 345 N.J. Super. 194, 201 (App. Div. 2001)).

"In addition, '[b]are conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment.'" Ibid. (quoting U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961)).

As was explained by the Court:

> R. 4:46-2(c)'s "genuine issue of material fact standard mandates that the opposing party do more than point to *any* fact in dispute' in order to defeat summary judgment. Brill, supra, 142 N.J. at 529). Under that standard, once the moving party presents sufficient evidence in support of the motion, the opposing party must 'demonstrate by competent evidential material that a genuine issue of fact exists[.]" Robbins v. Jersey City, 23 N.J. 229, 241 (1957) *see also* Brill, supra, 142 N.J. at 529 (noting opposing party should "come forward with evidence that creates a 'genuine issue as to any material fact challenged'" (quoting R. 4:46-2)).

A. Analysis and Findings as to Defendant, Township of Galloway's Motion for Summary Judgment

1. Analysis of Count II-Civil Conspiracy

Count II of plaintiff's complaint alleges civil conspiracy.

A civil conspiracy is the

> "combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage."
>
> [Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177, 876 A.2d 253 (2005) (quoting Morgan v. Union Cnty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364, 633 A.2d 985 (App. Div. 1993), certif. denied, 135 N.J. 468, 640 A.2d 850 (1994)).]

"'It is enough [for liability] if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them.'" Ibid. (quoting Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988)). Once a conspiracy is formed, each conspirator is liable for every act and declaration of each and all of the

conspirators made in pursuance of the conspiracy. Morgan, supra, 268 N.J. Super. at 366.

A plaintiff need not prove the existence of a conspiracy by direct evidence since, absent the testimony of a co-conspirator, it is unlikely that direct evidence of an unlawful agreement will exist. Id. at 365. Further, each defendant's conduct should not be considered in isolation or dissected into "discrete, watertight compartments." Id. at 364. Instead, the sequence of events must be viewed in its entirety to determine whether there was a conspiracy. Ibid. Additionally:

> [T]he question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can "infer from the circumstances [that the alleged conspirators] had a meeting of the minds and thus reached an understanding" to achieve the conspiracy's objectives.
>
> [Id. at 365 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 158, 90 S. Ct. 1598, 1609, 26 L. Ed. 2d 142, 155 (1970)).]

However, "'[t]he gravamen of an action in civil conspiracy is not the conspiracy itself but the underlying wrong which, absent the conspiracy, would give a right of action.'" Lopez v. Swyer, 62 N.J. 267, 276, 300 A.2d 563 (1973) (quoting Bd. of Educ., Asbury Park v. Hoek, 38 N.J. 213, 218, 183 A.2d 633 (1962)).

The unlawful act plaintiff is claiming is defamation. Plaintiff asserts that the township manager implicitly conspired with Defendant, Gorman when Gorman made the alleged defamatory statements as against plaintiff. Plaintiff asserts that the township conspired due to the non-action by the township manager in fulfilling his duties pursuant to N.J.S.A. 40:69A-92 et. seq. by either investigating Gorman's letters and/or taking action to stop Gorman from publishing the second letter.

The court hereby grants Township's Motion for Summary Judgment and

dismisses Count II- Civil Conspiracy with prejudice. The court finds that there is no evidence in the summary judgment record that plaintiff has shown that the township manager and Gorman had a meeting of the minds and reached an understanding to defame plaintiff. The evidence is quite contrary. The township manager has never waivered from his position that what Gorman did by the publication of the two letters was wrong. There is no evidence in the record which creates a genuine issue of fact that the township manager understood the general objectives of Gorman's alleged defamation, accepted such, and agreed to it, either explicitly or implicitly, to further the defamation. The court finds no genuine issue of material fact exists as to the last prong of the test noted above. The court finds no genuine issue of material fact has been shown as to an implicit agreement being established between Gorman and the township manager to defame plaintiff even based on the township manager's alleged inaction.

2. Analysis of Count III- *Respondeat Superior*

Plaintiff's complaint at Count III has pled a theory of recovery based on *respondeat superior.*

> Although as a general rule of tort law, liability must be based on personal fault, the doctrine of *respondeat superior* recognizes a vicarious liability principle pursuant to which a master will be held liable in certain cases for the wrongful acts of his servants or employees. W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* §§ 4, 69 at 21-23, 499-501 (5th ed.1984); Rhett B. Franklin, *Pouring New Wine into an Old Bottle: A Recommendation for Determining Liability of an* Employer Under *Respondeat Superior,* 39 S.D. L. Rev. 570, 572 (1994). The theoretical underpinning of the doctrine of *respondeat superior* has been described as follows: that one who expects to derive a benefit or advantage from an act performed on his behalf by another must answer for any injury that a third person may sustain from it. *Winkelstein v. Solitare, 129 N.J.L. 38, 40, 27 A.2d 868 (1942)* (citations omitted), *aff'd per curiam, 130 N.J.L. 158, 31 A.2d 843 (E. & A.1943)*; 27 *Am.Jur.2d Employment Relationship* § 459 (1996).
>
> Under *respondeat superior,* an employer can be found liable for the negligence of

> an employee causing injuries to third parties, if, at the time of the occurrence, the employee was acting within the scope of his or her employment. *Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 619, 626 A.2d 445 (1993)* (quoting *Restatement (Second) of Agency § 219* (1958)). To establish a master's liability for the acts of his servant, a plaintiff must prove (1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment. Those are two entirely distinct concepts governed by different legal principles. The former focuses on the nature of the relationship. If no master-servant relationship exists, no further inquiry need take place because the master-servant relationship is *sine qua non* to the invocation of *respondeat superior. See, e.g., Wright v. State, 169 N.J. 422, 436, 778 A.2d 443 (2001)* (observing that doctrine of *respondeat superior* is based on existence of master-servant relationship). If such a relationship exists, its margins are the subject of the scope of employment inquiry. *Restatement (Second) of Agency § 228 comment a* (1958).
>
> [Carter v. Reynolds, 175 N.J. 402, 408-409 (2003)

Even assuming a master/ servant relationship existed between the township and Gorman, the court finds the summary judgment does not contain any evidence that a genuine issue of any material fact exists that the act of publishing defamatory letters is within the scope of employment of a township committee person.

Further, the court finds that Defendant, Township is immune from liability pursuant to N.J.S.A. 59:2-10.

Under N.J.S.A. 59:2-10, a public entity cannot be held liable for the willful misconduct of its employees. N.J.S.A. 59:2-10 states: "A public entity is not liable for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct."

The plaintiff's complaint and proposed amended complaint assert defamation and concede the applicable standard requires the publication of false information knowingly and/or in reckless disregard of such falsity.

"Actual malice " is legally defined that the publisher of the statement made such statement with knowledge that it was false or with reckless disregard of whether it was false or not. See, W.J.A. v. D.A, 210 N.J. 229, 241 (2012) *citing New York Times v. Sullivan, 376 U.S. 254, 280 (1964)*

The court finds that based on plaintiff's own theory of liability under Count One that the township cannot be liable for Gorman's willful or malicious actions pursuant to N.J.S.A. 59:2-10.

3. Analysis of Proposed Count IV- Negligence

Plaintiff's proposed amended complaint for which he seeks leave to file in his cross-motion asserts a cause of action under a negligence theory against Township based on the township manager's failure to "investigate, correct, or retract the libelous publications from the Desk of Councilman Jim Gorman in violation of N.J.S.A. 40:69A-92 et. seq. and the Township's Code of Ethics" (Paragraph 29 of P's proposed complaint)

Plaintiff further asserts in Count IV of the proposed complaint that the "Township Manager was expressly required by New Jersey Statute to carry out all policies established by counsel, for proper administration of all affairs of the Township with the jurisdiction of Council, for execution of all laws, ordinances and codes of the municipality and for investigation at any time of the affairs of any officer or department of the municipality." (Paragraph 30 of P's proposed complaint)

Plaintiff also asserts that N.J.S.A. 59:2-2 which states:

> A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.

Movant has asserted that the Proposed Amended Complaint is futile as the Township and the township manager are immune from liability pursuant to N.J.S.A. 59-2-4 and N.J.S.A. 59:3-5 for the claimed acts which plaintiff alleges are negligent.

The Tort Claims Act gives absolute immunity to public entities from liability for injuries caused by a failure to enforce the law. N.J.S.A. 59:2-*4* provides: "A public entity is not liable for an injury caused by adopting or failing to adopt a law or by failing to enforce any law." N.J.S.A. 59:3-5 states: "A public employee is not liable for an injury caused by his adoption of or failure to adopt any law or by his failure to enforce any law."

Defendant, Township also asserts that the Township nor the township manager had any duty to investigate, make any statement to the public or take action to stop Gorman from sending out letters to the public.

The court finds Township's argument to be persuasive. The proposed amended complaint has asserted that the "township manager failed to investigate, correct or retract the libelous publications from the Desk of Councilman Jim Gorman in violation of N.J.S.A. 40:69A-92 et. seq. and the Township's Code of Ethics". Plaintiff's proposed amended complaint also asserts that the township manager "was expressly required by New Jersey Statute to carry out all policies established by counsel, for proper administration of all affairs of the Township with the jurisdiction of Council, for execution of all laws, ordinances and codes of the municipality and for investigation at any time of the affairs of any officer or department of the municipality". Such action or inaction of the township manager is based on his alleged failure to enforce N.J.S.A. 40:69A-92 et. seq., and it seems most likely those alleged duties set forth at N.J.S.A. 40:69A-95 and

his failure to act on the ethics code violations. These laws or ordinances which plaintiff claims the township manager was required to follow and enforce as the basis of his proposed Count IV are clearly actions or non-actions to enforce such which are afforded immunity to the Township and township manager pursuant to N.J.S.A. 59-2-4 and N.J.S.A. 59:3-5 respectively. Based on the above reasoning set forth above, the court finds plaintiff's complaint at proposed Count IV-Negligence is a futile claim and based on such his cross motion for leave to amend his complaint is denied.

III. Conclusion

Plaintiff's complaint at Counts II and III of his original complaint are dismissed with prejudice. Plaintiff's motion for leave to amend his complaint to add Count IV asserting a negligence claim is denied as futile.

s/ Stanley L. Bergman, Jr., J.S.C.