PREPARED BY THE COURT

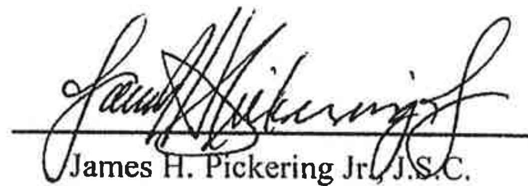
HERBERT C. FREDERICK, Plaintiff, v. **CHRISTOPHER J. FOX; JACQUELINE FERENTZ; MICHELLE DOUGLAS, ESQ. MARY D'ARCY BITTNER, ESQ.; CHRISTOPHER RIDINGS; SCOTT GOLDEN; CORNELIUS MAXWELL; LOUIS BARBONE, ESQ.; BOROUGH OF WEST WILDWOOD, ET ALS.,** Defendants.	:	SUPERIOR COURT OF NEW JERSEY CIVIL DIVISON – LAW DIVISION CAPE MAY COUNTY CPM-L-335-20 Civil Action **ORDER**

THIS MATTER having come before the Court by way of a Motion to Dismiss filed by Defendants Christopher J. Fox, Jacqueline Ferentz, Mary D'Arcy Bittner, Esq., Christopher Ridings, Scott Golden, Cornelius Maxwell, and Borough of West Wildwood, and the Court having considered the papers and having heard oral argument via Zoom on February 5, 2021, at which time James R. Birchmeier, Esq. appeared for Defendants, and Daniel P. McElhatton, Esq. appeared for Plaintiff, and for reasons stated on the record and in the accompanying Memorandum,

IT IS ON THIS 16th DAY OF FEBRUARY, 2021 ORDERED that:

1. Defendants' Motion to Dismiss is GRANTED; and
2. Defendants' Motion to Dismiss is granted because Plaintiff failed to serve a Tort Claim Notice on any Defendant; and
3. Defendants' Motion is denied as to Defendants' arguments that the claims are time barred; and

4. Defendants' Motion is granted as to Count I for harassment; and
5. Defendants' Motion is denied as to Counts II (Conspiracy) and III (Intentional Infliction of Emotional Distress); and
6. Plaintiff's Complaint is therefore dismissed; and
7. This Order shall be deemed automatically served upon all counsel of record and parties if served personally in court, and if not so served in court shall be deemed automatically served upon all counsel of record simultaneously with its online posting in eCourts; otherwise, all other parties shall be served by the party obtaining this Order within seven (7) days after this Order was signed. See Rule 1:5-1(a).



James H. Pickering Jr., J.S.C.

[X] Opposed
[ ] Unopposed

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

JAMES H. PICKERING, JR., J.S.C.

9 North Main Street
Cape May Court House, NJ 08210
609-402-0100 ext. 47730

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

CASE:	**Herbert C. Frederick v. Christopher J. Fox, et al.**
DOCKET #:	**CPM L - 335 - 20**
RETURN DATE:	**February 16, 2021**
MOTION:	**Motion to Dismiss**
MOVANT:	**Defendants Christopher J. Fox, Jacqueline Ferentz, Mary D'Arcy Bittner, Esq., Christopher F. Ridings, Scott Golden, Cornelius Maxwell, and Borough of West Wildwood**

BACKGROUND

On September 24, 2020 Plaintiff, Herbert C. Fredrick filed a Complaint against Defendants: Christopher J. Fox, Jacqueline Ferentz, Michelle Douglas, Esq., Mary D'Arcy Bittner, Esq., Christopher F. Ridings, Scott Golden, Cornelius Maxwell, Louis Barbone, & Borough of West Wildwood, NJ.

The Complaint alleges that Plaintiff Herbert C. Frederick was elected as a Commissioner and selected as Mayor for the Borough of West Wildwood in 2008. He served from 2008-2012. Defendant Christopher J. Fox was elected as the Mayor of West Wildwood in 2012. Jacqueline Ferentz was a West Wildwood police lieutenant who was dismissed by Frederick in August 2011 after alleged misconduct. A disciplinary complaint was filed by the Borough. In 2012, after

Christopher J. Fox was elected as Mayor, he withdrew the disciplinary complaint against Ferentz, reinstated her to the police department, promoted her to Police Chief, and gave her a pay increase and back pay. Christopher J. Fox and Jacqueline Ferentz reside in the same home.

Ferentz then filed suit against the Borough of West Wildwood and Herbert Frederick personally. Plaintiff was dismissed from that action. The case proceeded and resulted in a judgment of $1.7 million dollars against the Borough in 2017.

Defendant Mary D'Arcy Bittner was employed by the Borough of West Wildwood New Jersey; she was Municipal Solicitor. Scott Golden and Cornelius Maxwell served as Commissioners during the relevant period. Christopher Ridings was the Business Administrator.

Plaintiff alleges that upon taking office, Fox and his supporters harassed, intimidated, and threatened him. They removed plaques and monuments installed under Frederick. Frederick alleges that the harassment and intimidation started when he took office in 2008 and continues to this day.

In Count I of the Complaint for "Harassment," Plaintiff contends that Defendants continually harassed, intimidated, and threatened him. He asserts that Defendants have continually blamed him publicly for a substantial tax increase imposed on West Wildwood to pay for the substantial verdict a jury returned in favor of Ferentz against West Wildwood and attorney fees incurred by her counsel.

In Count II of the Complaint, Plaintiff alleges that Defendants conspired to draft a Resolution that restricted evidence in the Ferentz litigation and to otherwise hinder the litigation. The cause of action in this count is titled by Plaintiff as a conspiracy to commit harassment.

Count III alleges a claim of Intentional Infliction of Emotional Distress. Plaintiff claims he has suffered from severe emotional distress and mental anguish, loss of his personal and business reputation, and a resultant financial loss, all due to Defendants' conduct.

The court has previously dismissed claims against Michelle Douglass, Esq. and Lou Barbone, Esq. finding that they were protected by the litigation privilege.

On December 11, 2020, Defendants Christopher J. Fox, Jacqueline Ferentz, Mary D'Arcy Bittner, Christopher Ridings, Scott Golden, Cornelius Maxwell, and the Borough of West Wildwood filed a notice of motion to dismiss the plaintiff's Complaint for failure to state a claim in accordance with R. 4:6-2(e).

On January 22, 2021, Plaintiff filed Opposition.

On February 1, 2021, Defendants filed a Reply..

On February 4, 2021, oral argument was heard via Zoom. Daniel P. McElhatton, Esq. appeared on behalf of Plaintiff. James R. Birchmeier, Esq. appeared on behalf of the Defendants.

STANDARD OF REVIEW OF A MOTION TO DISMISS

The Court must apply the following familiar standards to an application to dismiss a Complaint pursuant to R. 4:6-2(e):

> "[O]ur inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." The essential test is simply "whether a cause of action is 'suggested' by the facts."
>
> In exercising this important function, "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."
>
> Moreover, "the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint[,]" rather, "plaintiffs are entitled to every reasonable inference of fact." As we have stressed, "[t]he examination of a complaint's allegations of fact required by the aforestated principles should be one

that is at once painstaking and undertaken with a generous and hospitable approach."

Green v. Morgan Properties, 215 N.J. 431, 451-52 (2013) (citations omitted).

The issue is simply "whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). In deciding a motion pursuant to Rule 4:6-2(e), "[t]he motion judge must accept as true all factual assertions in the complaint . . . [and] accord to the non-moving party every reasonable inference from those facts." Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008). The judge must examine 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.'" Green v. Morgan Props., 215 N.J. 431, 452 (2013) (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989)).

On a motion to dismiss for failure to state a claim under Rule 4:6-2(e), the court must only consider "the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (internal quotation marks omitted). "The court may not consider anything other than whether the complaint states a cognizable cause of action." Ibid. The court must "accept as true the facts alleged in the complaint," Darakjian v. Hanna, 366 N.J. Super. 238, 242 (App. Div. 2004), and "search[] 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," Printing Mart-Morristown, supra, 116 N.J. at 746 (internal quotation marks omitted). The party opposing the motion is "entitled to every reasonable inference of fact." Ibid.

Though the court must take "a generous and hospitable approach" in making that determination whether to dismiss a complaint in accordance with R. 4:6-2(e), "[a] pleading should

be dismissed if it states no basis for relief and discovery would not provide one." Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 286 (App. Div. 2014) (alteration in original) (first quoting Green, supra, 215 N.J. at 452, then quoting Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div.), certif. denied, 208 N.J. 368 (2011)).

The trial court has been instructed by the Supreme Court that Motions to dismiss should rarely be granted, and an order granting a motion to dismiss under Rule 4:6-2(e) should usually be without prejudice, so that the plaintiff may have an opportunity to re-plead, if he can do so, to state a viable cause of action. Nostrame v. Santiago 213 N.J. 109, 128 (2013); Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009); Printing Mart-Morristown, supra, 116 N.J. at 771-72.

ANALYSIS

Point I – New Jersey Tort Claims Act

Defendants allege that the claims should be dismissed because Plaintiff failed to comply with the New Jersey Tort Claims Act, N.J.S.A. 59:8-1, *et seq.* (TCA) by not filing a Tort Claims notice within the requisite time frame.

Plaintiff argues that as per N.J.S.A. 59:3-14, the Act does not apply to conduct that is "outside the scope of employment" or when it constitutes "a crime, actual fraud, actual malice, or willful misconduct." He argues a Tort Claims Notice is not required for intentional torts that were outside the scope of employment.

The TCA requires that in order to bring a suit in tort against a public entity or public employee, notice must first be provided no later than the 90th day after accrual of the cause of action. N.J.S.A. 59:8-8. Then, six months after the date of notice of claim is received, a suit can be filed. Id. The suit must be filed within two years of accrual. Id.

Plaintiff has never filed a Tort Claim Notice as to any defendant.

Our Supreme Court addressed this issue squarely in Velez v. City of Jersey City, 180 N.J. 284 (2004). In that case, Plaintiff alleged she was sexually assaulted by a City Councilman. She never filed a Tort Claims Notice. She sued for assault and other intentional torts. She argued a Tort Claim Notice was not required because she alleged intentional torts. The Court held that a Tort Claim Notice is still required even where the claims are for intentional torts against a public employee:

> Under N.J.S.A. 59:3-14, a public employee is not immune if he or she engaged in conduct that "constituted a crime, actual fraud, actual malice or willful misconduct." However, that provision must be read together with the overall mandate of N.J.S.A. 59:8-3, that "[n]o action shall be brought against a public entity or public employee under this [A]ct unless the claim [is] . . . presented in accordance with the procedure set forth in this [Act]." We discern nothing in the Act's legislative history or statutory scheme that indicates the Legislature intended the notice requirements to apply solely to claims based in negligence. Although the Act's pre-amendment legislative declaration only mentions negligence, this does not contradict our holding because the declaration defines the parameters of mandatory liability only for public entities under the Act. It does not limit the necessity of notice. When defining the parameters of notice in the 1994 amendments, the Legislature sought to bring the "injury" caused by the public entity or public employee under the umbrella of the Act's notice requirements. We are convinced that if the Legislature intended to exclude intentional torts from the notice requirements, it would have expressly done so when it amended N.J.S.A. 59:8-3 and 59:8-8. It did not.

Id. at 294.

The court also cited to an Appellate Division decision for additional reasons:

> The panel listed four persuasive reasons for its conclusion that the Act's notice provisions apply to intentional tort claims. First, the definition of "injury" in N.J.S.A. 59:1-3 is broad enough to encompass injuries inflicted from intentional as well as negligent conduct. Ibid. Second, the express language of the notice provisions do not distinguish between negligence claims and intentional torts. Ibid. Rather, the Act "states that '*[n]o action* shall be brought against a public entity or public employee under this [A]ct unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this

> chapter.'" Id. at 520-21, 833 A.2d 679 (quoting N.J.S.A. 59:8-3) (alterations in original). Third, the panel found that requiring notice in actions against a public employee is consistent with the purpose of the notice provisions, allowing a public entity an opportunity to correct the practices giving rise to the claim. Id. at 521, 833 A.2d 679 (citing Beauchamp, supra, 164 N.J. at 121-22, 751 A.2d 1047). The panel concluded that proper notice would provide a public entity "with an opportunity to investigate the claims, and take disciplinary or other appropriate action to rectify inappropriate behavior or flawed practices, if necessary, regardless of whether the [public entity] is liable for damages." Ibid. Finally, the panel reasoned that requiring notice would "give a public entity an opportunity to determine whether it will indemnify the [accused] employee," despite the fact that it may be immune from liability. Ibid.

Id. at 292-93, citing Bonitsis v. New Jersey Inst. of Tech., 363 N.J.Super. 505, 833 A.2d 679 (2003)., rev'd on other grounds, 180 N.J. 450 (2004).

The Court cited approvingly a previous case that required the Tort Claims Notice procedures to be followed where the claim was for Intentional Infliction of Emotional Distress. See Garlanger v. Berbeke, 223 F.Supp.2d 596, 602 (D.N.J. 2002)(noting Tort Claims Act's notice requirements applicable to claims for intentional infliction of emotional distress).

There are limited exceptions to the rule, generally where the cause of action is a "statutory cause of action with specific procedural requirements and greater damage allowances than available at common law," and "any state or federal constitutional rights that would supersede statutory limitations." The Velez court mentioned claims pursuant to the NJLAD and also inverse condemnation claims. Velez, 180 N.J. supra at 295-96, citing Greenway Dev. Co. v. Borough of Paramus, 163 N.J. 546 (2000)(claims for inverse condemnation), and Fuchilla v. Layman, 109 N.J. 319, 335, cert. denied, 488 U.S. 826, (1988) (claims made pursuant to the NJLAD). In Gazzillo v. Grieb, 398 N.J.Super. 259, 263-64 (App. Div.), cert. den., 195 N.J. 524 (2008), suit was not barred against an employee where the public entity was not named in the suit and the claim was based on a criminal sexual contact, and there was no nexus between the tort and defendant's public employment.

Here, all of Plaintiff's claims are intentional tort claims. A Tort Claims Notice was required to be served on West Wildwood. Notice is also required to be given to the employees. N.J.S.A. 59:8-8. The individual defendants, however, were not required to be served, as long as the municipality was served, and "the identity of the employee or employees was nearly as clear from the designation or description provided as it would have been by the inclusion of his or her name." Henderson v. Herman, 373 N.J. Super. 625, 633 (App. Div. 2004).

Plaintiff did not provide a Tort Claims Notice to the municipality nor the individual defendants. Plaintiff's Complaint is therefore dismissed.

Although the Court is dismissing the entire Complaint for Plaintiff's failure to provide a Tort Claims Notice, the Court will still address the remaining four points made by Defendants.

Point II – Statute of Limitations

Defendants' second argument is that Plaintiff's claims of "harassment," "conspiracy to commit the tort of harassment, and "intentional infliction of emotion distress" all must be brought within a two-year statute of limitations under N.J.S.A. 2A:14-2. Defendant states that the latest date in the Complaint is 2014, which is six (6) years before the action was filed. Therefore, the claims are all outside of the statute of limitations.

Plaintiff argues that the conduct has occurred up until the time of filing the Complaint and therefore his claims were made within the statute of limitations. The Complaint states in ¶ 21 that there was a "pattern of harassment and intimidation that was initiated from 2008 and continues until the present time."

At oral argument, Plaintiff's counsel agreed that Plaintiff could not recover for alleged conduct that occurred more than two years before the filing of the complaint. Those many paragraphs and allegations were included for context, not recovery. Plaintiff does seek recovery

for Defendants' actions that occurred in the last two years. Because the Complaint alleges that the conduct was ongoing up until the time of the Complaint, the limited alleged actions that happened within two years of the statute of limitations are not time barred.

Therefore, Defendants' Motion to Dismiss the Complaint for falling outside the statute of limitations is denied.

Point III – Harassment and/or Conspiracy to Commit Harassment

Defendants argue that New Jersey courts have not recognized a claim of "harassment." They argue there can be no viable claim for conspiracy without an unlawful act, so that claim should be dismissed as well.

Plaintiff does not address whether the tort claim of "harassment" is recognized by the New Jersey courts. Instead, Plaintiff's brief addresses the pattern of harassment that occurred by Defendants after 2012.

Under N.J.S.A. 2C:33-4, harassment is considered a "petty disorderly persons offense." While, a criminal action can be brought for harassment, the courts have not decided whether the statute provides relief for a civil cause of action. See Aly v. Garcia, 333 N.J. Super. 195, 203 (App. Div. 2000); Juzwiak v. Doe, 415 N.J. Super. 442, 454 (App. Div. 2010). The court in Aly decided to leave that issue for another day and treated the harassment claim the same as a claim for intentional infliction of emotional distress. Aly, 333 N.J.Super. supra at 204.

Because our courts view a claim for harassment under the exact same standard as a claim for intentional infliction of emotional distress, bringing forth both actions in this matter is redundant.

Defendants' Motion to Dismiss Count I for harassment is therefore granted.

Plaintiff also claimed that the Defendants conspired to harass him. For a cause of action of conspiracy, there must be two or more people, working together to commit an unlawful act, and there is an overt act that causes damages. See Morgan v. Union County, 268 N.J. Super. 337, 364 (App. Div. 1993).

As stated above, when reviewing a Motion to Dismiss, the court must "accept as true the facts alleged in the complaint," Darakjian v. Hanna, 366 N.J. Super. 238, 242 (App. Div. 2004), and "search[] 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," Printing Mart-Morristown, supra, 116 N.J. at 746 (internal quotation marks omitted).

Because New Jersey courts have looked at claims for harassment under the standard for intentional infliction of emotional distress, conspiracy to commit harassment should be viewed the same. In accepting the facts in the Complaint as true, Plaintiff has met the very low standard to defeat a Motion to Dismiss on this claim. Our courts do recognize a cause of action for Intentional Infliction of Emotional Distress; this court recognizes a tort for Conspiracy to Commit Intentional Infliction of Emotional Distress. Counts II and III, when read together, could state such a cause of action.

Therefore, Defendants' Motion to Dismiss Count II is denied.

Point IV – Intentional Infliction of Emotional Distress

Defendants contend that Plaintiff has failed to state a viable claim for Intentional Infliction of Emotional Distress because he cannot show he suffered "severe emotional distress."

Plaintiff argues that the four required elements of a claim for Intentional Infliction of Emotional Distress have been met. The Complaint outlines the history of conduct that caused the emotional distress, the harm that it caused, and that it was severe.

To establish a claim for Intentional Infliction of Emotional Distress, Plaintiff must show that: (1) Defendants' conduct was intentional or reckless and that they intended to cause emotional distress; (2) the conduct was extreme and outrageous such that it would be "utterly intolerable in a civilized community; (3) the conduct caused the emotional distress; and (4) the emotional distress was so severe a reasonable person could not endure it. Buckley v. Trenton Sav. Fund. Soc., 111 N.J.355, 366-67.

Viewing the Complaint liberally, Plaintiff does make allegations of intentional conduct by Defendants. He also alleges that the conduct was extreme and caused him emotional distress. In viewing the Complaint with liberality, the claims made by Plaintiff are legally sufficient. Therefore, Defendant's Motion to Dismiss Claim III for Intentional Infliction of Emotional Distress is denied.

Point V – New Jersey Frivolous Lawsuit Statute

Defendant argues that Plaintiff's Complaint should be considered "frivolous litigation" under the New Jersey Frivolous Litigation Statute N.J.S.A. 2A:15-59. By failing to file a Tort Claims notice and filing a Complaint for a tort not recognized under New Jersey law Defendant argues the Complaint amounts to frivolous litigation.

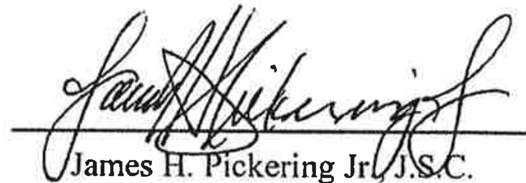
Plaintiff's simple argument is that there is nothing frivolous about the matters set forth and therefore the statute does not apply.

Because the Court has ruled Plaintiff may have had (but for the Tort Claim Notice issues) viable causes of action under Counts II and III of the Complaint, the Court does not find that the Complaint is frivolous such that it warrants a violation of N.J.S.A. 2A:15-59.

Therefore, Defendants' Motion to Dismiss under the Frivolous Litigation Statute is denied.

CONCLUSION

Count I for harassment against Defendants is dismissed with prejudice. Counts II and III for conspiracy to commit harassment and intentional infliction of emotional distress remain. All of the claims, and the entire Complaint, are dismissed because Plaintiff has failed to file a Tort Claims Notice to any Defendant.



James H. Pickering Jr., J.S.C.

Date: 2/16/2021