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JOSEPH P. CARNEY and CARNEY'S, INC.,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY
Plaintiffs,	Docket No. CPM-L-119-16
vs.	*Civil Action*
MAYOR EDWARD MAHANNEY, JR., AND THE CITY OF CAPE MAY	**ORDER**
Defendants.	

THIS MATTER having been opened to the Court by way of Motion for Summary Judgment of Robert P. Merenich, Esquire of the Law Firm of Gemmel, Todd & Merenich, P.A. for the Defendants', Mayor Edward Mahanney, Jr. and The City of Cape May, and the Court having considered the moving papers, opposition papers, and heard oral argument, if any, and for good cause shown;

IT IS on this 2nd day of January 2019, **ORDERED AND ADJUDGED** that Summary Judgment, be and the same is hereby granted in favor of the Defendants', Mayor Edward Mahanney, Jr. and The City of Cape May, and the Plaintiffs' Complaint, be and the same is hereby dismissed with prejudice.

J. Christopher Gibson, J.S.C.

X Opposed
__ Unopposed

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

CASE: **Joseph P. Carney and Carney's, Inc. v. Mayor Edward Mahanney, Jr., and the City of Cape May**

DOCKET NO.: **CPM-L-119-16**

NATURE OF APPLICATION: DEFENDANTS' – MAYOR EDWARD MAHANNEY, JR., AND THE CITY OF CAPE MAY – MOTION FOR SUMMARY JUDGMENT

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The Complaint in this matter was filed on March 23, 2016. Discovery ended on September 15, 2018. There were seven hundred ninety six (796) days of discovery. There has been four (4) discovery extensions. Arbitration is not yet scheduled. Trial is scheduled for November 26, 2018.

Defendants – Mayor Edward Mahanney, Jr., and The City of Cape May – now move for summary judgment.

This Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith 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. An 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.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid. (internal citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid. (internal citations omitted); see also Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (requiring opposition to a motion for summary judgment to have "competent evidential material beyond mere speculation and fanciful arguments").

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case

> the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such order as may be appropriate.

See also Brill, 142 N.J. at 529 (holding that the burden shifts to the non-movant to "come forward with evidence that creates a genuine issue as to any material fact challenged" after the movant has provided sufficient evidence for summary judgment). In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: '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.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

A motion for summary judgment is inappropriate prior to the completion of discovery. See Lederman v. Prudential Life Ins., 358 N.J. Super. 324, 337 (App. Div.), certif. denied, 188 N.J. 353 (2006); Wellington v.

Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) ("Ordinarily summary judgment dismissing the complaint should not be granted until the plaintiff has had a reasonable opportunity for discovery."). Also, summary judgment is inappropriate when "critical facts are peculiarly within the defendants' knowledge." Valentzas v. Colgate-Palmolive Co., 74 N.J. 189, 193 (1988), citing Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981). However, summary judgment may still be granted if, as a matter of law, further discovery will not rescue and maintain the action. The Appellate Division in Auster, 153 N.J. Super. at 56, held:

> Plaintiff has an obligation to demonstrate to some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action. Here, there was no attempt by plaintiffs to avail themselves of the opportunity to engage in discovery until after the Complaint was in jeopardy of being dismissed and they have failed and continue to fail to demonstrate how further discovery might rescue it.

See also Tisby v. Camden County Corr. Facility, 448 N.J. Super. 241, 247 (App. Div. 2017) (requiring the party objecting to a motion for summary judgment as premature only if the party can "demonstrate with some particularity [that] the likelihood of further discovery will supply the missing elements of the cause of action").

However, the non-moving party must show that the nature of the discovery and its materiality are issues at hand. See Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012). It is well-settled that bare conclusions in a Complaint without factual support

will not defeat a motion for summary judgment. Miller v. Bank of Am. Home Loan, 439 N.J. Super. 540, 551 (App. Div. 2015), certif. denied, 221 N.J. 567 (2015); see also Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (holding that a party opposing summary judgment must do more than simply show that there is some "metaphysical doubt" as to the material facts).

Similarly, self-serving assertions, unsupported by documentary proof, are "insufficient to create a genuine issue of material fact." Globe Motor Co. v. Igdalev, 436 N.J. Super. 594, 603 (App. Div. 2014); Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013); Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002); Blair v. Scott Specialty Gases, 283 F.3d 595, 607 (3d Cir. 2002). Furthermore, a party may not "create" an issue of fact for trial by creating illusory or fanciful arguments or sham facts and then rely on such facts or arguments. See Shelcusky v. Garjulio, 172 N.J. 185, 201 (2002) ("Sham facts should not subject a defendant to the burden of a trial.").

MOVANT'S POSITION

Defendants – Mayor Edward Mahanney, Jr., and The City of Cape May ("Defendants") – now move for Summary Judgment. In support of their Motion, Defendants submit the following in their Statement of Undisputed Material Facts:

Defendants assert that Plaintiffs are a bar owner, Joseph Carney and his corporation, Carneys, collectively referred herein as Carneys or Plaintiffs. On or about October 7, 2016. Plaintiffs filed an amended complaint attached

hereto as Exhibit A. In their first count Plaintiffs allege a violation of the New Jersey Civil Rights Act against defendants, the City of Cape May and former Mayor Edward Mahanney, Jr. for having shut down the bar on September 14, 2014, without due process, and for a loss of reputation when the City announced there were 78 calls for service as well as a sexual assault at the bar when the City knew these facts to be untrue. Id.

Carneys operates under a Plenary Retail Consumption License. Id. at Paragraph Two (2). On September 14, 2014 at approximately 1:20am, at least four (4) Cape May police officers and two EMS squads responded to the report of an aggravated assault at Carneys. See Initial General Complaint Report at Exhibit B; see also Lashley Arrest Report at Exhibit C.

One male individual, J.L., was placed under arrest for aggravated assault after having struck a fellow patron with a bottle. Id. at Arrest Report attached hereto as Exhibit C. SLEO Kara Brussell encountered a second individual, Dominic Digilio, a Carneys' employee, outside the Bar. See Russell Report attached hereto as Exhibit D. Mr. Digilio was found to have several lacerations on his head. Id. According to her report, Mr. Digilio would not tell SLEO Russell how his head became lacerated. Id.

Another patron, J.N., would file a criminal complaint for assault against Mr. Digilio for his having lept over the bar, tacking J.N. and throwing multiple punches to J.N.'s face. See Gallacio Report and J.N. Criminal Complaint against Mr. Digilio at Exhibit E. Joseph Carney terminated Mr. Digilio on September 14, 2014. See Joseph Carney

Deposition, Exhibit F, at Page 70, Lines 1-3.

The NJ ABC recommended that Carneys' license be suspended for thirty-six (36) days for multiple events related to this incident the most serious of which was an employee's involvement in the bar fight. See ABC Notice of Violation attached hereto as Exhibit G. Carneys has a history of suspension including a 2012 108 day suspension, most of which was suspended after the payment of a fine, for four (4) separate occasions of having served under-aged patrons. See ABC 2012 imposition of suspension attached hereto at Exhibit H.

On the evening of the September 14, 2014 incident, Mr. Carney 'out of respect' for Mayor Mahanney, shut down the bar at approximately 1:50am after having been told by the Mayor that he would not call the NJ ABC. Carney Deposition at Exhibit F, Page 61, Lines 15-21; see also Page 109, 4-13:

> I think, later on, he would be privy to the conversation that the mayor controlled, in still encouraging me to close my business down. And at that point in time, Eric, for sure, heard the mayor say, okay, Joe, I'll tell you what, if you shut your doors now, I won't call the ABC. And I said, well, I'm not sure that I believe that, but, Eric, you heard it. And the mayor stuck – stuck out – stuck out his hand to shake mine, which I did out of respect.

Former Mayor Mahaney did not have the authority to shut Carney's bar, see Mahaney Deposition at Exhibit I at Page 57, Lines 18-20. Former Mayor Mahaney did not call the ABC as he had promised. Id. at Page 81, Lines 1-6. Sergeant Lashley, who was present on the September 14, 2014

scene, called his supervisor to determine whether the police had the authority to shut down the bar and that the police did not have such authority. See Lashley Deposition at Exhibit J at Page 44, Lines 7-21.

Sergeant Lashley heard Mayor Mahanney and Joseph Carney agree that the bar would be shut down if Mayor Mahanney would not call the ABC; there was no order given to him to shut down the bar. Id. at Page 48, Line 17 to Page 54, Line 14. In June of the next year, the City of Cape May voted to renew Plaintiffs' plenary retain consumption license subject to conditions; Carneys was told by way of a letter to its attorney that it could request a hearing a hearing to challenge said conditions. See June 14, 2015 Monzo Letter attached hereto as Exhibit K.

At a hearing held on June 30, 2015, Plaintiffs appeared before the governing body, with its counsel present, to challenge the proposed conditions of its licensure; early in the hearing, any consideration of an early 12:00am closure was removed by the City. See Mahaney Deposition, Exhibit I, at Page 91, Line 11 to Page 95, Line 21. At least from the Mayor's perspective, the number of "serious calls" to the police for service, for e.g. assaults, were the reason why special conditions were being considered. Id. at Page 94, Line 10 to Page 95, Line 13.

The Plaintiffs and the City would negotiate and settle on the language of conditions so that the bar could remain open while, at the same time, the safety concerns of the City would be addressed. Id. at Page 93, Lines 1-9; see also Page 95, Lines 14-21. Plaintiffs did not appeal or challenge the

conditions of the license imposed by the City of Cape May on or about June 30, 2015. See Carney Deposition at Exhibit F at Page 113, Lines 9-22.

In its complaint, Plaintiffs allege that the City, when considering the conditions of its licensure in public session, tarnished Carney's reputation by making reference to a sexual assault which Plaintiffs deny ever having occurred at its bar and numerous calls they say did not actually arise from a Carney's incident. See Amended Complaint at Paragraphs 13 and 15.

The governing body did derive its Carney's statistics from a compilation of calls prepared by a Sergeant Marino in September of 2014. See September 2014 Compilation together with accompanying initial General incident reports and full police reports at Exhibit L. The November compilation list does refer to a call for a sexual assault at Carney's. Id. There is an initial general complaint report dated July 4, 2014 showing a 'sexual assault' as having prompted a police response at Carney's. See Initial General Complaint attached hereto as Exhibit M. In actuality, an off duty Carney's employee, (M.V.), is alleged to have exposed his erect penis to a female patron, [r]ubbed her arms, and pushed his penis against her. See Two Cape May Police Investigation Reports attached hereto as Exhibit N.

Former Chief Sheehan testified that the incident reflected at Exhibit N did not involve sexual assault insofar as there was no allegation of sexual penetration. See Sheehan Deposition Testimony attached as Exhibit O at Page 22, Line 23 to Page 23, Line 14. However, the incident did involve criminal sexual contact which Sheehan considered a lesser included offense of

Sexual Assault. Id.; see also Page 74, Line 8 to Page 75, Line 8. There was yet another Carneys' patron allegedly hit in the head with a bottle on January 1, 2015. See Exhibit P. In their amended complaint, Plaintiffs added a second count adding an equal protection claim. See Amended Complaint at Exhibit A.

In the course of discovery, the plaintiffs requested records pertaining to the City of Cape May's enforcement of noise violations at bars and restaurants which records are attached hereto as Exhibit Q; in five years, there were only two (2) warnings of record given to Carneys with regard to noise violations. Id.

The records attached at Exhibit Q reflect the enforcement of noise violations across several and varied restaurants at Cape May. Id. In the course of discovery, the defendants provided in their Notice to Produce a thorough review of each Cape May liquor license and the conditions imposed on each license as of June of 2016. See Liquor License Conditions attached hereto as Exhibit R. These conditions are fairly uniform. Id. Historically, Cape May required bars/restaurants, as a condition of its liquor license, to shut its doors and windows so as to prevent the escape of sound i.e. music outside its establishment. See Mahanney Deposition at Page 26, Line 14 to Page 27, Line 14. This requirement was also enforceable by ordinance. Id. Bars/Restaurants with outdoor seating were allowed outdoor music but the sound of that music was not allowed to extend pass the property line. Id. at Page 30, Line 12 to Page 31, Line 14. There were also time limits as to when

these outdoor establishments could play their music. Id. at Page 32, Lines 7-19.

The City became concerned that there was not a "level playing field" between self contained bars/restaurants and those with outdoor seating. Id. at Page 34, Line 5 to Page 35, Line 5; see also January 6, 2015 City Council Meeting Minutes "Outdoor Seating" attached hereto as Exhibit S: ("the playing field should be level for all and we may have to make adjustments to the master plan.")

Prior to the initiation of suit by plaintiffs, the defendants formed an Outdoor Seating Committee on or about February 2015 to gather information and formulate initial proposals regarding Cape May outdoor seating at bars/restaurants. See Answers to Interrogatories attached hereto as Exhibit T at Answer Twelve (12).

The committee included Council members, Beatrice Pessagno and Jerome Inderwies, Jr. Mr. MacLeod, the city attorney (Anthony Monzo) as well as representation from the police and fire departments, zoning and construction officers, and a representative from code enforcement. Id. This committee met publicly over a year ago to discuss how Cape May could more efficiently regulate outdoor seating at bars and restaurants. Id. Plaintiff was aware this outdoor seating committee was meeting in public but he attended no meeting. See Carney Deposition, Exhibit F, at Page 123, Line 6 to Page 125, Line 16. Plaintiff admitted at his deposition that he had no proof that anyone has intentionally focused on him or Carneys with regard to the

enforcement of the noise ordinance or *al fresco* dining. Id. (Carney Deposition) at Page 136, Line 20 to Page 137, Line 13. Plaintiff testified his ex-wife appeared before the Cape May Historic Commission in an effort to open up their frontage to allow open air dining but that this application was denied. Id. (Carney Deposition) at Page 24, Lines 12 to Page 25, Line 8.

To the extent this application was denied, Plaintiffs did not file any matter of prerogative writ appealing such denial. Id. at Page 129, Lines 7-16. In the course of discovery, defendants provided Plaintiffs land use records, some dating back to the 1960's, pertaining to the properties upon which Carney's now operates and it could not identify any Cape May Historic Commission resolution denying any application made on behalf of Carney's as was referenced in Mr. Carney's deposition; there was a 2012 application brought by plaintiff's ex-wife wherein Carney's requested the conversion of two (2) bay windows to two (2) doors to allow open frontage, but that application was tabled, not denied, so that Carney's could bring additional information to the Commission. See Minutes of Historic Commission attached hereto as Exhibit U.

Plaintiffs have the opportunity to place open air dining on his property, on their upper floors, but Mr. Carney does not believe that customers want to go upstairs. See Exhibit F, Carney Deposition, at Page 23, Line 15 to Page 24, Line 11. Plaintiffs have submitted an expert report of their accountant of twenty-five (25) years claiming a loss of three million dollars due to their inability to provide an "outdoor or al fresco dining experience as well as being

unable to provide a live band and/or music to accompany the patrons out of fear that defendants would cite and/or shut down Carney's." See April 12, 2017 Balles Report attached hereto as Exhibit V.

OPPOSITION

In opposition, Plaintiff, Joseph P. Carney and Carney's, Inc. ("Plaintiff,") submits the following.

Plaintiff incorporates its Responding Statement of Material Facts as well as the Additional Statement of Material Facts herein.

Plaintiff's complaint alleges a violation of the New Jersey Civil Rights Act in Counts One and Two. In Count One, plaintiff maintains that its right of substantive due process was violated by the City's mandatory closure of Carney's Bar on September 14, 2014. (Plaintiff's complaint, Exhibit A hereto, p2). Specifically, plaintiff averred:

> 8. At approximately 1:35 a.m., defendant Mahanney, in his official capacity as mayor, arrived at Carney's Inc. and maliciously interfered with plaintiff's privileged secured by the plenary retail license no. 0502-32-01-005 by ordering plaintiff to close his business immediately, approximately one and a half hours before the established time of closure. ...

(Exhibit A, ¶8, p2).

Within Count One plaintiff also identifies specific actions and conduct of the mayor and city manager at a council meeting on June 30, 2015 with regard to conditions being proposed on the plaintiff's liquor license. Plaintiff averred that although the city manager as well as the mayor knew the truth, they and the city council:

. . . purposely inflated the numbers of "calls for service" at plaintiff's establishment in an attempt to subject plaintiff to an early closure resolution. Of the 76 "calls for service", only 16 incidents actually involved Carney, Inc. (Exhibit A, ¶14, p3).

Nonetheless, on June 30, 2015 all of it was broadcast at a public meeting, specifically 76 calls for service as well as a sexual assault that allegedly occurred on the premises at Carney's. (Exhibit A, ¶17, p4).

As a result of Count 1, plaintiff summarized the violation being alleged as follows:

18. As a result of the September 14, 2014 mayor's unlawful order to close plaintiff's establishment prior to the 3:00 a.m. closing time and the publication of the false information regarding plaintiff's establishment at the June 30, 2015 council meeting, plaintiff suffered a tarnished reputation and a loss of revenue as approximately 250 patrons were mandated to untimely exit the premises.

(Exhibit A, ¶18, p4).

Count Two of plaintiff's complaint alleges a violation of equal protection. The essence of plaintiff's complaint is that for a period of over three decades the law in Cape May city prohibited any bar or restaurant from opening its doors and windows and permitting live entertainment or amplified music to escape. Plaintiff maintains that he strictly complied with the ordinance and complained to the City about the rampant violation of that ordinance by all other bars and restaurant[s] surrounding him. Plaintiff further maintains that notorious and conspicuous violations of the ordinance were accepted, authorized and sanctioned policy and practice of the city proximately causing the plaintiff damages.

In Count One of his complaint, plaintiff Carney asserts a violation of the New Jersey Civil Rights Act:

> c. Any person who has been deprived of any substantive due process or equal protection of rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of state law, may bring a civil action for damages and for injunctive or other appropriate relief. . . .

N.J.S.A. 10:6-2(c).

Carney's right to substantive due process is well engrained in our state constitution:

> The principle of substantive due process, founded in the federal constitution . . . and our state constitution, NJ Const., art. 1, §1 protects individuals from the "arbitrary exercise of the powers of the government" and "governmental power being used for the purposes of oppression." . . . However, the constitutional guarantee "does not protect all individuals from all governmental actions that infringe liberty or injury property in violation of some law" . . . Rather, substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that "shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity". . . .
> Correspondingly, if the challenged governmental restriction is seen to have a relation to a proper legislative purpose, and is "neither arbitrary nor discriminatory, the requirements of substantive due process are satisfied, and judicial determination to that effect renders the Court *functus officio*".

Felicioni v. Admin. Office of the Courts, 404 N.J. Super. 382, 392 (App. Div. 2008).

As such, in determining whether plaintiff has a claimed right entitled to protection as a matter of substantive due process:

> . . . A court looks to the traditions and collective conscience of our citizenry to determine whether a principle is so rooted there as to be ranked fundamental . . . Ibid., 404 N.J. Super. at 393. Plaintiff must establish (1) the existence of a right or interest of special or fundamental significance before restrictions on governmental choice will be imposed; (2) plaintiff must then establish either that the means chosen unduly interfere with the special right or interest so as to render invalid the contemplated reach of governmental action, . . . or that there is an effective lack of rational relationship between the means chose[n] and the end to be achieved.

Felicioni, ibid., 404 N.J. Super. at 393.

Defendant admits that plaintiff held a retail plenary liquor license pursuant to the New Jersey Alcoholic Beverage Act. Pursuant to state law, plaintiff's liquor establishment cannot be closed by mayoral edict or by police for an alleged violation of the Alcohol Beverage Code. Instead, the plaintiff's right of charges, discovery and hearing have been vouched safe by legislative command since 1955:

> No suspension or revocation of any license shall be made until a 5-day notice of the charges preferred against the licensee shall have been given to him personally or by mailing the same by registered mail addressed to him at the licensed premises and a reasonable opportunity to be heard thereon afforded to him. . . .

N.J.S.A. 33:1-31; see also Drozdowski v. Mayor & Borough Council of Sayerville, 133 N.J.L. 536 (1946); State v. City of Rahway, 58 N.J.L. 578 (1896).

While a liquor license is not a "property right", The Boss Company, Inc. v. Board of Commissioners of Atlantic City, 40 N.J. 379, 387 (1963), it is a "privilege" protected against arbitrary governmental action:

> A liquor license in New Jersey vests a personal right in the licensee to conduct a business otherwise illegal. As such, it is merely a temporary permit or privilege . . . But once granted, it is protected against arbitrary revocation, suspension or refusal to renew . . .
> This license has value – not merely the personal value to the licensee that inheres in the right to engage in the business of selling intoxicated liquors, but also the monetary value that arises from the power possessed by the licensee . . .

Ibid., 40 N.J. at 384.

As such, plaintiff's liquor license creates and vests in the plaintiff a right of substantive due process in his enjoyment of that "privilege" as protected by the New Jersey Civil Rights Act: "c. Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities . . . ." N.J.S.A. 10:6-2(c).

While defendant attempts to excerpt those parts of the plaintiff's testimony wherein he admits to shaking the mayor's hand, and therefore seeks to establish that there was an "agreement" as to closure of Carney's, the truth is the converse. As excerpted in plaintiff's Responding Statement of Material Fact, the mayor ordered Carney's to close and that is what Sgt. Lashley heard as he stood next to the mayor and Joseph Carney. Carney's testimony about closing out of "respect" was the plaintiff's expression of simply following the mandate of the law he was being told controlled the circumstance. The question as to whether Carney's was ordered closed by

mayoral fiat, or by the mayor's directive in support police officers in attendance, is a material and disputed fact.

There is, however, no dispute that the illegal, arbitrary and mandatory direction that plaintiff close his establishment could be anything other than that type of "arbitrary exercise of the powers of the government . . . used for the purpose of oppression". Defendants admit that mayor had no lawful authority nor did the police department. The order of the mayor was conduct undertaken by color of state law and was an unauthorized egregious abuse of governmental power. Where such arbitrary governmental occupation of a private establishment is either "arbitrary or discriminatory, the requirements of substantive due process" are violated. Felicioni, Supra, 404 N.J. Super. at 392.

Plaintiff respectfully submits that mandatory closure of a licensed liquor establishment closed by the unilateral and verbal order of a mayor, admittedly without legal authority and in violation of established state law, is the precise type of egregious governmental abuse that shocks both the conscience and any judicial notice of fairness.

As aforenoted [sic], plaintiff's complaint contains only two counts, Defendants argue that plaintiff has asserted an independent claim under the Civil Rights Act for loss of reputation and imposition of special conditions. Plaintiff makes no such independent claim.

Instead, as set forth in plaintiff's complaint Count One, plaintiff suffered a violation of substantive due process by the arbitrary closure of his

establishment, because that constitutes arbitrary and egregious governmental abuse, depriving him of the privilege secured by and vouched safe by the constitution and laws of the State of New Jersey. Plaintiff likewise pled those facts which demonstrate and will convince any reasonable jury that the intent of the defendant was specific and targeted at the plaintiff. Specifically, defendant knew at all times that there were not 78 calls for service at Carney's and knew, further that there was never a sexual assault perpetrated on the property of Carney's. Even with knowledge of the falsity of those accusations and claims, that is what the defendant broadcasted to the public at a meeting on June 30, 2015. There is no dispute that in fact the sexual assault accusation was "unfounded" and never even resulted in the filing of a criminal complaint. Likewise undisputed is the fact that there were never 78 calls for police service or assistance at Carney's and there were instead a mere 16, all of which was known by the defendant.

The assertions within Count One of plaintiff's complaint simply provide the factual predicate upon which intentional action can be found by a petit jury. Defendants had from November 14, 2014 to June 30, 2015 to review and conclude that there was never 78 calls for service and never a sexual assault perpetrated at Carney's Restaurant and Bar. Even after specific review of approximately seven months, the defendants published a purported "fact" that plaintiff's establishment was exhausting police department resources given an outrageous number of 78 police responses and

that the establishment was dangerous, by virtue of a sexual assault occurring thereon.

In sum, Count One of plaintiff's complain remains as it was pled: a violation to the plaintiff's rights of substantive due process within a factual context which establishes the nature and extent of governmental action as an egregious abuse of the plaintiff's civil rights and a shocking affront to our fundamental concepts of due process as well as plaintiff's statutory right to operate his business and secure income without arbitrary and capricious governmental closure.

Plaintiff Joseph Carney has operated a bar and restaurant his entire adult life. Plaintiff has testified that at all times during the operation of Carney's applicable to his complaint, there was in existence a local ordinance that prohibited him from opening his doors and windows and allowing live or amplified music to escape into the public zone. Plaintiff maintains that he followed the law and further maintains that all other establishments, those directly next door to him or down the block from him, routinely and regularly open their doors and windows, allowing both live and amplified music to escape into the public zone. He knows from personal experience after a lifetime of bar and restaurant operation that depriving him of the same right and privilege as all other surrounding competitive properties has caused him substantial economic harm. Plaintiff has testified that on any given day or night of operation, he sees police officers outside of the establishment next door, namely Cabanas, contemporaneously observes door[s] and windows

open with their live music and amplified music filling the public space. He then consistently observes the same conditions at all other establishments but his. Plaintiff complain[s] about the disparate treatment and is ignored for years. Once plaintiff files his complaint however, the solicitor agrees and defendant confesses that they must "level the playing field". Regardless of whether the City's records establish only two written warnings of the noise ordinance against plaintiff, he testifies that the number of times he has been ordered to close his doors is incalculable. Significantly, the police directive to close his doors is contemporaneous with his competitors' unfettered right to fill the public air with live and amplified music. Plaintiff factually presents the epitome of arbitrarily singling him out from all other similarly situated establishments:

> . . . An equal protection violation does not exist in the absence of disparate treatment of persons who are or ought to be considered to be members of the same class. Gregory v. Ashcroft, 501 U.S. 452, 470-473, 111 S.Ct. 2395, 2406-08, 115 L.Ed. 2d 410, 430-32 (1991); Brady v. New Jersey Redist. Comm'n, 131 N.J. 594, 610-11 (1992). . . .

Felicioni, Supra., 404 N.J. Super. at 397.

Notwithstanding the undisputed differential treatment, defendant maintains that conditions on plaintiff's license are similar to those of other establishments, that its records show only two warnings issued to the plaintiff for noise complains, and that plaintiff could offer no proof of any "intentional discrimination against him and his business". (Defendant's brief, p13).

Plaintiff's understanding of what constitutes "proof" creates a question of material fact. After deposing the plaintiff for 135 pages, counsel asked the following question:

> Q. . . . Do you have any proof, information that would allow someone to come to the conclusion that this was done intentionally to harm Carney's, that this was - -
> A. Intentionally to harm Carney's. I don't have proof to that - -
> Witness: But I make it really - -
> It's hard to understand when you pick up every publication that says there is live entertainment at Cabanas from 5 to 9, at happy hour, and the doors and windows are open and it's advertised.
> And the police sit out front of our establishments. That's where they hang.

(Exhibit F, 136:3).

It is plain and clear that plaintiff Carney was being asked for proof of intention after he had already provided via his testimony all the "proof" he had. There is no smoking gun. There is instead specialized, focused and targeted enforcement on Carney's because of what the defendant declared to be a trouble spot. That declaration was premised upon the false accusation that police responded over 78 times to Carney's for everything from disorderly conduct to sexual assault. Moreover, a mayor that personally arrived at the plaintiff's establishment at 1:30 in the morning and directs him to close down his business because a fight had occurred inside. Even Sgt. Lashley of the Cape May City Police Department confirmed that never in the history of the department had any mayor ordered the closure of any bar or restaurant at any time.

Q. Had it ever occurred in the course of your performance, duty, in the City of Cape May where you, as a responding officer, closed down a bar because there had been an assault inside?

A. No sir.

Q. Have you ever heard of an instance in the City of Cape May where that happened?

A. Not to my knowledge.

(Exhibit A to Plaintiff's Responding Statement of Material Facts, 48:3)[.]

The mayor knew directly from Sgt. Lashley that he had no authority to close Carney's (Ibid., 46:13). Nonetheless, plaintiff is ordered to close his establishment. Here, plaintiff asserts and can prove that the City's noise ordinance was a vehicle utilized by the defendant to target the plaintiff by mandating closure of his doors and windows by regular police patrol and directives. Contemporaneously with that consistent enforcement against the plaintiff, officers could literally hear the music emanating from the establishment next door from where they stood at Carney's front door. An ordinance that has as a purpose to prevent the escape of live or amplified music, wholly ignored to the benefit of all surrounding establishments to the plaintiff's, serves no rational basis whatsoever. Plaintiff can therefore not only prove the disparate treatment, he can prove those facts and circumstances previously recounted which demonstrate the defendant's focus, declarations and presence at his establishment for the purpose of enforcement without a scintilla of like effort or enforcement on all of those

similarly situated to the plaintiff. Plaintiff therefore establishes material and disputed issues of fact for a petit jury that can be reached by that petit jury on the circumstantial evidence proffered by the plaintiff.

REPLY

In reply, Defendants – Mayor Edward Mahanney, Jr., and The City of Cape May ("Defendants") – first deny all seven (7) of Plaintiffs' Additional Statement of Material Facts. Then, Defendants submit the following:

Plaintiff's presentation of the facts supporting his case is muddled and confused. As is argued by Defendants in their moving brief, Plaintiffs cannot present any matter of claim, arising under any theory of procedural due process, substantive property rights deprivation or equal protection because Carneys accepted the conditions placed on their license and did not appeal them as was their right to do so.

Defendants assert that the focus on Plaintiff's claim must be on the "closure" of Carney's on or about September 14, 2013. Plaintiff's allegations as to the Mayor's alleged assertion of power are "illogical" because if the Mayor forced Carney's to shut down, why was the Mayor willing to not contact the ABC? See Exhibit "F", p. 109, lines 4-13; Exhibit "C", p. 53, lines 3-25.

Defendants then state that a license to sell liquor is not a contract or a property right, but a temporary permit or privilege to pursue an occupation that is otherwise illegal. Mazza v. Cavicchia, 15 N.J. 498, 505 (1954). Once a liquor license is granted, it is protected against arbitrary revocation,

suspension, or refusal to renew. The Boss Co. v. Bd. of Comm'rs of Atl. City, 40 N.J. 379, 384 (1963). For most purposes, New Jersey law does not regard liquor licenses as property. In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 199, 1 A.3d. 747 (App. Div. 2010). To revoke these temporary permits, the liquor board must afford the permit holder procedural due process. Boss, supra, 40 N.J. at 384.

Defendants contend that while a liquor license affords its holder some procedural protections, it does not constitute a substantive right that would be protected by the Civil Rights Act. Bayview-Lofberg's, Inc. v. Milwaukee, 905 F.2d 142, 146 (7th Cir. 1990) (holding that denial of liquor license did not violate Section 1983). The license holder is entitled to claim certain equities that an applicant for a new license cannot. Common Council of Hightstown v. Hedy's Bar, 86 N.J. Super. 561, 565 (App. Div. 1965). The business of selling alcohol is a business attended with danger to the community, and so a license to sell liquor may be revoked, denied, or coupled with conditions in the public interest. See Mazza v. Cavicchia, 15 N.J. 498, 505, 105 A.2d 545 (1954).

The local issuing authority has the primary responsibility of enforcing alcoholic-beverage-control laws. Lyons Farms Tavern v. Mun. Bd. of Alcoholic Beverage Control of Newark, 55 N.J. 292 (1970). The local issuing authority has wide discretion in performing this responsibility, and should use the public interest as its principle guide. Lubliner v. Bd. of Alcoholic Beverage Control, 33 N.J. 428, 466 (1960). A licensee is responsible for keeping its business and its patronage under control. D & Z Realty v. City of Asbury

Park, 96 N.J.A.R.2d (ABC) 41, 48. A licensee is also responsible for conditions outside the licensed premises that are caused by its patrons; if the licensee fails to take active steps in preventing municipal, regulatory, and statutory violations by its patrons, those violations are, in effect, imputed to the licensee. See, e.g., Div. of Alcoholic Beverage Control v. H & H Wine and Spirit Shop, Inc., 11 N.J.A.R. 478, 483 (Div. of Alcoholic Beverage Control 1986), aff'd, 216 N.J. Super. 532 (App. Div. 1987).

Defendants then contend that on the evening of September 14, 2014, Plaintiff could not keep his own employee under control, let alone bar patrons charged with criminal conduct, for whom he was also responsible to maintain control. Plaintiff admitted in his deposition that a gentleman was "hurt fairly severely." These defendants do not concede that they "shut down" the bar, nor do they concede that there is a substantive due process right in play here. The Defendants repeat that the power of the local issuing authority is extensive to regulate activity which is "attended with danger to the community" and otherwise illegal. In this regulatory context, it is difficult to apprehend how the Mayor's advocacy to shut down the bar, even if considered manipulative or coercive, can be considered outrageous. For there to be a violation under the N.J. CRA, there needs to be evidence that there is an "egregious" governmental action that "shocks the conscience." Rivkin v. Dover Township Rent Leveling Board, 143 N.J. 352, 366, 671 A.2d. 567 (1996). Negotiating an agreement to close down a bar under these circumstances does not rise to the level of "egregious," according to Defendants.

Defendants then contend that Plaintiff's arguments, as to labeling the criminal sexual conduct which was alleged to have occurred on his property as "unfounded" is entirely without merit. First, Plaintiff was afforded due process to challenge the data upon which the governing body relied to evaluate conditions at Carney's in the year prior to renewal. Second, simply because the woman alleging declined to prosecute did not mean there was not a "call" to the police for assistance to investigate her allegations that a drunk, off-duty employee held the woman and pressed his naked genitals against her. These were not "unfounded" allegations, and "frankly" remain open for prosecution. This is another instance of Carney's failing to maintain control over its employees and patrons. The governing body, acting on data provided to them, rendered a decision to impose additional conditions on Plaintiff's license. These conditions were agreed to and not challenged by Plaintiff in any manner.

Plaintiff's equal protection/selective enforcement claim is premised upon a record where there is no summons, let alone convictions, against him for noise violations. Plaintiff was found guilty of having an illegal sign in front of his bar. When Plaintiff argues another bar was permitted to have a sign, he fails to discuss whether this other establishment had the requisite approval to have the sign.

In a recent Third Circuit Court of Appeals Decision, the Third Circuit held:

> In a class of one claim, a plaintiff must establish that: "(1) the defendant[s] treated him differently from others similarly situated; (2) the defendant[s] did so intentionally, and [3] there was no rational basis for the difference in treatment." The Seventh Circuit has held that to survive summary judgment, a plaintiff must point to evidence showing that an officer who unequally enforces the law is "motivated by personal animus unrelated to official duties[,]" i.e., for no reason other than malice. The District Court correctly determined that Thomas had failed to identify record evidence creating a genuine issue of material fact as to intentional, different treatment. Even assuming that Flyte was similarly situated, both she and Thomas were cited on occasion, and in general, the incident reports showed that the Bushkill police officers talked to both parties, took reports from both parties, and did not issue citations without good cause.

Thomas v. Coopersmith, 663 Fed. Appx. 120 *; 2016 U.S. App. LEXIS 18379, 4-5; 2016 WL 5929640 (attached) (internal citations omitted).

Defendants then contend that Plaintiff has failed to articulate why Carney's is being intentionally differentiated from other bars. Plaintiff would have this Court infer malice from the issuance of warnings themselves, but more proof is required. Plaintiff cannot attribute malice to Eric Lashley who not only testified that he had never singled Carney's out, but that he had also enforced the ordinance against other establishments. Lashley's testimony is corroborated by the documentary record set forth before the Court. Plaintiff's claim of differential treatment based on malice or improper animus is completely belied by the former Mayor's uncontradicted testimony that, when resuming office, he advocated for and saw adopted an ordinance limiting when music could be played outdoors. Plaintiff's claim of malice is also undermined by the City's forming of a commission to evaluate indoor and

outdoor facilities and how to better "level the playing field." Forming the commission is not evidence of malice but rather is evidence that the City of Cape May sought to create a level playing field. Defendants also argue that Plaintiff has failed to establish any link between the allegedly malicious Mayor and the actions of those who would enforce the noise ordinance. Instead, Plaintiff wholly relies upon Eric Lashley's testimony and there is no testimony to establish any such link.

The Thomas Court ultimately found that plaintiff Thomas had no selective enforcement claim because there was no evidence of a discriminatory purpose in enforcing a noise ordinance against him: "Even if he had shown that others were treated differently, he has not pointed to record evidence to support his contention that he was treated differently from Flyte for a discriminatory purpose." Thomas v. Coopersmith, 663 Fed. Appx. 120 *; 2016 U.S. App. LEXIS 18379, 4-5; 2016 WL 5929640 (attached) (internal citations omitted).

Defendants then argue that Plaintiff's affidavit does not prove that the police, when enforcing the noise ordinance against him, actually did so for any discriminatory purpose. To the contrary, Plaintiff states clearly: "I don't have any proof of anyone [that] did anything intentional to harm Carney[']s ..." Without such proof, the Plaintiff cannot sustain a claim.

Defendants then state that Plaintiff, as the owner of Carney's, is "struggling" to compete against other establishments which have grown to establish outdoor seating and entertainment. On this record, through no

apparent fault of the City of Cape May, Carney's has not adapted to this "new competitive reality." Plaintiff's expert focuses upon the lack of *al fresco* dining as to why there are damages but offers no other proof of damages related to Plaintiff's selective enforcement claim. The City of Cape May did not invent *al fresco* dining and entertainment so as to compete with Carney's. Carney's having a liquor or mercantile license does not mean it is entitled to a competition-free environment. It would appear to be reasonable for the City of Cape May, "imbued with a history of being a tourist destination since Colonial times," to permit drinking and eating establishments to have open air and visual access to the ocean. That some establishments may be more attractive to tourists than others is beyond the City's control. There is no evidence that the City of Cape May has intentionally targeted Carney's for any discriminatory or malicious purpose on the record. As such, Plaintiff's equal protection/selective enforcement claims must fail.

Therefore, Defendants respectfully request this Court grant their motion for summary judgment.

DISCUSSION

Defendants – Mayor Edward Mahanney, Jr., and The City of Cape May ("Defendants") – are entitled to summary judgment.

R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith 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. An 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.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid. (internal citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid. (internal citations omitted); see also Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (requiring opposition to a motion for summary judgment to have "competent evidential material beyond mere speculation and fanciful arguments").

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be

> taken or discovery to be had, or may make such order as may be appropriate.

See also Brill, 142 N.J. at 529 (holding that the burden shifts to the non-movant to "come forward with evidence that creates a genuine issue as to any material fact challenged" after the movant has provided sufficient evidence for summary judgment). In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: '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.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

A motion for summary judgment should be denied if there exists credibility issues that should be decided by a jury. "Obviously, the motion for summary judgment should be denied when determination of material disputed facts depends primarily on credibility evaluations or when the

existence of a genuine issue of material fact appears from the discovery materials or from the pleadings and affidavits on the motion." R. 4:46-2[2.3.2]; Parks v. Rogers, 176 N.J. 491, 502 (2003); Gilborges v. Wallace, 153 N.J. Super. 121 (App. Div. 1977), aff'd in part and rev'd in part 78 N.J. 342 (1978).

A motion for summary judgment is inappropriate prior to the completion of discovery. See Lederman v. Prudential Life Ins., 358 N.J. Super. 324, 337 (App. Div.), certif. denied, 188 N.J. 353 (2006); Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) ("Ordinarily summary judgment dismissing the complaint should not be granted until the plaintiff has had a reasonable opportunity for discovery."). Also, summary judgment is inappropriate when "critical facts are peculiarly within the defendants' knowledge." Valentzas v. Colgate-Palmolive Co., 74 N.J. 189, 193 (1988), citing Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981). However, summary judgment may still be granted if, as a matter of law, further discovery will not rescue and maintain the action. The Appellate Division in Auster, 153 N.J. Super. at 56, held:

> Plaintiff has an obligation to demonstrate to some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action. Here, there was no attempt by plaintiffs to avail themselves of the opportunity to engage in discovery until after the Complaint was in jeopardy of being dismissed and they have failed and continue to fail to demonstrate how further discovery might rescue it.

See also Tisby v. Camden County Corr. Facility, 448 N.J. Super. 241, 247 (App. Div. 2017) (requiring the party objecting to a motion for summary judgment as premature only if the party can "demonstrate with some particularity [that] the likelihood of further discovery will supply the missing elements of the cause of action").

However, the non-moving party must show that the nature of the discovery and its materiality are issues at hand. See Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012). It is well-settled that bare conclusions in a Complaint without factual support will not defeat a motion for summary judgment. Miller v. Bank of Am. Home Loan, 439 N.J. Super. 540, 551 (App. Div. 2015), certif. denied, 221 N.J. 567 (2015); see also Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (holding that a party opposing summary judgment must do more than simply show that there is some "metaphysical doubt" as to the material facts).

Similarly, self-serving assertions, unsupported by documentary proof, are "insufficient to create a genuine issue of material fact." Globe Motor Co. v. Igdalev, 436 N.J. Super. 594, 603 (App. Div. 2014); Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013); Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002); Blair v. Scott Specialty Gases, 283 F.3d 595, 607 (3d Cir. 2002). Furthermore, a party may not "create" an issue of fact for trial by creating illusory or fanciful arguments or sham facts and then

rely on such facts or arguments. See Shelcusky v. Garjulio, 172 N.J. 185, 201 (2002) ("Sham facts should not subject a defendant to the burden of a trial.").

With respect to Defendants' motion, Defendants are entitled to summary judgment because, despite Plaintiff's opposition, no genuine issues as to material facts exist, as to any substantiated legal claim and accordingly, Defendants are granted judgment as a matter of law. R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith 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. An 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).

As thoroughly laid out in Defendants' Statement of Undisputed Material Facts, no material facts exist that are relevant to Plaintiffs' causes of action in this matter. Specifically, in Count One of Plaintiffs' First Amended Complaint, Plaintiffs allege a violation of the New Jersey Civil Rights Act, claiming that they "suffered a tarnished reputation and a loss of revenue as approximately 250 patrons were mandated to untimely exit the premises." See Defendants' Ex. "A", Plaintiffs' First Amended Complaint, p. 4, ¶18. Within this count, Plaintiffs detail that an alleged "sexual assault" that Plaintiffs claim did not occur on their premises, as well as the 78 "calls

for service" became published information to a "full auditorium of spectators" at a Cape May City Council meeting on June 30, 2015. See Id., p. 4, ¶¶16-18. As evident through Defendants' Exhibits B, C, D, and E, many police reports involving altercations at Carneys have occurred. See Defendants' Exhibits "B", "C", "D", "E", "P".

Given the above-mentioned evidence refuting Plaintiffs' allegations that the Defendants violated the New Jersey Civil Rights Act, summary judgment is appropriate as to this first count of Plaintiffs' Amended Complaint. Pursuant to the Civil Rights Act, "c. Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States . . . [or] of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief." 2004 N.J. A.N. 2073(c). Plaintiffs have failed to present sufficient evidence to show that the use of his liquor license has been impaired through discriminatory actions depriving him of his substantive due process or equal protection rights.

Additionally, Plaintiffs have failed to meet the high burden needed to sustain a cause of action under the New Jersey Civil Rights Act. For there to be a violation under the N.J. Civil Rights Act, there needs to be evidence that there is an "egregious" governmental action that "shocks the conscience."

Rivkin v. Dover Township Rent Leveling Board, 143 N.J. 352, 366, 671 A.2d. 567 (1996). Plaintiff has failed to present evidence beyond the negotiation with the former Mayor to close down the bar. Such a negotiation, considering the surrounding circumstances of frequent police calls and allegations of criminal conduct, does not rise to the level of "egregious" conduct. Further, this Court is unsure how Plaintiffs can boldly deny that a sexual assault occurred on its premises when their Amended Complaint references multiple filed complaints and investigative reports regarding this alleged sexual assault. See Defendants' Exhibits "M", "N"; see also Exhibit "O" at Page 74, Line 8 to Page 75, Line 8 (wherein Former Chief Sheehan testified at his deposition that this incident involved criminal sexual conduct and a sexual assault offense).

In Count Two of Plaintiffs' Complaint, Plaintiffs claim they received "disparate and unequal treatment" from Defendants; however, the undisputed facts show Plaintiffs do not have sufficient evidence to survive this motion for summary judgment as to this count. See Defendants' Exhibit "A", Plaintiffs' Amended Complaint, p. 5, ¶21.

While New Jersey state courts have infrequently addressed disparate and unequal treatment claims, the United States Court of Appeals for the Third Circuit set forth the standard for a plaintiff to succeed to show they received "disparate and unequal treatment." To succeed on such a claim, the "plaintiff must establish that: '(1) the defendant[s] treated him differently from others similarly situated, (2) the defendant[s] did so intentionally, and

(3) there was no rational basis for the difference in treatment.'" Thomas v. Coopersmith, 663 Fed. Appx. 120, 123, 2016 U.S. App. LEXIS 18379, *4-5, 2016 WL 5929640 (internal citations omitted); cited by Purvis v. City of Newark, 2017.

Plaintiffs fail to present evidence to even satisfy the first prong, let alone to satisfy all three prongs. Id. While Defendants' Statement of Material Facts is filled with various supported reasons why Plaintiffs were not treated differently by Defendants as compared to other Cape May establishments, what is most persuasive to this Court is the abundance of quotes from Plaintiff Carney that show he was not treated unequally. Specifically, during his deposition, Plaintiff Carney admitted that he was aware of this Outdoor Seating Committee in February of 2015 regarding Cape May bars and restaurants but chose not to attend this meeting. See Defendants' Exhibit "F", 123:6-125:16. Plaintiff Carney also admitted that he did not have proof that anyone intentionally focused on him or Carney's with regard to the enforcement of the noise ordinance (applicable to *all* Cape May establishments such as Carney's) or *al fresco* dining. Id. at 126:20 – 137:13. What is even more telling is that despite the June 2015 hearing - wherein the City of Cape May imposed special conditions on Carney's liquor license – Plaintiff Carney did not appeal the result of the hearing. See Defendants' Brief in Support of their Motion for Summary Judgment, p. 11. Therefore, while finding all legitimate inferences in favor of Plaintiffs, Count Two of the Amended Complaint also cannot withstand this motion for summary

judgment. No genuine dispute as to any material fact exists, and as such, Defendants are entitled to judgment as a matter of law. R. 4:46-2[2.3.2].

Therefore, this Court, resolving all legitimate inferences in favor of the Plaintiffs here, finds that, in reviewing Defendants' Statement of Material Facts and Plaintiffs' Opposition, Defendants are entitled to judgment as a matter of law. Thus, summary judgment is appropriate as to both Counts of Plaintiffs' Amended Complaint and, as such, shall be granted in this case.

CONCLUSION

The motion is opposed.

Defendants' – Mayor Edward Mahanney, Jr. and the City of Cape May – motion for summary judgment is granted.

The Plaintiffs' – Joseph P. Carney and Carney's, Inc. – Complaint is hereby dismissed with prejudice.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

January 2, 2019

J. Christopher Gibson, J.S.C.