

A. Michael Barker, Esquire
Attorney ID#009511976
Barker, Gelfand & James
A PROFESSIONAL CORPORATION
Linwood Greene - Suite 12
210 New Road
Linwood, New Jersey 08221
(609) 601-8677
AMBarker@BarkerLawFirm.net
Our File Number: 47620-143
Attorney for Defendant, Borough of Longport

FILED

JAN 19 2016

NOAH BRONKESH, J.S.C.

MARK HYMAN,

Plaintiff,

v.

YELENA MELNICHENKO,
VITALY MELNICHENKO,
NATALIA KOLYADA,
BOROUGH OF LONGPORT,
JAMES BRENNENSTUHL,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ATLANTIC COUNTY
DOCKET NO. ATL-L-1603-14

Civil Action


ORDER

THIS MATTER having been brought before the Court by A. Michael Barker, Esquire, of the Law Offices of Barker, Gelfand & James, attorneys for Defendant, Borough of Longport, for an Order granting summary judgment in favor of the Defendant Borough of Longport; and, the Court having reviewed the moving papers submitted by counsel and any opposition filed thereto; and, good cause having been shown; ~~For the reasons stated in the Memorandum of Decision~~

It is on this 19 day of January 2016,

ORDERED and ADJUDGED that summary judgment be and hereby is **GRANTED** in favor of the Defendant, Borough of Longport.

It is FURTHER ORDERED and ADJUDGED that a copy of this Order shall be served upon all counsel within ten (10) days of receipt hereof.



J.S.C.

NOAH BRONKESH, J.S.C



SUPERIOR COURT OF NEW JERSEY
COUNTIES OF
ATLANTIC AND CAPE MAY

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON
OPINIONS**

Noah Bronkesh, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
(609) 594-3335

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

CASE: Hyman v Melnichenko
DOCKET #: ATL-L-1603-14
DATE:
MOTION: Motion for Summary Judgment

Nature of Motion and Procedural Background

The Defendant, Borough of Longport, moves the Court for Summary Judgment against Plaintiff. This is a case brought by Plaintiff Mark Hyman, a citizen and resident of the Borough of Longport, NJ, for First Amendment retaliation as a result of his having criticized the Longport police department publicly on the Harry Hurley radio talk show. The trial date is set for January 4, 2016 and the discovery end date was on November 30, 2015. Plaintiff filed the Complaint April 24, 2014. Three Counts from the original Complaint have been dismissed by the Court. The only remaining Count at this time from the Complaint is Plaintiff's Free Speech retaliation claim under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq. ("NJCRRA").

Defendant contends that Plaintiff's NJCRRA claim fails for several reasons. First, Plaintiff was not retaliated against in the form of an inadequate investigation. Second, Plaintiff has no evidence to show that even if there had been an inadequate investigation, the cause was due to

the criticisms Plaintiff voiced on the radio talk show. Furthermore, Defendant contends that Plaintiff cannot show that Longport maintains a policy or custom of retaliating against citizens who voice criticisms against Longport by failing to investigate their criminal complaints. For these reasons, Defendant argues that they are entitled to summary judgment. In support of their position, Defendant submits evidence of police reports documenting the procedures followed in the investigation of the burglary. Plaintiff opposes this motion.

Discussion

Motions for summary judgment are made pursuant to R. 4:46-1. A court should grant summary judgment when:

[T]he 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). This rule requires a court to “deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates “a genuine issue as to any material fact challenged.” Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). Further, “summary judgment should be denied where determination of material disputed facts depends primarily on credibility evaluations or where the existence of a genuine issue of material fact appears from the discovery materials or from the pleadings and affidavits on the motion.” See Comment 2.3.2 to R. 4:46-2; Parks v. Rogers, 176 N.J. 491, 502 (2003). All inferences of doubt are drawn against the movant in favor of the opponent of the motion. See Brill, 142 N.J. at 520.

The Plaintiff argues that the New Jersey Civil Rights Act, codified under N.J.S.A. 10:6-2, is modeled after 42 U.S.C. Sec 1983. Rezem Family Associates, LP v. Borough of Millstone, 423 N.J. Super. 103, 115 (App. Div. 2011). In Gormley v. Wood-El, 218 N.J. 72 (2014), the court reiterated that the NJCRA should be interpreted coextensively with its federal counterpart, Section 1983. Retaliation for the exercise of constitutionally protected rights “is itself a violation of rights secured by the Constitution actionable under Section 1983.” White v. Napoleon, 897 F.2d 103, 111-12 (3d Cir.1990); see also Allah v. Seiverling, 229 F.3d 200, (3d Cir.2000)(“Government actions, which standing alone do not violate the Constitution, may nonetheless by constitutional torts if motivated in substantial part by the desire to punish an individual for exercise of a Constitutional right.” The First Amendment was fashioned to secure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Accordingly, the Supreme Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of the First Amendment values, and is entitled to special protection. Retaliatory conduct is actionable if it intended to punish the Plaintiff for exercising his free speech rights and under the circumstances, it would be sufficient to deter a person of ordinary firmness from exercising his free speech rights. O’Connor v. City of Newark, 440 F.3d 125, 128 (3d Cir. 2006).

Plaintiff argues that there is sufficient evidence to establish a genuine issue of material fact with regard to the Plaintiff’s Free Speech retaliation claim under the New Jersey Civil Rights Act, NJSA 10:6-1. The Plaintiff certifies that he has personal experiences with Longport that stand in support of the Plaintiff’s claim for retaliatory harassment, including the fact that his ice cream vendor license was threatened if he did not stay off the radio, and the fact that Longport cut his daughter’s beach work hours without explanation. Plaintiff certifies that the

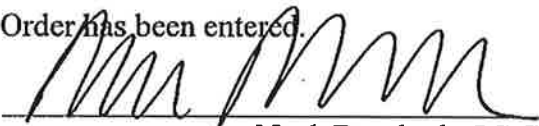
Longport police purposefully sabotaged and refused to provide any meaningful assistance to conduct a criminal investigation that would have led to the apprehension of the criminal suspects. Specifically, Plaintiff points out that the result of a prime suspect's polygraph exam was that deception was found at a probability of greater than ninety nine percent, and yet Longport chose to accept the suspect's denial of participation in the burglary. Plaintiff argues that he has set forth specific acts of potential retaliation, the culmination of which may lead a reasonable factfinder to infer that the acts were causally motivated by relations for Plaintiff's constitutionally protected speech. Plaintiff further contends that the questions of whether Longport acted adequately in conducting the police investigation, and the motivation behind the actions taken during the investigation are issues to be decided before a trier of fact.

This Court finds that there are no genuine issues of material fact when the facts are viewed in the light most favorable to the non-moving party. The record establishes that the investigation into Plaintiff's alleged burglary was proper, thorough and adequate. (Record 88-172). All leads were pursued and while suspects were found, there was not enough evidence to warrant the filing of criminal charges. The record shows the thorough effort made by the investigating officer in pursuing leads in the alleged burglary. Additionally, even if Plaintiff could show that the investigation was inadequate, the Plaintiff has not shown that the inadequate investigations was due to the criticisms voiced on the radio talk show.

In order to establish a First Amendment claim, a Plaintiff must prove (1) that he was engaged in a constitutionally protected activity; (2) that the government responded with retaliation, and (3) that the protected activity caused the retaliation." *Muhammad v. Abington Twp. Police Dept*, 37 F. Supp. 3d 746, 760 (E.D. Pa. 2014), citing *George v. Rehiel*, 738 F. 3d 562, 585 (3d Cir. 2013). Plaintiff cannot show that he was retaliated against by an inadequate

investigation because the investigation was proper and in compliance with Longport policies and procedures. Contrary to the Plaintiff's argument, the competent evidence on the records shows that the police properly investigated the alleged burglary. Among other listed procedures, the investigation included having police check the property to make sure the perpetrator was not still on the premises, securing the scene to protect evidence, interviewing the victim and any witnesses, dusting the scene for fingerprints, check with neighbors and surrounding residents for additional potential witnesses, documenting the actions, and taking whatever other actions officers deem necessary for the successful arrest and prosecution of the perpetrator. (Record p 194). The steps taken by the police are set forth in further detail in the police records and demonstrate that an adequate investigation was made. Moreover, "there is no statutory or common law right, much less a constitutional right, to an investigation." Mitchell v. McNeil, 487 F. 3d 374, 378 (6th Cir. 2007). As such, Plaintiff has not produced sufficient evidence of retaliatory conduct in the burglary investigation. Furthermore, Plaintiff has not produce adequate evidence to support his assertions of other instances of retaliation, and he has not set forth sufficient evidence that any inadequacy in the burglary investigation was due to statements Plaintiff made on the radio show. Finally, Plaintiff's NJCRA claim fails because Plaintiff cannot establish that he suffered any underlying constitutional violation by any Longport employee or agent, or that Longport maintained a custom or policy of retaliating against citizens for exercising their right to free speech. Kriss v. Fayette County, 504 Fed. Appx. 182, 187-88 (3d Cir. November 16, 2012); Wicks v. Lycoming County, 456 Fed. Appx. 112, 115-6 (3d Cir. January 5, 2012). "All harms, while they may chill free speech, are not actionable under the First Amendment retaliation jurisprudence" Colson v Grohm, 174 F. 3d 498, 512 (5th Cir. 1999). The cases cited by Plaintiff in his brief in large measure relates to employees of public entities that

have the right to impact a Plaintiff's continued employment. That is not the case here. For the foregoing reasons, this Court finds that when viewed in the light most favorable to the non-moving party, there are no questions of material fact that exist. Accordingly, the Defendant's summary judgment Motion is granted. An appropriate Order has been entered.



Noah Bronkesh, J.S.C.