SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4571-14T3

DENNIS KLEINER,

Plaintiff-Appellant,

v.

DON PURDY, TOWNSHIP OF GALLOWAY, DON PURDY, KEITH HARTMAN, Jointly, Severally, and In The Alternative,

Defendants-Respondents.

Submitted November 3, 2016 – Decided January 12, 2017

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-6479-13.

Weintraub & Marone, L.L.C., attorneys for appellant (Heidi R. Weintraub, of counsel and on the brief; Erica Domingo, on the brief).

Birchmeier & Powell, L.L.C., attorneys for respondents Township of Galloway and Don Purdy (Charles B. Austermuhl, on the brief).

Craig, Annin & Baxter, L.L.P., attorneys for respondent Keith Hartman (Robert A. Baxter, of counsel and on the brief).

PER CURIAM

Plaintiff, Dennis Kleiner, appeals from a July 25, 2014 order granting a motion to dismiss his claims against defendants, Galloway Township and Don Purdy. Plaintiff also appeals from an April 30, 2015 order granting defendant, Keith Hartman's, motion for summary judgment; denying plaintiff's motion for reconsideration and plaintiff's motion for leave to amend his complaint to restate his claim against defendants. We affirm.

Plaintiff was elected Galloway Township councilman in November 2009, and took his seat in January 2010. Defendants, Purdy and Hartman, were fellow council members. At a municipal organization meeting in January 2010, Hartman was selected to serve as mayor. Plaintiff alleges from the time he took office until the time he resigned in May 2012, he was subjected to personal attacks by Purdy and Hartman, as retaliation for political disputes. In his complaint, plaintiff details disputes over municipal appointments, political disagreements between himself and a municipal clerk, rumors accusing him of affairs and sexual harassment, as well as his belief that Purdy and Hartman lied to him regarding municipal business. Plaintiff asserts he resigned from his position as councilman as a result of the alleged retaliatory actions of defendants.

Specifically, plaintiff alleges Purdy and Hartman attempted to destroy his reputation by (1) spreading rumors that he sexually harassed the municipal clerk, (2) spreading rumors he had engaged in an affair with the sister of the municipal clerk, (3) falsely accusing him of physically threatening Hartman, and (4) falsely stating he was under criminal investigation for threatening Hartman.

Plaintiff filed a complaint asserting claims pursuant to the New Jersey Constitution and the New Jersey Civil Rights Act of 2004 (CRA), N.J.S.A. 10:6-1 to -2, against Purdy, Galloway Township, and Hartman on October 25, 2013. More specifically, plaintiff alleged "defendants . . . acting under color of the law, have deprived plaintiff of his substantive due process rights protected by the New Jersey Constitution, including the right to equal protection and the right to his good reputation." Purdy and the Township moved to dismiss for failure to state a claim on June 11, 2014. The trial judge dismissed plaintiff's complaint as to Purdy and Galloway Township with prejudice on July 25, 2014. Hartman filed a motion for summary judgment on August 6, 2014. Plaintiff cross-moved for reconsideration of the July 25 dismissal order, moved for leave to amend his complaint, and opposed Hartman's motion for summary judgment. The trial judge granted

Hartman's summary judgment motion and denied plaintiff's cross-motions on April 20, 2015. This appeal followed.

Plaintiff argues the trial court erred in granting Purdy's and the Township's motion to dismiss for failure to state a claim, pursuant to Rule 4:6-2(e). Initially, plaintiff alleged defendants' deprived him of his "substantive due process rights," which included his right to equal protection and the right to his good reputation. Abandoning on appeal the right to his good reputation, plaintiff now argues the language of his complaint, read liberally, elucidates a freedom of speech claim under the New Jersey Civil Rights Act. We disagree.

A motion to dismiss for failure to state a claim will be denied if, giving plaintiff the benefit of the allegations, a cause of action has been made out. R. 4:6-2(e); Burg v. State, 147 N.J. Super. 316, 319-20 (App. Div. 1977). The complaint must be searched "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." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). This court is not concerned with the weight, worth, nature or extent of the evidence when reviewing a motion to dismiss for failure to state a claim. Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). When

even a generous reading of the complaint reveals no basis for relief, dismissal is required. Camden Cty. Energy Recovery Assoc. v. N.J. Dep. of Envtl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd, 170 N.J. 246 (2001). This court applies the same standard in its review of the order, as the trial court uses when granting the motion. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002).

Plaintiff argues freedom of speech is a substantive due process right and, when generally interpreting his pleading, it includes freedom of speech by incorporation. The CRA allows:

> 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 any substantive rights, privileges or immunities secured by the Constitution or law 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.
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> [N.J.S.A. 10:6-2(c).]

To set forth a claim under the CRA, a plaintiff must (1) identify the state actor who has caused the alleged deprivation; and (2) identify the constitutional right, privilege, or immunity being deprived. Filgueiras v. Newark Pub. Schools, 426 N.J. Super.

449, 468 (App. Div.), certif. denied, 212 N.J. 460 (2012) (quoting Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 353, 363 (1996)). Plaintiff argues defendants deprived him of his substantive due process rights, which includes the right to equal protection and right to free speech. Specifically, plaintiff argues defendants' campaign of rumors was retaliation for plaintiff's opposition to several decisions made by the Town Council and the retaliation prevented him from engaging in protected activities, expressing opinions, and serving in public office.

Plaintiff asserts he was deprived of free speech rights because defendants' actions caused him to resign from his position. Even a liberal reading of plaintiff's complaint does not articulate a freedom of speech claim, specifically because a violation of plaintiff's free speech rights is not mentioned anywhere in the complaint. Even if a First Amendment claim could be gleaned from the complaint, the complaint was properly dismissed as plaintiff does not articulate a legal basis that would entitle him to relief. Federal courts addressing this question have required a plaintiff to demonstrate defendant intended to inhibit speech protected by the First Amendment in order to show a deprivation of a First Amendment Right, and that defendant's conduct had a chilling effect on protected speech. Tatro v. Kervin 41 F.3d 9, 18 (1st Cir. 1994). In order to establish a connection between the retaliation

alleged and the violation of his speech rights, plaintiff must show (1) engagement in constitutionally protected conduct; (2) an adverse action sufficient to deter a person of ordinary firmness; and (3) a causal link between the exercise of a constitutionally protected right and the adverse action. Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003) (citing Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001)). The focus in evaluating a claim of retaliation for exercising protected speech, "is upon whether a person of ordinary firmness would be chilled, rather than whether a particular plaintiff is chilled." Smith v. Plati, 258 F.3d 1167, 1177 (10th Cir. 2001) (emphasis in original). The weight given to this factor must be tailored to the circumstances. Dawes v. Walker, 239 F.3d 489, 493 (2d Cir. 2001).

Here, plaintiff was an elected official whose position subjected him to public scrutiny whether it be fair or unfair. Plaintiff asserts he resigned from his position because of adverse false publicity. However, another politician may not have resigned under the same circumstances. This court has never found First Amendment retaliation protection to extend to politicians who have been the target of negative comments and does not do so now. Such political disputes are best left to be resolved in voting booths, not courtrooms. Tenney v. Brandhove, 341 U.S. 367, 378, 71 S. Ct. 783, 789, 95 L. Ed. 2d 1019, 1027 (1951).

Additionally, plaintiff argues the trial judge committed reversible error by dismissing the complaint based upon his failure to comply with the requirements of the New Jersey Tort Claims Act, N.J.S.A. 59:1. Plaintiff argues he is seeking to bring a claim under CRA, not the New Jersey Tort Claims Act. Because the trial judge addressed the New Jersey Tort Claims Act to explain why allowing plaintiff to amend his complaint would be futile, the trial judge was not evaluating the claim under an incorrect standard.

Plaintiff also argues summary judgment for defendants was improper as the CRA/First Amendment claim was properly pled and not considered by the court, and comments made by the trial judge describing plaintiff as sensitive were fact findings and should have been left to the jury. As previously stated, plaintiff's CRA/First Amendment claim lacks merit; therefore, his argument fails. Plaintiff specifically takes issue with the trial judge who wrote, "[p]laintiff's complaints over his hurt feelings, damaged reputation and potential embarrassment fall far short of violation of his First Amendment rights. This court will not condone this pointless litigation over [p]laintiff's disappointments in the world of politics to linger any longer." "Appeals are taken from judgments, not opinions of the trial court," Price v. Hudson Heights Dev., LLC, 417 N.J. Super. 462,

467 (App. Div. 2011), and the trial judge's phrasing does not disturb the sound footing of his conclusions.

Plaintiff's remaining claims are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.