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December 29, 2016

VIA HAND DELIVERY

Hon. Gregg A. Padovano, J.S.C.
Superior Court of New Jersey
Bergen County Justice Center
10 Main Street, Chambers 335
Hackensack, New Jersey 07601

Re: Michael McMorrow v. James Tracy, BER-L-5013-16

Dear Judge Padovano:

We represent Defendant James Tracy in the above case. Please accept this letter brief in opposition to Plaintiff Michael McMorrow's motion to dismiss, along with a copy of Mr. Tracy's just-filed amended counterclaim and third party complaint.

The essence of Plaintiff's motion is that he cannot be liable for aiding and abetting a violation of the New Jersey Law Against Discrimination ("NJ LAD") without the principal violator being named as a defendant and that he cannot aid and abet his own violation of NJ LAD. Mr. Tracy's new pleadings have negated the motion. Mr. Tracy has amended his counterclaim to add retaliation in violation of

NJ LAD and the New Jersey Conscientious Employee Protection Act (“CEPA”) and violation of the New Jersey Civil Rights Act (“NJ CRA”). Contrary to the implications of the motion, Plaintiff can be liable for retaliation under NJ LAD and CEPA, regardless of whether the employer or principal violator is named as a defendant. Regardless, Mr. Tracy has impleaded the Borough of Englewood Cliffs, the Englewood Cliffs Police Department, the Mayor and Council of Englewood Cliffs, and Mayor Mario Kranjac in a third party complaint that connects to the aiding and abetting claim against Plaintiff in the counterclaim, thereby negating the motion. The motion is now moot.

FACTUAL BACKGROUND AND NEW ALLEGATIONS

Without regurgitating the allegations already set forth in the pleadings, the following is the relevant factual background and new allegations for this motion.

Plaintiff is a former officer in the Englewood Cliffs Police Department. Mr. Tracy is a current officer. On July 5, 2016, Plaintiff sued Mr. Tracy for defamation arising from, among other things, sworn deposition testimony and a tort claims notice where Mr. Tracy alleged that Plaintiff made homophobic comments and continually harassed Mr. Tracy about his sexual orientation during their time in the Englewood Cliffs Police Department. (Compl. ¶ 15-24.) The deposition testimony was sought by the Borough of Englewood Cliffs in defense of Plaintiff’s claim that it had wrongly failed to promote Plaintiff and harassed him. (Amended counterclaim ¶ 7.) Apparently unbeknownst to Plaintiff, deposition testimony is subject to a litigation privilege and cannot form the basis of a defamation claim; the

same is true of a tort claims notice. See e.g. Rabinowitz v. Wahrenberger, 406 N.J.Super. 126, 134 (App. Div. 2009) (citing leading cases).

At some point in early 2016, Plaintiff became Mr. Tracy's supervisor and acting chief. The actual chief, Michael Cioffi, was suspended. Prior to his suspension, Mr. Cioffi was aware of—and had received complaints about—the treatment of Mr. Tracy in the Englewood Cliffs Police Department, including by Plaintiff, and failed to take any remedial action, as required by NJ LAD. (Third party compl. ¶ 15-16.)

As acting chief and supervisor, Plaintiff was obligated under NJ LAD to ensure that no hostile work environment existed around Mr. Tracy because he is gay. Instead, Plaintiff ignored several complaints by Mr. Tracy about the environment in the Englewood Cliffs Police Department, including that a lieutenant had threatened Mr. Tracy with a knife and the lieutenant's wife had called Mr. Tracy a "fucking faggot" and said nobody in the Englewood Cliffs Police Department liked him because he was gay. (Amended counterclaim ¶ 11-12.) Plaintiff was more interested in convincing Mr. Tracy that he had never said any of the homophobic comments Mr. Tracy testified to, under oath, such as calling Mr. Tracy a "cocksucker" on multiple occasions. (Amended counterclaim ¶ 15.)

Eventually, Mr. Tracy's allegations against Plaintiff were sent to the Bergen County Prosecutor's Office for an internal affairs investigation because Plaintiff was the acting chief. Mr. Tracy's allegations were sustained but the Borough of Englewood Cliffs took no action against Plaintiff or to remedy the hostile work

environment. (Amended complaint ¶ 16.) Just coincidentally, McMorrow's wife is president of the Mayor and Council of Englewood Cliffs.

Because Plaintiff's complaint against Mr. Tracy is based on a subpoena that the Borough of Englewood Cliffs had served on Mr. Tracy relating to his "official duties," Mr. Tracy requested that the Borough of Englewood Cliffs indemnify him from Plaintiff's complaint. (Third party compl. ¶ 4, 19-22.) The Mayor and Council of Englewood Cliffs refused to do so as required by N.J.S.A. 40A:14-155 and despite that the Englewood Cliffs Code states:

The City shall provide for the defense of any civil actions brought against a public employee arising out of any act or omission directly related to the lawful exercise of that person's authority in the furtherance of his or her official duties, and this obligation shall extend to any cross-action, counterclaim or cross-complaint against such employee.

(Id.) The Mayor and Council of Englewood Cliffs is named as a defendant for its refusal to indemnify Mr. Tracy and only insofar as necessary to compel indemnification.

On October 17, 2016, Mr. Tracy filed a counterclaim against Plaintiff. The counterclaim was filed by Mr. Tracy's prior counsel. While the counterclaim should have been cast more clearly as based on aiding and abetting and retaliation, the allegations in the counterclaim easily satisfy the minimal pleading requirements under R. 4:5-1. The amended counterclaim now explicitly states that Plaintiff's liability is based on aiding and abetting and retaliation, as well as violation of the NJ CRA.

The third party complaint sets forth the principal liability of the Borough of Englewood Cliffs and the Englewood Cliffs Police Department. In addition, the third party complaint names Mayor Kranjac as a defendant for retaliation and aiding and abetting. Mayor Kranjac continually ignored the hostile work environment in the Englewood Cliffs Police Department and took affirmative action to stop any investigation into it. In an email on March 22, 2016, Mayor Kranjac “suggested” that Mr. Cioffi ignore what was going on in the Englewood Cliffs Police Department:

Suggestions for you include a return by the force to policing (rather than writing the strained reports I have been reading about harpoon knives, unsafe work conditions, hostile work environments, apparent drug use, portable radios being found unattended...) and better scheduling and deployment of the detectives.

(Third party complaint ¶ 23-26.)

LEGAL ARGUMENT

Plaintiff’s motion contains no recitation of the standard for a motion to dismiss, but the standard is well known. “All the facts and all the reasonable inferences and implications therefrom are to be considered most strongly in favor of the plaintiff since the remedy sought by the defendant is a drastic one.” City of Jersey City v. Hague, 18 N.J. 584, 587–588 (1955). “The test for determining the adequacy of a [complaint] is whether a cause of action is suggested by the facts.” Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). The non-movant’s allegations must be assumed to be true, Nostrame v. Santiago, 213 N.J. 109, 113 (2013), “without regard to the ability of the plaintiff to prove those facts.” Printing

Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). A motion to dismiss “**should be granted in only the rarest of instances.**” Id. at 772 [emphasis added].

Here, Mr. Tracy’s amended counterclaim and third party complaint “suggest[s]” a cause of action against Plaintiff, the Borough of Englewood Cliffs, the Englewood Cliffs Police Department, the Mayor and Council of Englewood Cliffs, and Mayor Kranjac. Plaintiff’s motion is defeated by the amended counterclaim and third party complaint. Mr. Tracy does not need leave to file either, and Plaintiff should not be permitted to argue against new pleadings in reply.

I. Mr. Tracy has a right to file the amended counterclaim and third party complaint

Pursuant to R. 4:9-1, Mr. Tracy may amend his counterclaim “at any time before a responsive pleading is served” within 90 days after service of the counterclaim. A motion to dismiss is not a “responsive pleading.” See Malik v. Ruttenberg, 398 N.J.Super. 489, 493 (App. Div. 2008). Mr. Tracy’s counterclaim was filed on October 17, 2016; thus, he is well within time to file an amended counterclaim without leave of court.

Pursuant to R. 4:8-1, Mr. Tracy is entitled to file a third party complaint “within 90 days after service of the original answer...upon a person not a party to the action who is or may be liable to defendant for all or part of the plaintiff’s claim and may also assert any claim which defendant has against the third-party defendant involving a common question of law and fact...” Mr. Tracy’s claim for

indemnification against the Borough of Englewood Cliffs and the Mayor and Council of Englewood Cliffs is a classic third party claim. See generally Fornarotto v. Clara Maass Mem'l Hosp., 118 N.J.Super. 316, 318 (App. Div. 1972); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J.Super. 45, 60 (App. Div. 2012) (indemnification as third party claim).

Because Mr. Tracy can file the amended counterclaim and third party complaint as of right, Plaintiff's motion is moot. Plaintiff should not be permitted to argue against new pleadings in reply. See e.g. Bouie v. New Jersey Dep't of Cmty. Affairs, 407 N.J.Super. 518, 525 n.1 (App. Div. 2009). The "correct procedure" is for Plaintiff to file a new motion, if he so chooses. Pedicini v. Pedicini, 2006 WL 695509 at *3 (Ch. Div. Mar. 17, 2006).

II. Mr. Tracy has pled valid claims against Plaintiff

Plaintiff makes several legal errors in its motion that cloud the valid claims against him, which have been appropriately clarified by the new pleadings.

First, contrary to Plaintiff's argument, NJ LAD does not create personal liability *only* for aiding and abetting a principal violation of NJ LAD. NJ LAD creates personal liability for retaliation against rights protected by NJ LAD [emphasis added]:

It shall be unlawful...For **any person** to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other

person in the exercise or enjoyment of, any right granted or protected by this act.

N.J.S.A. 10:5-12(d). "Person" means "one or more individuals...." N.J.S.A. 10:5-5(a). Plaintiff's motion is based on the premise that Plaintiff was not Mr. Tracy's employer and can only be liable as an aider and abettor under NJ LAD. But this is only half-true, especially now that the counterclaim has been corrected and amended. Plaintiff can be personally liable for "reprisals" under N.J.S.A. 10:5-12(d), which is separate and distinct from the employer liability part of NJ LAD, N.J.S.A. 10:5-12(a), and from the aider and abettor part of NJ LAD, N.J.S.A. 10:5-12(e). N.J.S.A. 10:5-2(d), the "reprisals" part, "expressly contemplates direct liability for individual supervisory employees." Cortes v. Univ. of Med. & Dentistry of New Jersey, 391 F.Supp. 2d 298, 314 (D.N.J. 2005). As an easy example, Plaintiff may not retaliate against Mr. Tracy for his deposition testimony where that testimony set forth violations of NJ LAD.

Mr. Tracy's amended complaint now pleads aiding and abetting and retaliation causes of action against Plaintiff, with specific acts of substantial assistance to the principal violation of NJ LAD and "reprisal." The aiding and abetting cause of action is valid when connected with the principal violations set forth in the third party complaint.

Second, Plaintiff's argument that he cannot aid and abet his own unlawful conduct is a confusion of how aiding and abetting liability works under NJ LAD when the principal violator is an entity, not a person. By failing to remediate the

hostile work environment, and in fact actively discriminating against Mr. Tracy, Plaintiff aided and abetted the Borough of Englewood Cliffs and the Englewood Cliffs Police Department's principal violation of NJ LAD because Plaintiff's actions and omissions, as supervisor, are imputed to them. Cicchetti v. Morris Cty. Sheriff's Office, 194 N.J. 563, 595 (2008). Plaintiff gave substantial assistance to the principal violation by, among other things, refusing to address Mr. Tracy's complaints once Plaintiff became acting chief and, of course, calling Mr. Tracy a "fucking faggot" and a "cocksucker." In other words: Plaintiff, as supervisor (both before and after he became acting chief), aided and abetted, his employer, not himself. Mr. Tracy's amended counterclaim now makes clear that the employer was the Borough of Englewood Cliffs "and/or" the Englewood Cliffs Police Department.

Third, CEPA and the NJ CRA provide additional bases of personal liability against Plaintiff.

CEPA's definition of "employer" is much different than NJ LAD's [emphasis added]:

Any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent...

N.J.S.A. 34:19-2(a). Under CEPA, unlike NJ LAD, a "supervisor" can be an "employer" and thus be personally liable for retaliation. Espinosa v. Cont'l Airlines, 80 F.Supp. 2d 297, 305 (D.N.J. 2000); Palladino v. VNA of Southern New Jersey, Inc., 68 F.Supp.2d 455, 472 (D.N.J. 1999); see Maimone v. City of Atl. City, 188 N.J.

221, 235 (2006) (personal liability against chief of police separate and apart from the city).

By its plain language, the NJ CRA provides a cause of action against Plaintiff

[emphasis added]:

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 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 law, may bring a civil action for damages and for injunctive or other appropriate relief.

N.J.S.A. 10:6-2(c). Plaintiff, acting under color of law as Mr. Tracy's supervisor and as part of an internal affairs investigation subject to the New Jersey Attorney General's Guidelines, interfered or attempted to interfere with Mr. Tracy's rights protected by the United States and New Jersey Constitution, including his right to equal protection because of his sexual orientation and his right to be free from retaliation for petitioning the Borough of Englewood Cliffs and the Englewood Cliffs Police Department for redress of grievances. See e.g. Lewis v. Harris, 188 N.J. 415, 457 (2006) (sexual orientation is a protected class under the New Jersey Constitution); Borough of Duryea, Pa. v. Guarnieri, 131 S.Ct. 2488, 2491-2501 (2011) (it is unconstitutional for a government or its officer to retaliate against someone for "petitioning for a redress of grievances").

While Plaintiff may assert defenses to the NJ CRA claim, such as qualified immunity, those defenses are first subject to discovery so that, for example, it can

be determined “whether a reasonable officer in the same situation clearly would understand that his actions were unlawful.” Morillo v. Torres, 222 N.J. 104, 118 (2015); see Kirk v. City of Newark, 109 N.J. 173, 187 (1988) (summary judgment is the most appropriate mechanism for determining qualified immunity).

CONCLUSION

Mr. Tracy’s amended counterclaim and third party complaint contain a litany of specific factual allegations against Plaintiff and the other defendants sufficient to overcome a motion to dismiss. Obviously, only the allegations against Plaintiff are relevant to this motion. Because Mr. Tracy has added and clarified claims against Plaintiff and impleaded the principal violators of NJ LAD, the motion is moot and should be denied.

Respectfully submitted,

JUSTIN D. SANTAGATA

JDS/bar
Encls.

cc: Anthony S. Bocchi, Esq. (via email/lawyers service)
Client (via email)