

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin A. Pezzano and Elizabeth L. :
Pezzano, :
Appellants :
v. :
David J. Mosesso, Harold C. Wilson : Nos. 189 & 190 C.D. 2014
III, and Towamencin Township : Argued: October 6, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. MCGINLEY, Judge (P)
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: October 24, 2014

Kevin A. Pezzano (Plaintiff) and his wife, Elizabeth L. Pezzano, appeal from the orders of the Court of Common Pleas of Montgomery County (trial court) sustaining the preliminary objections filed by David J. Mosesso (Mosesso) and Harold C. Wilson III (Wilson) (collectively, Defendants) and dismissing Plaintiff's amended complaint seeking damages for defamation, invasion of privacy and fraud regarding a Confidential Employee Separation Agreement and General Release (Agreement) Plaintiff entered into with Towamencin Township (Township). Finding no error, we affirm.

I.

Plaintiff's amended complaint alleges that after the Township advised Plaintiff that his employment as its Fire Marshal, Code Enforcement Officer and Emergency Management Coordinator would be terminated because the Township was "too small" to have a full-time Fire Marshal, Plaintiff and the Township entered into the Agreement governing the terms approved by the Township's Board of Supervisors in a 3-2 vote, with Defendants dissenting. The Agreement contained the following confidentiality clause:

CONFIDENTIALITY

All parties agree that, at all times hereafter, the facts relating to the existence, terms and conditions of this Agreement and the allegations in this matter will be kept confidential and will not be disclosed voluntarily to any third party, except to the extent required by law, to enforce this Agreement, or to obtain confidential legal, tax, or insurance advice with respect thereto. All parties further agree to refrain from disparaging each other in any fashion and to that end they will decline comment to any third party regarding each other, provided, however, that either party may give sworn testimony about the other party if required or compelled to do so in a legal action or proceeding.

(Am. Compl. ¶11; Reproduced Record [R.R.] at 6a-7a.)

The amended complaint states that Defendants had no intention of honoring the confidentiality clause at the time the Agreement was executed and that after execution, they voluntarily communicated with a journalist for *The Reporter* newspaper outside a meeting of the Board of Supervisors which resulted

in publication of an article falsely stating that Plaintiff was “dismissed for cause.” (Am. Compl. ¶26; R.R. at 8a.)¹ Plaintiff alleges that the false statements harmed his veracity and professional reputation, through which he performs fire and code investigations, produces expert reports and provides expert testimony. The amended complaint sets forth claims for defamation *per se* and invasion of privacy against Mosesso and a fraud claim against both Defendants because neither party intended to honor the confidentiality clause.²

¹ The article states, in pertinent part:

TOWAMENCIN—A personnel separation agreement regarding two former township employees passed the township’s board of supervisors Wednesday night with a one-vote margin.

Supervisors Chuck Wilson and David Mosesso both voted against the agreement at the Jan. 23 public meeting.

In an email received Friday morning, Wilson wrote that he opposed the measure. He says he thought the severance packages for both employees “were excessive compared to the norm in the private sector.” In the same email, Wilson confirmed the identity of those dismissed employees as Joe Leis...and Kevin Pezzano, Towamencin’s former fire marshal, code enforcement officer and emergency management coordinator.

Mosesso said that since both were dismissed for cause, he didn’t think they should get the severance.

“In my working life, I have never seen employees, who were dismissed for cause, receive this kind of compensation,” he said.

(Am. Compl. Ex. B; R.R. at 15a.)

² The fraud claim avers:

(Footnote continued on next page...)

II.

Both Defendants filed preliminary objections. Mosesso's preliminary objections contended that as a high public official, he had absolute immunity from the defamation and invasion-of-privacy claims because his comments were made in the course of explaining his vote to the public. He also asserted that the fraud claim fails because: (1) it did not establish that he made any representation, let alone a false representation, to Plaintiff; (2) the confidentiality clause is unenforceable as it violates public policy; and (3) it is invalid under the gist of the action doctrine.

(continued...)

42. Paragraphs 1 through 41 are incorporated by reference as though set forth at length herein.

43. The actions of defendants Mosesso and Wilson were fraudulent.

44. Plaintiff Kevin A. Pezzano affirms the Agreement and brings this action in deceit for damages.

45. As a direct and proximate result of their actions, defendants have caused damage to plaintiff as aforesaid.

WHEREFORE, plaintiff Kevin A. Pezzano demands judgment in his favor and against the defendants David J. Mosesso and Harold C. Wilson, III in an amount in excess of \$50,000.00, plus punitive damages and costs.

(Am. Compl. ¶¶42-45; R.R. at 11a.) Plaintiff also alleged a breach-of-contract claim against the Township for its agents' violation of the confidentiality clause which he subsequently discontinued, and his wife alleged a derivative claim for loss of consortium against Mosesso. (R.R. at 3a.) However, those claims are not the subject of the instant appeal.

Wilson also filed preliminary objections to the fraud claim asserting that it fails because: (1) he is immune from liability under Sections 8541 and 8545 of the Judicial Code³ and that he had absolute immunity as a high public official; (2) it fails to set forth any facts establishing the necessary elements of the claim; (3) that the fraud claim was not pled with particularity as required by Pennsylvania Rule of Civil Procedure No. 1019(b) which states that “Averments of fraud or mistake shall be averred with particularity;” and (4) it is barred by the gist of the action doctrine because Plaintiff recast his breach of contract claim as negligence claims.

By separate orders, the trial court sustained both sets of preliminary objections and dismissed the amended complaint with prejudice. Regarding Mosesso’s objections, the trial court found that Plaintiff’s defamation and invasion-of-privacy claims were barred by Mosesso’s immunity because his status as a second-class township supervisor qualified him as a high public official and his comments to the local press regarding the Township’s finances were made in the scope of his authority. The trial court also found the fraud claim against both Defendants legally insufficient because it contained no well-pleaded material facts, was not stated with particularity in violation of Rule 1019(b), and failed to satisfy

³ 42 Pa. C.S. §§8541-8542. Section 8541 of the Judicial Code provides, “Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.” 42 Pa. C.S. §8541. Moreover, Section 8545 of the Judicial Code states, “An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter.” 42 Pa. C.S. §8545.

any of the necessary elements as it was “predicated upon speculation, expressions of opinion, argumentative allegations and legal conclusions.” (Trial Court Opinion (No. 189 C.D. 2014), at 5; Trial Court Opinion (No. 190 C.D. 2014), at 3.) This consolidated appeal followed.⁴

III.

A.

Regarding the trial court’s dismissal of his defamation and invasion-of-privacy claims, Plaintiff does not dispute that Mosesso’s status as a supervisor qualifies him as a high public official. However, he contends that the doctrine of absolute immunity does not apply to Mosesso’s communications with the press because the statements were made outside the course and scope of his duties and in violation of the confidentiality clause which the Township approved.

The doctrine of absolute immunity:

is designed to protect the official from the suit itself, from the expense, publicity, and danger of defending the good faith of his public actions before a jury. And yet, beyond this lies a deeper purpose, the protection of society’s interest in the unfettered discharge of public business and in full public knowledge of the facts and conduct of such business. Absolute immunity is thus a

⁴ Our review of a common pleas order sustaining preliminary objections and dismissing a complaint is limited to determining whether an error of law was committed or an abuse of discretion occurred. *Muncy Creek Township Citizens Committee v. Shipman*, 573 A.2d 662, 663 (Pa. Cmwlth. 1990). Preliminary objections should be sustained only when it appears “with certainty that the law will not permit recovery,” and any doubt should be resolved by a refusal to sustain them. *Id.*

means of removing any inhibit[i]on which might deprive the public of the best service of its officers and agencies.

Montgomery v. City of Philadelphia, 140 A.2d 100, 103 (Pa. 1958) (internal quotation omitted). However, in applying the doctrine, the courts “have sought to balance the public’s interest in encouraging unfettered discussion of public business against the undeniable right of the individual to protect his or her reputation,” and, therefore, have required defendants to qualify as “high ranking officers” to be entitled to protection. *Osiris Enterprises v. Borough of Whitehall*, 877 A.2d 560, 566-67 (Pa. Cmwlth. 2005), *appeal denied*, 897 A.2d 459 (Pa. 2006).

In *Matson v. Margiotti*, our Supreme Court described absolute immunity:

Absolute privilege, as its name implies, is unlimited, and exempts a high public official from all civil suits for damages arising out of false defamatory statements and even from statements or actions motivated by malice, *provided the statements are made or the actions are taken in the course of the official’s duties or powers and within the scope of his authority, or as it is sometimes expressed, within his jurisdiction[.]*

88 A.2d 892, 895 (Pa. 1952) (emphasis in original), *overruled on other grounds*, 383 A.2d 819 (Pa. 1978).

Because Plaintiff concedes that Mosesso qualifies as a “high public official,” we need only determine if his statements to the press were made in the

course of his legitimate duties and within the scope of his authority. In *Hall v. Kiger*, this Court recognized two critical factors in analyzing whether an official's communications are closely related to his official duties: (1) the formality of the forum in which the words were spoken or published; and (2) the relationship of the legitimate subject of governmental concern to the person seeking damages for the defamatory utterance. 795 A.2d 497, 501 (Pa. Cmwlth.) (finding that allegedly defamatory statements were closely related to a councilman's duties when he made the statements at a public meeting while performing his duty to report on matters of great public concern), *appeal denied*, 813 A.2d 846 (Pa. 2002).

While the amended complaint does not specify the forum in which Mosesso communicated with the press, it does state that the exchange was made outside a Board of Supervisors' meeting which counsels against an extension of absolute immunity. However, this averment, alone, is not fatal. Based on the specific facts of this case, we find more persuasive the close relationship between Mosesso's duties under the Second Class Township Code (Code)⁵ and his communication to the press. Indeed, Section 607 of the Code provides:

The board of supervisors shall:

(1) Be charged with the general governance of the township and the execution of legislative, executive and administrative powers in order to ensure sound fiscal management and to secure the health, safety and welfare of the citizens of the township.

* * *

⁵ Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. §§65101-68701.

(3) Employ persons as may be necessary for the general conduct of the business of the township and provide for the compensation, organization and supervision of the persons so employed. Records shall be kept and reports made and filed giving the names of all persons employed, dates on which work was done and the number of hours worked with compensation paid to each person and the capacity in which employed.

53 P.S. §65607(1)-(3).

Mosesso is charged with ensuring the Township's sound fiscal management as well as providing for the compensation of its employees and reporting on each employee's compensation. Any statements made by Mosesso explaining his vote about the proposed Agreement concerning Plaintiff's severance and the rationale for his vote were certainly within the course of his legitimate duties. *See Matson*, 88 A.2d at 900 (finding that it was in the public interest to permit an attorney general to submit to the press a copy of a letter he was authorized to send to a district attorney regarding allegations against one of the district attorney's subordinates because of the importance of keeping "the public advised of [the attorney general's] official acts and conduct").

Relying on *Biggans v. Foglietta*, 170 A.2d 345, 347 (Pa. 1961), Plaintiff contends that absolute immunity protects an official's defamatory statements only when they are made on the floor of an official meeting. *Biggans* involved a city councilman whose letter allegedly libeling a public officer was not published in any official capacity but through a political party headquarter, presumably for political purposes. *Id.* at 347. Because of the way the letter was

issued, our Supreme Court held that the councilman did not enjoy absolute privilege but that he still may enjoy a conditional privilege and was open to attack for malice or other abuse. *Id.* Moreover, in *Matson*, our Supreme Court stated that although absolute immunity “applied originally” only to proceedings of legislative bodies, judicial proceedings and communications by military and naval officers, it had since “gradually been extended” to encompass the “official communications” and “official acts” of high public officials. 88 A.2d at 896. Not only does the requirement Plaintiff seeks to impose that statements be made on the floor of an official meeting ignore the second factor set forth in *Hall*, 795 A.2d at 501, it also fails to further the purposes for which the doctrine was created: to keep the public advised of official acts and conduct.

Plaintiff also asserts that even if Mosesso communicated with the press in the course of his official duties, he lacked authority to make his statements because they violated the Township’s policy as set forth in the Agreement’s confidentiality clause. Plaintiff attempts to parlay his breach-of-contract claim against the Township which he voluntarily dismissed into an exception to absolute immunity. Whether Defendants, and through them, the Township, breached the confidentiality clause is of no moment in determining whether Mosesso is immune from a civil suit for damages on the basis of high public official immunity because the doctrine applies “even when statements and/or actions are improperly motivated and lack a reasonable basis, provided the statements are made or the actions are taken in the course of the official’s duties or powers and within the scope of his authority.” *See Osiris Enterprises*, 877 A.2d at 568-69 (holding that a previous ruling that the defendants’ actions were arbitrary and capricious did not

affect whether the defendants were immune from civil suit under the doctrine of absolute immunity because no such exception is carved out in the doctrine) (internal quotations omitted), *appeal denied*, 897 A.2d 459 (Pa. 2006).

B.

Regarding the dismissal of his fraud claim, Plaintiff contends that the trial court erred because the amended complaint did, in fact, allege a material misrepresentation insofar as it stated that Defendants had no intention of honoring the confidentiality clause but remained silent about their intention to induce Plaintiff to enter the Agreement, and that such intentional non-disclosure is akin to an intentional misrepresentation for the purposes of a fraud claim.

At the outset, we note that the trial court dismissed Plaintiff's fraud claim not only because Plaintiff failed to allege a material misrepresentation, but also because Plaintiff failed to satisfy *any* of the necessary elements of fraud,⁶ failed to state *any* well-pleaded material facts, and violated Pennsylvania Rule of Civil Procedure No. 1019(b). We agree with the trial court's analysis.

Plaintiff's fraud claim pertains to the negotiation of the Agreement's confidentiality clause. However, the amended complaint does not aver that either Defendant made any representation concerning the confidentiality clause prior to

⁶ To state a cognizable claim for fraud or intentional misrepresentation, a plaintiff must establish the following elements: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994).

the execution of the Agreement which conceivably could have induced Plaintiff to enter the Agreement. Indeed, the amended complaint does not allege that Mosesso or Wilson drafted the Agreement, negotiated the Agreement or were parties to the Agreement. To the contrary, Plaintiff asserts that the Agreement was drafted by the Township.

Plaintiff counters that it is irrelevant whether Mosesso or Wilson personally negotiated or was a party to the Agreement because, as the Township's agents, they were bound by the Agreement's provisions. As such, Plaintiff contends, "To hold that Mosesso and Wilson are insulated from the representations of the solicitor would be contrary to natural justice and common honesty." (Reply Br. for Appellants, at 10.)

The question of whether Defendants were bound by the Agreement is separate and apart from whether they procured Plaintiff's execution through fraud. Plaintiff seeks to impute representations made by the Township's solicitor during the negotiation process to Defendants, simply by virtue of Defendants' agency relationship with the Township. First, an individual councilmember does not have an agency relationship with the Solicitor; the Solicitor represents the Township, not individual members. Second, the only party bound by the Agreement is the Township; a solicitor cannot make an agreement that would preclude a council person from explaining why he or she voted. Third, there exists no authority to support such an imputation. *See* Restatement (Second) of Torts §358(1) (1958) ("The agent of a disclosed or partially disclosed principal is not subject to liability for the conduct supervising, or cooperating with them."). Finally, we need not

accept as true Plaintiff's legal conclusions that the "actions" of Defendants "were fraudulent," as Plaintiff provided no well-pleaded allegations of material fact to satisfy the elements of a fraud claim. *R.H.S. v. Allegheny County Department of Human Services, Office of Mental Health*, 936 A.2d 1218, 1224 (Pa. Cmwlth. 2007), *appeal denied*, 954 A.2d 579 (Pa. 2008).

Plaintiff's fraud claim likewise fails under Pennsylvania Rule of Civil Procedure No. 1019(b)'s particularity standard for pleading fraud, which requires that two conditions be met: "(1) the pleadings must adequately explain the nature of the claim to the opposing party so as to permit the preparation of a defense, and (2) they must be sufficient to convince the court that the averments are not merely subterfuge." *Martin v. Lancaster Battery Co., Inc.*, 606 A.2d 444, 448 (Pa. 1992). Plaintiff's mere allegations that "[t]he actions of defendants Mosesso and Wilson were fraudulent," and that "[a]s a direct and proximate result of their actions, defendants have caused damage to plaintiff as aforesaid," are insufficient to put Defendants on notice of the claims against them. (Am. Compl. ¶¶43, 45; R.R. at 11a.) This conclusory language does not allow Defendants to prepare an adequate defense and does not persuade this Court that the claim is cognizable, as it merely recites the elements of the cause of action. *See Commonwealth of Pennsylvania v. National Apartment Leasing Co.*, 519 A.2d 1050, 1053 (Pa. Cmwlth. 1986) (finding that a complaint was deficient under Rule No. 1019(b) when it only repeated the elements of the cause of action as extracted from the Unfair Trade Practices and Consumer Protection Law). Because Plaintiff's fraud claim sets forth only conclusory allegations which were not pled with particularity in

violation of Rule No. 1019(b) and which failed to satisfy the necessary elements of the claim, the trial court did not err in dismissing the cause of action.

Accordingly, we affirm the trial court's orders sustaining Defendants' preliminary objections and dismissing Plaintiff's amended complaint with prejudice.

DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin A. Pezzano and Elizabeth L.	:	
Pezzano,	:	
	:	
Appellants	:	
	:	
	:	
v.	:	
	:	
	:	
David J. Mosesso, Harold C. Wilson	:	
III, and Towamencin Township	:	Nos. 189 & 190 C.D. 2014

ORDER

AND NOW, this 24th day of October, 2014, the orders of the Court of Common Pleas of Montgomery County dated November 20, 2013, in the above-captioned matters are affirmed.

DAN PELLEGRINI, President Judge