

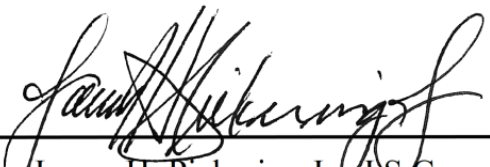
PREPARED BY THE COURT

<p>JEROME E. INDERWIES,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>ADAM GORDON, STACEY SHEEHAN, MICHAEL VOLL, CITY OF CAPE MAY,</p> <p style="text-align: center;">Defendants.</p>	<p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p>	<p>SUPERIOR COURT OF NEW JERSEY CIVIL DIVISION – LAW CAPE MAY COUNTY</p> <p style="text-align: center;">CPM-L-56-22</p> <p style="text-align: center;">Civil Action</p> <p style="text-align: center;">ORDER</p>
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THIS MATTER having come before the Court by way of Defendant Adam Gordon’s Motion to Dismiss Complaint for Failure to State a Claim, and the Court having considered the papers and for good cause shown,

IT IS ON THIS 11th DAY OF AUGUST, 2022 ORDERED that:

1. Defendant’s Motion to Dismiss is GRANTED. Plaintiff’s complaint against Defendant Adam Gordon is hereby DISMISSED with prejudice; and
2. This Order or Judgment shall be deemed automatically served upon all counsel of record simultaneously with its online posting in eCourts; otherwise, all other parties shall be served by the party obtaining this Order or Judgment within seven (7) days of its entry. See Rule 1:5-1(a).



 James H. Pickering Jr., J.S.C.

[X] Opposed
 [] Unopposed



**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE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

JAMES H. PICKERING, JR., J.S.C.

9 North Main Street
Cape May Court House, NJ 08210
609-402-0100 ext. 47730

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

CASE: **Jerome E. Inderwies v. Adam Gordon, Stacey Sheehan, Michael Voll, City of Cape May**

DOCKET #: **CPM-L-56-22**

RETURN DATE: **June 24, 2022**

MOTION: **Motion for Dismissal**

MOVANT: **Defendant Adam Gordon**

I. BACKGROUND

This Motion to Dismiss arises out of a suit filed by the Plaintiff, the former City Manager of the City of Cape May for comments made by City officials concerning the expenditure of designated Affordable Housing funds made during the former City Manager’s watch.

Plaintiff Jerome E. Inderweis is the former City Manager of the City of Cape May. Defendant Adam Gordon (“Gordon”) is the Executive Director of the Fair Share Housing Center (“FSHC”). Plaintiff alleges that he “is a notable member of the community” as his “late father, Jerome Inderwies Sr. served as mayor of the City of Cape May.” Plaintiff also alleges that he “held a strong desire to follow in his father’s footsteps by one day holding local elected office himself” and that “[i]t was generally known among locals within Cape May that Plaintiff had ambitions for elected public office.”

After Plaintiff left his position, there was an investigation regarding the use of the City's affordable housing trust fund moneys while Plaintiff was City Manager. Essentially, in the final months of his time serving as City Manager, a number of payments were made from the trust fund directly to certain employees. After the County Prosecutor's Office announced that it would not pursue charges against Plaintiff, *The Cape May Sentinel*, a local newspaper, sought comment from Defendant Gordon. The published article of July 16, 2021, titled "Prosecutor Closes Inderweis Case" reads, in pertinent part:

"I have no doubt whatsoever that as a matter of civil law what happened is deeply wrong and a remedy reimbursing the trust fund is necessary and will ultimately happen," Adam Gordon, a lawyer and executive director of the Fair Share Housing Center (FSHC) told the Sentinel. "We believe that now is the time for the city to take civil action to recover illegally disbursed funds and hope to work with the city to take appropriate steps to do so in the near future," he said, noting that the city could seek reimbursement through "voluntary agreements or civil action in Superior Court." But, he added, "If the city does not take those steps, which we hope they will, then we will take appropriate court action."

In response to Gordon's comments, Plaintiff sued, alleging three claims against Gordon: two speech-based claims (defamation and false light invasion of privacy) and a third claim for civil conspiracy.

Plaintiff filed the Complaint on February 24, 2022, an Amended Complaint on May 19, 2022, and a Second Amended Complaint on June 13, 2022. The allegations against Gordon remained essentially the same in each of the documents.

Gordon filed this Motion to Dismiss on April 5, 2022. On May 20, 2022, after Plaintiff filed the Amended Complaint, Gordon's counsel sent a letter to the court pointing out the changes to the allegations against Gordon, and stating that he was still pursuing the Motion to Dismiss.

Plaintiff filed Opposition to the Motion on June 14, 2022.

Gordon filed a Reply on June 20, 2022.

Oral argument was held via Zoom on June 24, 2022.

II. DEFENDANT'S ARGUMENT

Defendant Gordon first claims that the statements attributed to him are merely expressions of opinion which are not actionable as a matter of law. Second, the statements were made in connection with judicial and quasi-judicial proceedings and therefore are protected by New Jersey's litigation privilege. Third, New Jersey law requires this court to closely scrutinize claims based on speech to weed out non-meritorious claims and protect against the chilling effect that litigation can have on free speech. Here, Plaintiff has not articulated sufficient factual allegations to allege that Gordon acted with actual malice. Fourth, without the underlying speech-based claims for defamation or false light, Plaintiff's conspiracy allegation cannot stand. Accordingly, Defendant Gordon seeks dismissal of Plaintiff's Complaint with prejudice.

III. PLAINTIFF'S ARGUMENT

Plaintiff alleges Defendant's Motion to Dismiss must be treated as a motion for summary judgment because it is based on the submission of evidence other than the pleadings, is premature, and is an improper attempt to restrict Plaintiff from access to the courts, to engage in discovery, and to hold Defendant accountable. Defendant is inappropriately attempting to require Plaintiff to prove the merits of his claims without any discovery. Plaintiff further alleges genuine issues of material fact that preclude summary judgment as a matter of law: 1) Whether Defendant Gordon's statements were expressions of opinion rather than definitive false statements of fact; 2) Whether Defendant Gordon's statements were made in the course of judicial or quasi-judicial proceedings; 3) Whether Defendant Gordon acted with actual malice;

and 4) Whether Defendant Gordon engaged in a conspiracy with his co-defendants. Plaintiff claims Defendant Gordon's Motion to Dismiss is without merit and must be denied.

IV. LAW AND ANALYSIS

A. **Motion to Dismiss Standard**

Rule 4:6-2(e) specifically limits a trial court to consider only the complaint under review when determining whether it fails to state a claim upon which relief can be granted. The court must apply the following standards to an application to dismiss a Complaint pursuant to R. 4:6-2(e):

“[O]ur inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint.” Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). The essential test is simply “whether a cause of action is 'suggested' by the facts.” Ibid. (quoting Valentzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

In exercising this important function, "a reviewing court searches the complaint 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, opportunity being given to amend if necessary." Ibid. Moreover, "the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint[.]" rather, "plaintiffs are entitled to every reasonable inference of fact." Ibid. As we have stressed, "[t]he examination of a complaint's allegations of fact required by the aforesaid principles should be one that is at once painstaking and undertaken with a generous and hospitable approach." Ibid.

Green v. Morgan Properties, 215 N.J. 431, 451-52 (2013); see also Lederman v.

Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 349 (App. Div.), certif. denied, 188 N.J. 353 (2006).

Though the court must take "a generous and hospitable approach" in making that determination whether to dismiss a complaint in accordance with R. 4:6-2(e), "[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one." Flinn v.

Amboy Nat'l Bank, 436 N.J. Super. 274, 286 (App. Div. 2014) (alteration in original) (first quoting Green, supra, 215 N.J. at 452, then quoting Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div.), certif. denied, 208 N.J. 368 (2011)).

The trial court has been instructed by the Supreme Court that Motions to dismiss should rarely be granted, and an order granting a motion to dismiss under Rule 4:6-2(e) should usually be without prejudice, so that the plaintiff may have an opportunity to re-plead, if he can do so, to state a viable cause of action. Nostrame v. Santiago 213 N.J. 109, 128 (2013); Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009); Printing Mart-Morristown, supra, 116 N.J. at 771-72. However, such a motion "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." Edwards v. Prudential Prop. and Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003).

"In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir. 2004)). If evidence other than the pleadings is introduced on a motion to dismiss, then the same standard applies as if the court were ruling on a motion for summary judgment. See R. 4:6-2, 4:46; Jersey City Educ. Ass'n v. City of Jersey City, 316 N.J. Super. 245, 253-54 (App. Div. 1998). However, a court may take judicial notice of the fact "that a [new document] has been filed" by the moving party, without taking notice of a document's contents "for the purpose of determining the truth of what it asserts." State v. Silva, 394 N.J. Super. 270, 275 (App. Div. 2007) (citing RWB Newton Assocs. v. Gunn, 224 N.J. Super. 704, 711 (App.Div.1988)).

Trial courts play a critical gatekeeping role in cases involving speech-based claims (such as defamation and false light). Considering the importance of First Amendment interests, the New Jersey Supreme Court has encouraged trial courts to dismiss baseless speech-based claims wherever appropriate, even before discovery. “Our courts should resolve free speech litigation more expeditiously whenever possible.” Maressa v. N.J. Monthly, 89 N.J. 176, 196 (1982). To this end, “in defamation actions, the standards of inquiry a trial court is obliged to apply [on a motion to dismiss or one for summary judgment] are more congruent than different.” Darakjian v. Hanna, 366 N.J. Super. 238, 249 (App. Div. 2004) (dismissing defamation claim because the complaint was “bereft of any particular factual allegations.”).

Here, the court finds that all exhibits introduced by Defendant Gordon in his Motion to Dismiss, as well as all exhibits introduced by Plaintiff in his opposition, were exhibits attached to the Complaint or referenced in the complaint, were matters of public record, and/or were merely cited to show their existence. As such, the court will apply a Motion to Dismiss standard to this motion.

B. Gordon’s Statements Were Expressions of Opinion

1. Defamation and False Light

There are three elements in a cause of action for defamation: “(1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher.” NuWave Inv. Corp. v. Hyman Beck & Co., Inc., 432 N.J. Super. 539, 552 (App. Div. 2013) (quoting Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 585 (2009); DeAngelis v. Hill, 180 N.J. 1, 13 (2004)). “A defamatory statement, generally, is one that subjects an individual to contempt or ridicule, one that harms a person’s reputation by lowering the community’s estimation of him or by deterring

others from wanting to associate or deal with him.” Ibid. (quoting G.D. v. Kenny, 205 N.J. 275, 293 (2011)). The court looks at three aspects of a statement to determine if it “has a defamatory meaning”: (1) the content, (2) the verifiability, and (3) the context of the challenged statement. NuWave Inv. Corp., supra, 432 N.J. Super. at 552. Generally, opinions are not considered defamation because they cannot be verified; however, factual assertions that are verifiable can be defamatory. Id. at 553.

A statement is considered *per se* defamatory if it asserts “(1) a criminal offense, (2) a loathsome disease, (3) conduct, characteristics or a condition that is incompatible with his business, trade or office; or (4) serious sexual misconduct.” Id. at 554.

To prevail on a false-light claim, a plaintiff is required to establish: (1) that the defendant has “give[n] publicity to a matter that places the [plaintiff] before the public in a false light”; (2) that “the false light in which [the plaintiff] was placed would be highly offensive to a reasonable person”; and (3) that the defendant “had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which [the plaintiff] would be placed.” Romaine v. Kallinger, 109 N.J. 282, 294 (1988) (quoting Restatement (Second) of Torts § 652E (1977)). The first element “requires that the contested publicity be untrue[.]” Hart v. City of Jersey City, 308 N.J. Super. 487, 493 (App. Div. 1998), and “a major misrepresentation of plaintiff’s character, history, activities, or beliefs.” G.D., supra, 205 N.J. at 308 (quoting Romaine, supra, 109 N.J. at 295).

Both torts require the plaintiff to establish that the defendant made a false statement. “[A] fundamental requirement of the [defamation and] false light tort[s] is that the disputed publicity be in fact false, or else ‘at least have the capacity to give rise to a false public impression as to the plaintiff.’” G.D., supra, 205 N.J. at 282.

If a defamation claim fails, so too must a claim of false light. See Walko v. Kean College, 235 N.J. Super. 139, 156 (App. Div. 1988).

2. Expressions of Opinion

Like true statements, expressions of opinion cannot support either a defamation or false light claim. “Opinions ‘are generally not capable of proof of truth or falsity because they reflect a person’s state of mind,’ and as such are usually not actionable as defamation.” NuWave Inv. Corp., supra, 432 N.J. Super. at 553 (quoting Ward v. Zelikovsky, 136 N.J. 516, 531 (1994)). See also McLaughlin v. Rosanio, Bailets & Talamo, 331 N.J. Super. 303, 312 (App. Div. 2000) (“Since opinions and name-calling cannot be proved true or false, they are not actionable.”).

The distasteful or hurtful nature of the opinion is irrelevant. DeAngelis, supra, 180 N.J. at 14. “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” Gertz v. Robert Welch, 418 U.S. 323, 339-40 (1974). The New Jersey and United States Supreme Courts have made it clear that “[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.” State v. Vawter, 136 N.J. 56, 82 (1994) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 414 (1992) (Stevens, J., concurring)).

3. Analysis

Here, Plaintiff alleges defamation and false light for the following statements made by Defendant Gordon to the press: “I have no doubt whatsoever that as a matter of civil law what happened is deeply wrong. . . . We believe that now is the time for the city to take civil action to recover illegally disbursed funds. . . . [the city could seek reimbursement through] civil action in Superior Court. . . . [But, if] the city does not take those steps. . . then we will take appropriate

court action.” Any and all of these statements fail the first prong of a defamation and false light claim, as they are expressions of opinion, not factual assertions. As such, the statements cannot be proven true or false, either by Plaintiff or Defendant.

The statement that “what happened is deeply wrong” is a statement of opinion because whether or not any conduct or transaction was “wrong” is a moral position determined by the speaker; others could come to a different conclusion. Clearly it is an opinion. The qualifier “as a matter of civil law” reflects only that the opinion is given in the context of the civil law, and not the criminal law. Similarly, the introductory phrase “I have no doubt whatsoever” may indicate the strength of Gordon’s opinion, but it does not transform it into a factual assertion. Taken all together, Gordon stated that he believes that there was a wrongful violation of the civil law. That is an opinion.

The statement that “now is the time for the city to take civil action to recover illegally disbursed funds” expresses a moral position about right and wrong and a political position about public policy and priorities. Gordon offers his opinion that the City should file a civil action to recover the funds. He does use the word ‘illegally’, but in this context it is clearly not an alleged violation of the criminal law, but an alleged violation of the civil law.

The statement that the city could seek reimbursement through “voluntary agreements or civil action in Superior Court” is an opinion as to what the City of Cape May might do in the future. Whether viewed as a prognostication or a legal or political position, this statement is not capable of being proven true or false.

The final statement that “[i]f the city does not take those steps. . .then we will take appropriate court action” is likewise an opinion as to potential future events. It could be viewed

as a statement on the likelihood of particular outcomes or as a political expression as to what may or should happen.

The statements are all opinion statements, the statements of Gordon.

In his opposition to the present Motion, Plaintiff fails to cite any caselaw to suggest that Defendant's statements were factual assertions, that the statements were made with actual malice, or are otherwise in any way actionable. Instead, Plaintiff merely reasserts his position that the statements were defamatory. It is an empty argument, lacking legal weight, and is not persuasive in any way.

This court finds these statements to be well within the permissible boundaries set by State and Federal courts as non-justiciable free expressions of opinion regarding a public figure and a matter of public concern. Far more inflammatory language has been held to be non-actionable expression of opinion. For example, in Kotlikoff v. Cmty. News, the mayor of Pennsauken objected to a letter published in a local newspaper accusing him "of involvement in a 'huge coverup' and a 'conspiracy' in connection with his refusal to reveal the names of delinquent taxpayers." 89 N.J. 62, 72 (1982). The New Jersey Supreme Court held that the statements were non-actionable opinion because "[t]he terms 'conspiracy' and 'coverup' were employed here in a 'loose, figurative sense' and as 'rhetorical hyperbole.'" Ibid. (quoting Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6, 14 (1970)). The Court explained that, "[w]hen examined in their full context, the offending words appear to have been used not as specific accusations of criminal activity, but rather merely as pejorative rhetoric, criticizing plaintiff in an identified, isolated instance of his performance in public office." Ibid. See also Dunn v. Gannett N.Y. Newspapers, Inc., 833 F.2d 446 (3d Cir. 1987) (comparison of mayor to Hitler and Fidel Castro held to be a protected statement of opinion); Yourman v. People's Sec. Life Ins. Co., 992 F. Supp. 696

(D.N.J. 1998) (accusation by insurer that insured engaged in intentional misrepresentation held to be non-actionable “pure opinion”); Creditors Relief LLC v. United Debt Settlement LLC, No. 17-7474, 2019 U.S. Dist. LEXIS 222358, at *30-34 (D.N.J. Dec. 30, 2019) (collecting cases and holding that statements in an online review that a company was “un-American,” “greedy,” “unfair,” and a “Scam,” were all non-actionable opinion).

This court finds Gordon’s statements were not defamatory.

The court will therefore grant the Motion to Dismiss the claims for defamation and false light.

C. Gordon’s Statements Are Protected by The Litigation Privilege

In March 2015, in response to a motion by FSHC, the New Jersey Supreme Court held that the Council on Affordable Housing (“COAH”) had been rendered “moribund,” and, “[d]ue to COAH’s inaction,” it established “judicial processes” to “provide the means for a town . . . to demonstrate that its housing plan satisfies Mount Laurel obligations.” *In re N.J.A.C. 5:96 & 5:97*, 221 N.J. 1, 5-6 (2015) (better known as “Mount Laurel IV”).

The “judicial processes” crafted by the Court specifically provided for participation by FSHC. Namely, the Court directed that, “[i]f a municipality seeks to obtain an affirmative declaration of constitutional compliance, it will have to do so on notice and opportunity to be heard to FSHC and interested parties” and that trial courts “will be assisted in rendering . . . preliminary determination[s] on need by the fact that all initial and succeeding applications will be on notice to FSHC and other interested parties.” *Id.* at 23, 29.

In 2015, hundreds of New Jersey towns, including the City of Cape May, filed complaints seeking a judicial determination that their housing plans were constitutionally compliant. Defendant Gordon participated in that litigation as counsel representing FSHC.

Since then, the judicial process established by our Supreme Court in Mount Laurel IV has led FSHC to enter into settlement agreements with more than 300 municipalities across the State, upon terms fair and reasonable to the members of the protected class.

Cape May filed its Complaint on July 8, 2015 seeking to approve the City's Housing Element and Fair Share Plan. A Compliance Hearing was held on August 30, 2018. A Final Order of Compliance and Repose was held on August 30, 2018 which approved the City's Fair Share Plan which contained some short-term conditions. The conditions were satisfied. On December 18, 2018, an Order Finalizing the City's Judgment of Compliance and Repose was entered, essentially making the August 30, 2018 Order a Final Judgment with no conditions remaining. See CPM-L-307-15, filed December 17, 2018, eCourts ID: LCV20182184388.

That same order also states that the court retained jurisdiction for the limited purpose of allowing FSHC and the City the "ability to enforce rights under the Settlement Agreement entered into between the City and FSHC on February 21, 2018"

Gordon is alleged to have made the allegedly defamatory statements on July 16, 2021, well after the December 17, 2018 Order.

"A statement made in the course of judicial, administrative, or legislative proceedings is absolutely privileged and wholly immune from liability." Hawkins v. Harris, 141 N.J. 207, 213-21 (1995) (quoting Erickson v. Marsh & McLennan Co., 117 N.J. 539, 563 (1990)); see also Williams v. Kenney, 379 N.J. Super. 118, 133 (App. Div. 2005); Loigman v. Twp. Comm., 185 N.J. 566, 579-84 (2006). This litigation privilege "affords litigants and witnesses 'the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.'" Hawkins, supra, 141 N.J. at 216 (emphasis added) (citation omitted). The privilege applies to all statements or communications "(1) made in judicial or quasi-judicial proceedings;

(2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.” Rabinowitz v. Wahrenberger, 406 N.J. Super. 126, 134 (App. Div. 2009) (citing Hawkins, supra, 141 N.J. at 216). “The only limitation which New Jersey places upon the privilege is that the statements at issue ‘have some relation to the nature of the proceedings.’” Ibid. (quoting Hawkins, supra, 141 N.J. at 215).

“The privilege is not limited to statements made at trial; it extends to all statements or communications in connection with the judicial proceeding.” Baglini v. Lauletta, 338 N.J. Super. 282, 287 (App. Div. 2001). However, courts should not grant absolute privilege “to novel situations unless the underlying policy on which the privilege is based compels this result.” Williams, supra, 379 N.J. Super. at 122. Since the privilege is intended to protect “the ability to speak freely which is indispensable to the due administration of justice, this policy is not served by extending the privilege to extra-judicial statements made by an attorney to a newspaper in anticipation of her client's press conference.” Ibid. (internal quotations omitted). New Jersey courts have distinguished between “bona fide litigation activities and a public relations campaign. The litigation privilege should not be extended to litigating in the press.” Ibid.

Gordon’s statements meet all four criteria necessary to be protected by the litigation privilege. First, Defendant made his statements as the Executive Director of the FSHC, an entity which had been named by the Supreme Court as an interested party in all affordable housing cases. FSHC has an interest in all affordable housing cases, and was specifically named in the Order referenced above as having the continuing ability to enforce rights under the Settlement Agreement entered into between the City and FSHC on February 21, 2018.

The expenditure of Affordable Housing Trust Fund money clearly involves issues related to the approved plan, and issues in which FSHC has an interest. FSHC had that interest in 2018, and it retained that interest in 2021. This court finds that in these circumstances, and considering the on-going and continuing nature of affordable housing litigation, and the specific terms of the Order entered on December 17, 2018 that gives to FSHC the continuing interest in enforcement of the settlement agreement, that Gordon and FSHC made the statements in the context of judicial proceedings even though the active judicial proceedings had ended about two and a half years before the statements were made. In short, it is unlikely that Gordon would have been contacted at all by the newspaper, or that Gordon would have offered comment, but for FSHC's continuing role in Cape May's compliance with its affordable housing obligations pursuant to the settlement agreement.

The second prong of the four-part test is also satisfied. Gordon and FSHC were clearly litigants.

Third, the statements were made to further the objective of the enforcement of the settlement agreement.

Fourth, the statements are logically related to enforcement of the settlement agreement. the actions of both the 2015 litigation and the prosecutor's decision not to pursue charges.

The court above has determined that the statements made by Gordon were not defamatory. Even if the statements were defamatory, however, this court also finds that the statements would be protected by the litigation privilege. Gordon's statements addressed the litigation, the terms of the settlement of that litigation, and the possibility of future civil litigation to enforce that settlement, or to enforce the law as FSHC believes the law should be interpreted. The statement is measured: it does not state that Gordon or FSHC disagrees with the County

Prosecutor's office and that in fact a crime was committed, but instead states that even though there are no criminal violations, there are civil options that remain and that Cape May should pursue.

D. Plaintiff Has Not Alleged Actual Malice with The Requisite Particularity

1. Actual Malice Standard

Speech on matters of public concern is at the heart of First Amendment protection. See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978). The New Jersey Supreme Court "give[s] greater protection to speech involving public officials, public figures, and the public interest because of the important role that uninhibited and robust debate plays in our democratic society." Senna v. Florimont, 196 N.J. 469, 474 (2008). Under New Jersey law, when a person speaks on a matter of public concern or speaks about public officials, the inaccuracy or falsity of their statements will not subject them to liability unless they acted with actual malice. Durando, supra, 209 N.J. at 239 ("New Jersey's common law provides special protection to speech touching on matters of public concern, even when that speech contains some careless falsehoods.").

Proving actual malice requires the plaintiff to "show[] that the speaker made a false and defamatory statement either knowing it was false or in reckless disregard of the truth." Senna, supra, 196 N.J. at 474. "Actual malice must be established with 'convincing clarity.'" Durando, supra, 209 N.J. at 239 (internal citations omitted); see also Costello v. Ocean County Observer, 136 N.J. 594, 612 (1994); Fortenbaugh v. New Jersey Press, Inc., 317 N.J. Super. 439, 455 (App. Div. 1999). This "subjective" test "involves analyzing the thought processes of the particular defendant." Durando, supra, 209 N.J. at 251-52 (citations omitted). Merely saying that the speaker "'should have known' or 'should have doubted'" the accuracy of the statement "before

publishing it is insufficient to show reckless disregard for the truth.” Ibid. In order to act with reckless disregard of the truth, a defendant must “actually doubt[]” the veracity of the publication. Lawrence v. Bauer Publ’g & Printing, 89 N.J. 451, 468 (1982).

The actual-malice standard “tolerates more falsehood and harm to reputation than the negligence standard in order to shield highly valued speech from ruinous lawsuits.” Ibid. Thus, “the actual-malice standard applies to all speech-based torts involving matters of public concern or public officials.” Durando, 209 N.J. at 250-51 (internal citation omitted). Therefore, allegations of defamation and false light against a public official must rise to the actual malice standard to be actionable.

2. Factual Basis Required to Allege Actual Malice

A plaintiff is required to set forth the factual basis for a finding of actual malice; a merely “conclusory allegation” that a defendant “published the defamatory statements with actual malice is not sufficient to withstand a motion to dismiss on the pleadings.” Donato v. Moldow, 374 N.J. Super. 475, 501 (2005). As the Appellate Division has explained:

Normally, the facts as pleaded must be taken to be true for the purposes of the motion, and the court’s “inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint.” Yet, when the allegations of a defamation complaint, as here, are limited to the fact of publication and a bare conclusory assertion that the press defendants “knew and/or reasonably should have known that the statement . . . was false,” with no other factual reference to lend support to the contention, the court may not simply take the facial assertion as a given, but rather must evaluate the circumstances as best it can to determine whether there is any reasonable basis upon which the defamation claim can be seen to be viable.

Darakjian v. Hanna, 366 N.J. Super. 238, 248 (App. Div. 2004) (citations omitted).

3. Analysis

Here, this court has found Defendant Gordon's statements were not defamatory. Even if the statements were defamatory, however, there is no doubt that the expenditure of public funds is a matter of public concern, regardless of whether the funds were spent appropriately or inappropriately. Plaintiff, therefore, would have an obligation to plead facts to support, or which allow the court to reasonably infer, that Gordon made the statements with actual malice. This court finds that Plaintiff has failed to assert facts, and has failed to cite caselaw, to suggest Defendant Gordon's knowledge of the statements' falsity or reckless disregard for their truth. This court finds Plaintiff has only offered a "conclusory allegation," Donato, 374 N.J. Super. at 501, that Gordon made the statements with actual malice. This court cannot find "any reasonable basis upon which the defamation claim can be seen to be viable." Darakjian, 366 N.J. Super. at 248. As such, if the statements were defamatory, this court would still grant the Motion to Dismiss because Plaintiff has failed to adequately plead any facts that support or that would allow this court to reasonably infer that Gordon acted with actual malice.


E. The Conspiracy Claim Is Dismissed.

A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." Banco Popular North America v. Gandi, 184 N.J. 161, 177 (2005) (quoting Morgan v. Union Cnty Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994)). The essence of a civil conspiracy claim "is not the unlawful agreement, 'but the underlying wrong which, absent the conspiracy, would give a right of action.'" Ibid. (quoting Morgan, supra, 268 N.J. Super. at 365).

Here, as stated above, this court will dismiss Plaintiff's claims for defamation and false light. Because no "underlying wrong" is adequately plead to form the basis for a claim of conspiracy, the court will also grant the Motion to Dismiss the conspiracy claim.

V. CONCLUSION

For the foregoing reasons, Defendant Gordon's Motion to Dismiss is Granted with prejudice.



James H. Pickering Jr., J.S.C.

Date: 8/11/2022

