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Appellate Division Allows Sham Land Use Litigation Claim to Proceed

When individuals and corporations sue to challenge a proposed real estate development, are they exercising their right to petition the government for redress or engaging in sham litigation to prevent competition? In a recent opinion, the New Jersey Appellate Division provided guidance to trial courts on how to discern the difference between constitutionally protected behavior and anti-competitive misconduct. In *Main Street at Woolwich, LLC v. Ammons Supermarket, Inc., et al.*, Docket No. A-0713-15T3 (App. Div. July 25, 2017), the Appellate Division reversed the Chancery Division's dismissal of an abuse of process claim against competitors that challenged a shopping center development in Woolwich Township. The Appellate Division concluded that the Chancery Division should have considered the developer's allegations that the competitor's action was "part of a pattern of sham litigation brought by defendants for the purpose of injuring market rivals rather than to redress actual grievances." Facing this issue of first impression in New Jersey state courts, the Appellate Division explicitly adopted the reasoning of the U.S. Court of Appeals for the Third Circuit in *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.,* 806 F.3d 162 (3d Cir. 2015), cert. denied, 136 S.Ct. 2451, 195 L. Ed. 2d 264 (2016), a case in which a developer alleged that an objector-competitor had engaged in sham litigation and violated antitrust laws.

The controversy in *Woolwich* traces back to the site plan approval of a supermarket, pursuant to a general development plan (GDP) that had been approved three years earlier. When it received approval of the GDP, the developer made no mention of which brand of supermarket would be operating the supermarket component of the development. Following the final site plan approval, the competitor filed a complaint against both the applicant and the Woolwich Township Planning Board challenging the GDP and the approvals. Unimpressed with the challenge, the Chancery Division granted summary judgment and dismissed the complaint with prejudice. The competitor then appealed arguing, among other things, that the GDP was invalid and that the Planning Board committed errors during the approval process. The Appellate Division affirmed the Chancery Division's decision finding that many of the competitor's arguments were without merit.

After defeating the challenge, the applicant (Plaintiffs) sued. They alleged that the competitor and its attorneys (Defendants), engaged in malicious abuse of process, tortious interference with prospective business contracts, and civil conspiracy "to employ sham litigation to impede, hinder and delay competing developments ..." such as theirs. The Defendants promptly moved to dismiss, claiming they were immune from suit under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine derives from two United States Supreme Court decisions, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L. Ed. 2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). This doctrine recognizes that those who petition the government for redress are immune from suit, unless the petition is "objectively baseless." The trial court in *Woolwich* sided with the defendants' claim of immunity and dismissed the suit.

The Appellate Division found the trial court's analysis lacking in several respects. First, the trial court "provided only cursory and unsupported conclusions in finding defendants exercised a 'permissible right' in filing ... the litigation." Moreover, the trial court did not consider the conclusions of the Chancery judge and Appellate Division in the earlier litigation. Those courts had rejected the Defendants' original complaint challenging the site plan approval and GDP after concluding that the original claims were time-barred, without merit, and not supported by the Municipal Land Use Law. Citing *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.,* the Appellate Division also criticized the trial court's failure to consider Plaintiffs' claims that the Defendants' original suit was "part of a pattern of successive filings, used ... as an anticompetitive weapon for the purpose of

injuring market rivals." The Appellate Division described 13 other instances in the motion record where the Defendants attempted to thwart competitor supermarkets from being constructed throughout the state.

The Appellate Division remanded the matter for the trial court to consider Plaintiffs' claim that the Defendants "engaged in a pattern of sham litigation." On remand, the trial court must consider each of Plaintiffs' claims of malicious abuse of process including the filing of the appeal by Defendants of the Chancery Division's initial ruling; a Defendants' contact with a representative of Plaintiffs during the pendency of the appeal to lease space at the site; and the timing of the litigation, because Defendants did not timely appeal the original GDP approval and only initiated litigation after learning a competitor would be a tenant at the site. Perhaps being prescient, and again citing *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.,* the Appellate Division posited "Had the [trial court] examined the filings referenced in the plaintiffs' complaint and found '[a] high percentage of meritless or objectively baseless proceedings,' it would 'tend to support a finding that the filings were not brought to redress any actual grievances,'" but rather, implicitly, were used as an "anticompetitive weapon for the purpose of injuring market rivals."

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