

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel D. McCaffery, :
Appellant :
v. : No. 896 C.D. 2010
J. Shane Creamer, Jr. : Argued: February 7, 2011
and City of Philadelphia :
Board of Ethics :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: March 16, 2011

Daniel D. McCaffery (McCaffery) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court) sustaining the preliminary objection in the nature of a demurrer filed by J. Shane Creamer, Jr. and the City of Philadelphia Board of Ethics (Board), dismissing McCaffery's complaint with prejudice, and dismissing the remaining preliminary objections as moot.

On December 1, 2009, McCaffery filed a complaint against Creamer, the Executive Director of the Board of Ethics, in his official capacity, and the Board alleging defamation, false light, and interference with prospective economic contracts and relations and advantages regarding the Board's handling of campaign finance issues arising from McCaffery's unsuccessful primary campaign for

District Attorney of Philadelphia in the Spring of 2009. The pertinent factual allegations set forth in the complaint are as follows.

McCaffery was a candidate for the office of District Attorney for the City and County of Philadelphia. Pursuant to all applicable rules and regulations, McCaffery established “McCaffery for District Attorney” as the designated committee for his campaign for District Attorney. McCaffery for District Attorney, through its Treasurer Joseph Fernandes, Esquire, spent funds, and otherwise took all steps necessary to act in a manner fully consistent with all applicable laws and regulations governing the establishment of a committee, and acting as an independent entity.

The Pennsylvania Good Government Fund (Fund) is a duly registered political action committee affiliated with McCaffery’s private law firm and registered at 101 Greenwood Avenue, 5th Floor, Jenkintown, Montgomery County, Pennsylvania. On or about April 17, 2009, Creamer and the Board issued a subpoena directed to the Fund demanding that various documents and information be produced. Creamer and the Board directed this subpoena and served it upon a private residence at 312 Palmer Drive, Philadelphia, Pennsylvania. At all times relevant hereto, the registered address for the Fund was 101 Greenwood Avenue, 5th Floor, Jenkintown, Montgomery County, Pennsylvania.

When McCaffery learned of the invalidly served subpoena, he contacted Creamer and asked about the nature of the Board’s inquiry and why the subpoena was served upon a Philadelphia residence rather than through the proper legal channels. In response, Creamer threatened McCaffery by stating that if he did not receive documents in response to the subpoena, he would file an enforcement action and convene a press conference telling “everyone who would listen” that McCaffery was deliberately obstructing justice, hiding his financials

from public scrutiny and refusing to comply with a Board investigation of his campaign and law firm's political action committee.

Due to the time and expense it would require to challenge the subpoena, and in light of Creamer's threats to convene a press conference, McCaffery directed the Fund to simply turn over all of the requested documents. In response, Creamer and the Board accused McCaffery and the McCaffery for District Attorney Committee of intentionally violating campaign finance laws and misleading the public by misallocating certain campaign contributions in 2009 that should have been allocated to 2008. However, there was no hiding of funds, rather an administrative allocation of \$3,100 to calendar year 2008 and the remaining \$7,400 from a check in the amount of \$10,500 to calendar year 2009. The allocation was made to comply with the Philadelphia campaign finance laws.

After reviewing the books and records of the McCaffery for District Attorney Committee and the hundreds of thousands of dollars that were raised by the committee, the Board could only find an open allocation of \$3,100. The allocation was consistent with federal election laws which allow a contributor to allocate monies from a single check over two calendar years so as to comply with calendar year limits on campaign contributions.

Upon discovery of the allocation, Creamer and the Board informed the McCaffery for District Attorney Committee that notwithstanding the fact that local election laws are silent on allowable allocations, Creamer and the Board perceived the allocation as a violation of campaign finance laws. As a result, on the eve of the 2009 Primary Election, Creamer and the Board offered to allow McCaffery and his campaign to admit to knowing violations of the laws, pay a fine and repay the monies allocated from the campaign committee to the Fund.

McCaffery rejected the offer knowing that no one committed any intentional violation of the campaign finance laws. The Board responded by filing an enforcement action with the trial court alleging that McCaffery: (1) deliberately violated the campaign finance laws; (2) attempted to hide campaign contributions from the public; (3) concocted a “scheme” to hide contributions from the public; and (4) deliberately misreported the \$3,100 campaign contribution. Simultaneously with filing the enforcement action, on the eve of the 2009 Primary Election, Creamer held an extra-judicial press conference, not pertinent in any way to the enforcement action against McCaffery or his committee, where Creamer publicly accused McCaffery of criminal and civil misconduct, attempting to circumvent the campaign finance laws, and knowingly conspiring to hide the truth from the public.

As a result of the filing of the enforcement action, the McCaffery campaign ultimately paid a \$750 fine for the allocation of the \$3,100 to calendar year 2008. As part of the settlement agreement, which was reached long after the 2009 Primary Election, Creamer and the Board admitted that neither the McCaffery for District Attorney Committee, McCaffery individually or the committee treasurer intentionally or deliberately violated any of the campaign financial disclosure or conflict of interest laws. This admission by Creamer and the Board is in sharp contrast to the enforcement petition and the press conference statements made before the 2009 Primary Election. At all times relevant hereto, Creamer and the Board knew despite the press conference and filings, that McCaffery did nothing wrong intentionally, never intended to hide any of his campaign contributions from the public and never sought to violate the public trust.

Based on the facts set forth in the complaint, McCaffery alleges that Creamer, as Executive Director of the Board, was authorized to recommend and

take all actions on behalf of the Board against McCaffery and his committee and was required to do so in a lawful, unbiased, even-handed and fair manner. McCaffery alleges that Creamer and the Board failed to do so, and instead made frivolous, misleading and false statements about McCaffery and his campaign which were known to Creamer and the Board to be false and/or reckless. McCaffery further alleges that Creamer and the Board undertook this deliberate, rogue and reckless course of conduct in an effort to sabotage McCaffery's campaign, to embarrass McCaffery and to tarnish his name and reputation in the eyes of the voting public. Therefore, McCaffery demands, *inter alia*, compensatory damages, interest, costs, attorney's fees, and an award of punitive damages.

Creamer and the Board filed preliminary objections to the complaint on numerous grounds. In response, McCaffery filed preliminary objections to Creamer's and the Board's preliminary objections. Upon review, the trial court only addressed and sustained one preliminary objection on the basis that Creamer and the Board are immune from suit under the doctrine of quasi-judicial immunity.

The trial court held that the defense of quasi-judicial immunity was apparent on the face of the pleadings as McCaffery was suing the Board and Creamer, in their official capacities, for their conduct relating to the disposition of certain campaign finance issues. Trial Court Op. at 2. The trial court opined that pursuant to Section 4-1100 of the Philadelphia Home Rule Charter,¹ Creamer and

¹ Section 4-1100 of the Philadelphia Home Rule Charter specifically provides as follows:

The Board of Ethics shall administer and enforce all provisions of this Charter and ordinances pertaining to ethical matters, which for purposes of this Chapter shall include conflicts of interest, financial disclosure, standards of governmental conduct, campaign

(Continued....)

the Board are authorized, *inter alia*, to conduct investigations, to hold hearings regarding campaign finance irregularities, and to bring enforcement actions in the Court of Common Pleas, which would entail appellate review. Id. at 3. The trial court determined that such activities are clearly quasi-judicial. Id. The trial court held that given the diverse nature of the Board’s functions as both prosecutorial (conducting investigations) and quasi-judicial (holding hearings), the Board and its members are entitled to absolute quasi-judicial immunity. Id.

Citing Section 4-1100 of the Home Rule Charter, the trial court opined further that there are procedures and safeguards in place to “check” the actions of the Board and its members, including judicial review. Trial Court Op. at 3. The trial court stated that “[a]s the Board and its members enforce campaign laws for the public good in their quasi-judicial functions, they are entitled to

finance matters, prohibited political activities, and such additional related matters as the Council may from time to time assign to the Board. The Board shall handle all inquiries and complaints surrounding ethical matters and, notwithstanding the provisions of Section 4-400(a) and Section 8-410 of this charter, the Board shall render advisory opinions; provided that, with respect to opinions regarding State law, the Law Department, at the option of an employee requesting advice, shall have concurrent authority to render advisory opinions. The Board shall have the power to conduct investigations and convene hearings. The Board shall conduct its enforcement activities either by bringing enforcement actions in the Court of Common Pleas or, if authorized by Council by ordinance, administratively adjudicating alleged violations and imposing civil penalties and other remedies for violations. The Board shall prepare and disseminate a Code of Ethics Manual for use by all City officers and employees and conduct educational and training programs for all City officers and employees.

In addition, and subject to the provisions of this charter, the Board of Ethics shall exercise such other powers and duties vested in and imposed upon it by ordinance.

function without the harassment or intimidation arising from retaliatory lawsuits.” Id. at 3-4. The trial court stated that precious governmental resources should not be expended on defending frivolous lawsuits. Id. at 4. Finally, the trial court concluded that McCaffery’s concerns with the Board could have been litigated in the enforcement matter and that by circumventing the appropriate process, McCaffery has forfeited his right to complain due to the quasi-judicial immunity accorded to the Board and its members. Id. Accordingly, the trial court dismissed McCaffery’s complaint with prejudice. This appeal followed.

Initially, we note that our scope of review of an appeal from an order sustaining preliminary objections in the nature of a demurrer is to determine whether on the facts alleged in the complaint, the law states with certainty that no recovery is possible. Dynamic Sports Fitness Corporation of America v. Community YMCA, 768 A.2d 375 (Pa. Cmwlth. 2001), petition for allowance of appeal denied, 568 Pa. 707, 796 A12d 986 (2002). In making this review, we must accept as true all well-pled allegations of material fact averred in the complaint, as well as all inferences reasonably deducible therefrom. Id. Any doubts must be resolved in favor of overruling the demurrer. Id.

State law in Pennsylvania has extended quasi-judicial immunity to the administrative agency process. In Petition of Dwyer, 486 Pa. 585, 406 A.2d 1355 (1979), our Supreme Court followed the lead established by the United States Supreme Court in Butz v. Economou, 438 U.S. 478 (1978), a Section 1983 action, and extended the principle of quasi-judicial immunity to agency officials performing adjudicatory functions within an administrative agency. The granting of immunity was based upon the belief that adjudications within an administrative agency share enough of the characteristics of the judicial process (e.g., issuing subpoenas, ruling on evidence, regulating hearings and making or recommending

decisions) that those who participate in them should be absolutely immune from suit for damages. Just as with judicial immunity, it must be established that the actions complained of were performed within the quasi-judicial function for immunity to apply. See also Tulio v. Commonwealth, 470 A.2d 645 (Pa. Cmwlth. 1984). The test to determine if a function is “quasi-judicial” is whether it involves the exercise of discretion and requires notice and a hearing. Urban v. Meneses, 431 A.2d 308 (Pa. Super. 1981) (zoning board entitled to judicial immunity). See also Delate v. Kollé, 667 A.2d 1218 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 544 Pa. 677, 678 A.2d 367 (1996).

Section 3-806 of the Philadelphia Home Rule Charter establishes a 5 appointed member Board of Ethics, provides for the appointment of an executive director, and sets forth that the Board shall meet at least quarterly and at such other times as the chair may deem necessary.² As pointed out by the trial court, Section 4-1100 of the Home Rule Charter sets forth the powers of the Board of Ethics. These powers include the power to: (1) conduct investigations and convene hearings; (2) conduct its enforcement activities either by bringing enforcement actions in the Court of Common Pleas or, if authorized by Council by ordinance; (3) administratively adjudicated alleged violations; and (4) impose civil penalties

² Section 3-806(a) of the Philadelphia Home Rule Charter specifically provides as follows:

- (a) Composition. There shall be a Board of Ethics consisting of five members appointed by the Mayor with the advice and consent of a majority of the members of City Council. Members shall be chosen for their independence, integrity, civic commitment and high ethical standards; they shall be residents of, or have their primary place of business in, the City of Philadelphia and registered to vote. The members of the Board shall elect a chair and such other officers as deemed necessary.

and other remedies for violations. Finally, Section 20-606 of the Philadelphia Code sets forth detailed powers and duties of the Board.³ Section 20-606(i)

³ Section 20-606 of the Philadelphia Code provides, in pertinent part, as follows:

(1) Powers and Duties.

(a) Rules and Regulations. The Board shall promulgate rules and regulations as are necessary to implement and interpret the provisions of this Chapter consistent with the goal of providing clear guidance regarding standards of conduct and ethics.

....

(f) Complaints.

(i) The Board shall receive written complaints alleging violations of this Chapter. All such complaints must be signed by the complainant and the Board shall preserve the confidentiality of the complainant and keep information, records and proceedings relating to an investigation confidential at all times.

(ii) Whenever a written complaint is received by the Board, it shall:

(.1) Dismiss the complaint if it determines that no further action is required by the Board;

(.2) Investigate internally;

(.3) Make an initial determination as to whether there is probable cause to believe that a City officer or employee has violated a provision of this Chapter and, if so, proceed to adjudicate the matter in accordance with the regulations promulgated under paragraph (g) of this Section; or

(.4) Refer the alleged violation of this Chapter to the head of the City agency in which the City officer or employee serves if the Board deems the violation to be minor or if related disciplinary charges are pending against the City officer or employee; or

(.5) Refer the alleged violation to the Inspector General or other appropriate enforcement authorities.

(g) Investigations and Referrals.

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mandates that the records, reports, memoranda and files of the Board shall be confidential and shall not be subject to public inspection, except as otherwise provided by law. Also, no person shall disclose or acknowledge to any other person any information relating to a complaint, investigation, referral or pending adjudication, except as otherwise provided by law.

(i) The Board shall have the power to conduct an investigation of any matter related to the Board's responsibilities under this Chapter.

(ii) Whenever a City agency receives a complaint alleging a violation of the provisions of this Chapter or determines that a violation of this Chapter may have occurred, it shall refer such matter to the Board. Such referral shall be reviewed and acted upon by the Board in the same manner as a complaint received by the Board under paragraph (e) (sic) of this Section.

(h) Adjudication. The Board shall, by regulation, provide for adjudication of alleged violations of this Chapter, insuring that notice and an opportunity to be heard are provided prior to any final decision by the Board. If the Board finds that there has been a violation of this Chapter it may impose penalties pursuant to Section 20-612. Findings and decisions of the Board on any actions taken by the Board shall be final and there shall be no further appeal other than to court as provided by law.

(i) Confidentiality. Except as otherwise provided in this Chapter, the records, reports, memoranda and files of the Board shall be confidential and shall not be subject to public inspection, except as otherwise provided by law. Also, no person shall disclose or acknowledge to any other person any information relating to a complaint, investigation, referral or pending adjudication, except as otherwise provided by law.

(2) Mandatory Cooperation with the Board. All City officers and employees shall cooperate fully with any request of the Board made pursuant to the execution of the Board's powers and duties. Any City officer or employee who fails or refuses to cooperate with the Board shall be deemed to be in violation of this Chapter.

Herein, McCaffery argues that Creamer and the Board are not entitled to immunity for actions apart from filed litigation or administrative hearings. McCaffery contends that his complaint raises factual issues regarding whether Creamer and the Board acted outside the normal course and scope of their employment that cannot be resolved on preliminary objections. McCaffery contends that Creamer and the Board publicly disclosed their filing against him in violation of Section 20-606(i) of the Philadelphia Code. McCaffery argues that the trial court accepted the “facts” as proposed by Creamer and the Board in their preliminary objections and the documents improperly attached thereto resulting in a rushed judgment on the part of the trial court to dismiss his complaint on the basis of immunity.

In response, Creamer and the Board argue that the public disclosure that McCaffery alleges defamed him was in reality an enforcement update read into the record at an official meeting of the Board.⁴ Creamer and the Board contend that the filing and disclosure of the enforcement action against McCaffery by the Board are so obviously integral to the Board’s investigative, adjudicatory and enforcement functions, as well as its duty to keep the public informed, that it is self-evident why McCaffery’s complaint was dismissed on its face by the trial court.

Upon review of McCaffery’s complaint, we conclude that the trial court erred in sustaining the preliminary objection alleging that Creamer and the Board are entitled to quasi-judicial immunity for their actions and dismissing McCaffery’s complaint with prejudice. The material facts alleged in McCaffery’s

⁴ In reply, McCaffery contends that any arguments regarding the enforcement action are irrelevant because his claims are not predicated on the enforcement action but rather the Board’s

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complaint, if accepted as true, show that if Creamer and the Board did in fact publicly disclose frivolous, misleading and false statements about McCaffery and his campaign at a press conference, then recovery is possible. We recognize that Creamer and the Board allege that the public disclosure that McCaffery alleges defamed him was in reality an enforcement update read into the record at an official meeting of the Board. However, whether the alleged public disclosure was made at a press conference or at an official meeting of the Board is a question of fact that cannot be resolved on preliminary objections.

Moreover, while Creamer and the Board attached several documents to their preliminary objections to support their version of the facts, the trial court does not state whether the attached documents were of the nature that the trial court could take judicial notice. In other words, Creamer and the Board are relying upon the statement of facts that they have alleged in their preliminary objections and in the documents attached thereto to prove at this stage of the proceedings that they are entitled to the affirmative defense of quasi-judicial immunity. However, it is the facts set forth in the complaint that must be accepted as true and from the facts alleged in McCaffery's complaint it is not clear from the face of the complaint that Creamer and the Board are entitled quasi-judicial immunity.

This Court is well aware that it is important to resolve immunity questions at the earliest possible stage in litigation. Hunter v. Bryant, 502 U.S. 224, 227 (1991). We are also aware that the immunity afforded to certain public officials from suits for money damages arising out of their official acts serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.

and Creamer's extra-judicial defamatory statements.

Clinton v. Jones, 520 U.S. 681, 692-93 (1997). However, said immunity arising out of official acts is inapplicable to unofficial conduct. Id. In this matter, we conclude, based on the factual allegations of McCaffery's complaint, that the doubts as to where, when, and if an unlawful public disclosure by Creamer and the Board resulting in unofficial conduct on their part occurred, must be resolved in favor of overruling the demurrer.

Accordingly, we reverse and remand this matter to the trial court for a ruling on the remaining preliminary objections that the court deemed moot.

JAMES R. KELLEY, Senior Judge

