SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2649-20

LAWRENCE B. SEIDMAN,

Plaintiff-Appellant,

v.

SPENCER SAVINGS BANK, S.L.A., JOSE B. GUERRERO, PETER J. HAYES, NICHOLAS LORUSSO, BARRY MINKIN, ALBERT D. CHAMBERLAIN, and JOHN STURGES,

Defendants-Respondents.

Argued March 2, 2022 – Decided May 11, 2022

Before Judges Gilson, Gooden Brown, and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. C-000111-20.

Peter R. Bray argued the cause for appellant (Bray & Bray, LLC, attorneys; Peter R. Bray, on the briefs).

Sean Mack argued the cause for respondents (Pashman Stein Walder Hayden, PC attorneys; Sean Mack, of

counsel and on the brief; Timothy P. Malone and Darcy Baboulis-Gyscek, on the brief).

PER CURIAM

The parties are engaged in ongoing disputes to control Spencer Savings Bank, S.L.A. (the Bank). In this litigation, plaintiff Lawrence Seidman appeals from portions of an order dismissing his claims that the directors of the Bank (Directors) violated their fiduciary duties by lobbying against a proposed amendment to legislation concerning the governance of mutual savings banks. We hold that the Directors' lobbying was protected under the Noerr-Pennington doctrine, which precludes civil liability for exercising the First Amendment right to petition the government. Accordingly, we affirm.

I.

The Bank is a mutual savings association established under the New Jersey Savings and Loan Act (the S&L Act), N.J.S.A. 17:12B-1 to -319. The S&L Act provides that depositors and borrowers are the members of a mutual savings association, and those members elect the bank's directors. N.J.S.A. 17:12B-63; N.J.S.A. 17:12B-74. The board of directors in turn oversees the association. N.J.S.A. 17:12B-62.

For seventeen years, plaintiff, who is a depositor in the Bank, has sought to become a director. Plaintiff's efforts and the existing Directors' opposition to

those efforts have engendered several litigations and appeals. See Seidman v. Spencer Sav. Bank, SLA, No. A-2039-17 (App. Div. Oct. 3, 2019) (slip op. at 3, n.2) ("Seidman V") (listing and summarizing the four appeals before this court from 2006 to 2015); Vasta v. Spencer Sav. Bank, SLA, No. PAS-C-00108-21 (filed Nov. 10, 2021).

This appeal arises out of a dispute over a proposed plan to convert the Bank to a different type of bank. In 2019, the Directors voted to present a plan to convert the Bank from a mutual savings association to a mutual savings bank. Mutual savings banks are governed by a board of managers, and the managers are elected by the board of managers. N.J.S.A. 17:9A-188. In other words, the member-depositors do not vote for the bank's leadership. The Directors claim that they propose this change to expand the Bank's ability to make commercial loans because mutual savings banks are not required to meet a federal regulation known as the "qualified thrift lender test." In contrast, plaintiff asserts that the proposed conversion was an effort to entrench the Directors in their position and prevent him from becoming a director.

After the Bank announced the plan to convert to a mutual savings bank, bills were introduced into the New Jersey Senate and Assembly to amend the

statutes governing mutual savings banks and other mutual associations. See S. 2726 and A. 4824 (2020) (collectively the Proposed Bill).

The Proposed Bill provided that, for newly converted mutual savings banks, the management would be elected by account holders. Plaintiff apparently supports the Proposed Bill, and defendants assert that he helped cause it to be introduced. Defendants also assert that the Proposed Bill would be bad for the Bank.

In December 2020, plaintiff brought this action seeking to enjoin the Bank and the Directors from conducting the 2021 annual meeting where members would elect the board of directors. Plaintiff also alleged that the Directors and the Bank were breaching their fiduciary duties and engaging in corporate waste by lobbying against the Proposed Bill.

The trial court denied plaintiff's request for temporary restraints. The Bank and the Directors then moved to dismiss plaintiff's complaint. Relevant to this appeal, defendants argued that their lobbying activities were protected under the Noerr-Pennington doctrine. The trial court agreed, and on April 29, 2021, it issued an order and written opinion dismissing with prejudice all of plaintiff's claims. Plaintiff now appeals but challenges only the dismissal of his claims for breach of fiduciary duties (count II) and corporate waste (count III).

II.

On appeal, plaintiff argues that the Noerr-Pennington doctrine does not apply to the Directors' lobbying activities because the Directors had "abrogate[ed] their fiduciary duties and squander[ed] the [Bank's] money." We reject that argument because plaintiff does not contend, and the record does not support, that the lobbying efforts were a sham. Instead, the record establishes that plaintiff and the Directors have different views of the Proposed Bill. Therefore, the lobbying by the Directors and the Bank was protected by the First Amendment right to petition the government.

We use a de novo standard when reviewing an order dismissing a complaint for failure to state a claim. State ex rel. Campagna v. Post Integrations, Inc., 451 N.J. Super. 276, 279 (App. Div. 2017). "When reviewing a motion to dismiss under Rule 4:6-2(e), we assume that the allegations in the pleadings are true and afford the pleader all reasonable inferences." Sparroween, LLC v. Twp. of W. Caldwell, 452 N.J. Super. 329, 339 (App. Div. 2017). Where, however, it is clear that "the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate remedy." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005).

The Noerr-Pennington doctrine recognizes the First Amendment right of citizens to petition their government and generally immunizes petitioning activities from civil liability. Oasis Therapeutic Life Ctrs., Inc. v. Wade, 457 N.J. Super. 218, 232 (App. Div. 2018); Fraser v. Bovino, 317 N.J. Super. 23, 37 (App. Div. 1998). The doctrine has its roots in antitrust law and was named after two antitrust cases. See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965). In those cases, the United States Supreme Court held that the defendants were immune from antitrust liability for engaging in conduct, including litigation, aimed at influencing decision-making by the government. Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (1993).

The protection accorded under the Noerr-Pennington doctrine has been expanded beyond antitrust to include protection against other types of claims, including tort claims of malicious prosecution and abuse of process. Main St. at Woolwich, LLC v. Ammons Supermarket, Inc., 451 N.J. Super. 135, 144 (App. Div. 2017). Accordingly, "New Jersey courts have recognized the Noerr-Pennington doctrine and applied it to afford immunity to those who petition the government for redress." Ibid.; see also Structure Bldg. Corp. v. Abella, 377

N.J. Super. 467, 471 (App. Div. 2005) (holding that a homeowners' group that fought a developer's effort to obtain subdivision approval was protected under the doctrine); Fraser, 317 N.J. Super. at 37-38 (holding that objectors to a land-use application are immune from tort liability under the Noerr-Pennington doctrine).

There is a limitation on the application of the Noerr-Pennington doctrine. The doctrine does not apply if the conduct at issue is a sham. See Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 556 (2014); Main St. at Woolwich, 451 N.J. Super. at 144. For example, the doctrine will not apply if the petitioning activity is a "mere sham" to cover an attempt to interfere with the business relationship of a competitor. Fraser, 317 N.J. Super. at 37 (quoting Pro. Real Est. Invs., Inc., 508 U.S. at 60-61). Petitioning activity is also not protected when it is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Pro. Real Est. Invs., Inc., 508 U.S. at 60. Accordingly, the doctrine does not protect actions that aim to further wrongful conduct through use of the governmental process as opposed to the outcome of that process. Id. at 60-61. "[P]rivate action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be

deemed a valid effort to influence government action." Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 n.4 (1988).

Plaintiff contends that the Directors' lobbying activity against the Proposed Bill was driven by self-interest and was not in the best interest of the Bank and its members. He alleges that the Directors breached their fiduciary duties by lobbying against the Proposed Bill and engaged in corporate waste by spending the Bank's money to hire a lobbying firm. Although plaintiff concedes that lobbying is a protected right, he argues that his claims are not governed by the Noerr-Pennington doctrine because the Directors were taking actions to entrench themselves in their positions.

We are not persuaded by plaintiff's arguments because he has not alleged that the lobbying activity was a sham. Indeed, the record would not support a claim that the lobbying was a sham. To determine whether conduct is a sham, a court engages in an objective consideration without evaluating "the actor's underlying motivation, no matter how improper it may be." Oasis Therapeutic, 457 N.J. Super. at 232 (quoting Fraser, 317 N.J. Super. at 38). "Only if challenged [activity] is objectively meritless may a court examine the [petitioner's] subjective motivation." Pro. Real Est. Invs., Inc., 508 U.S. at 60.

In plaintiff's complaint, he asserts that the Directors sought to influence government policy by opposing the Proposed Bill. There is no allegation that the Directors' lobbying efforts were so baseless that they had no reasonable expectation of success. Even affording plaintiff all reasonable inferences, and assuming the Directors' motivations were as malign as he says, the lobbying activity was not objectively meritless. Indeed, the Proposed Bill did not pass in the 2020-2021 legislative session. See Bill S2726, New Jersey Legislature, https://njleg.state.nj.us/bill-search/2020/S2726 (last visited Apr. 29, 2022) (indicating that the last action taken on the Bill was referral to senate committee); see also Noerr, 365 U.S. at 144 (finding no sham where effort to influence legislation "was not only genuine but also highly successful").

The critical, indisputable fact is that the Directors had a right to oppose the Proposed Bill. No matter what their motives were, the Proposed Bill, as a proposed amendment to an existing statute, was subject to legitimate debate. The Directors' and the Bank's effort to lobby against the Proposed Bill becoming law was an exercise of their First Amendment rights to petition the government. Accordingly, those lobbying efforts cannot form the basis for civil liability.

Plaintiff also argues that the Directors' First Amendment activities can be limited because their positions with a mutual savings association were quasi-

public. Plaintiff analogizes the Directors' position to the limitations on judges engaging in political activity. We reject that unprecedented argument as applied to the facts alleged by plaintiff. The position of the Directors, even if we consider them to be quasi-public positions, are not analogous to judges. Noerr-Pennington immunity from civil liability covers all genuine petitioning efforts without regard for an actor's status or profession. Plaintiffs' contention that the Directors should not be protected by the Noerr-Pennington doctrine is not consistent with the doctrine's underlying policy to allow democratic engagement.

In short, the Noerr-Pennington doctrine applies to the lobbying efforts by the Directors and the Bank, and there are no facts that would support a finding that those efforts were a sham. The trial court, therefore, correctly dismissed plaintiff's claims in this action.

Affirmed.