

FRIEDMAN DOHERTY, LLC
125 North Route 73
West Berlin, NJ 08091
(856) 988-7777
Attorneys for the Plaintiff Karen Banda

SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION
ESSEX COUNTY
JUL 24 2009
RECEIVED

KAREN BANDA,

Plaintiff,

vs.

BLOOMFIELD TOWNSHIP and
LOUISE M. PALAGANO, MUNICIPAL CLERK
OF BLOOMFIELD TOWNSHIP,

Defendants.

NEW JERSEY SUPERIOR COURT
ESSEX COUNTY- LAW DIVISION

DOCKET NO. **ESX-L 6099-09**
Civil Action

VERIFIED COMPLAINT
OPRA, Prerogative Writ and other relief

JUL 24 2009
RECEIVED

Plaintiff, Karen Banda, hereby complains against the Defendant as follows:

Background

1. Plaintiff Karen Banda resides at 18 Mountain Avenue, Bloomfield, NJ 07003.
2. Defendant Bloomfield Township is a New Jersey municipality with offices at One Municipal Plaza, Bloomfield NJ 07003. Within the powers and oversight of the municipality is the Bloomfield Department of Health.
3. Louise M. Palagano is the Municipal Clerk of Bloomfield Township. She is being sued in her official capacity only.
4. On/about May 21, 2009 the Bloomfield Board of Health held a meeting that was open to the public.
5. On/about May 26, 2009 Plaintiff requested a copy of the tape of the meeting held on May 21, 2009.
6. Plaintiff was informed that there was a \$25 charge for a copy of a meeting tape if the township supplied the tape.
7. Plaintiff paid the \$25 requested.
8. On/about June 22, 2009, the audio tape copy was supplied to the Plaintiff.
9. Plaintiff was unable to understand what was taking place on the tape as it was "gibberish".

- The tape was copied at a high a speed so as to be unintelligible when played at a normal speed.
10. During the week of June 22, Plaintiff sent e-mail to the Bloomfield Health Department and Bloomfield relating the problem with the tape.
 11. No response was received.
 12. The week of June 29, Plaintiff contacted the Bloomfield Health Department and spoke with personnel (Donna-no last name provided), who informed her that Bloomfield made the copies for the Bloomfield Health Department and that she would get another copy of the tape made.
 13. On July 13, Plaintiff again called the Bloomfield Health Department to inquire about the status of the replacement tape.
 14. At that time, Plaintiff was informed that Bloomfield has only had one tape machine and it only makes high speed tapes.
 15. Plaintiff was instructed that she could listen to the original tape on the township equipment located in Town Hall. The town has operating hours between 8:30 and 4:30 p.m., Monday through Friday only.
 16. The tape was made on a high-speed recording device, rendering it unintelligible on typical consumer audio equipment such as home stereos, "Walkman"-type radio cassette players and car audio systems.

COUNT ONE
VIOLATION OF THE OPEN PUBLIC RECORDS ACT, N.J.S.A. 47:1A-1, et. seq.
PREROGATIVE WRIT
(high-speed tape recordings)

17. The above allegations are incorporated by reference.
18. Defendants provide copies of meeting tapes in a format that is not intelligible on equipment commonly available to consumers.
19. Providing copies of tapes in formats or speeds that are not accessible to citizens on typical consumer audio equipment is a denial of access in violation of OPRA.

WHEREFORE, Plaintiff requests judgement as follows:

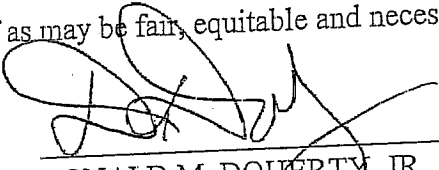
- a. Compelling Defendants to provide copies of audiotapes in a format able to accessed on audio equipment typically available in the consumer market place;
- b. Awarding counsel fees and costs of suit;
- c. Awarding other such relief as may be fair, equitable and necessary.

COUNT TWO
VIOLATION OF THE CIVIL RIGHTS ACT, N.J.S.A. 10:6-1, et. seq.
(excessive fees)

20. The above allegations are incorporated by reference.
21. The Open Public Records Act and common law authority limit the Defendants to charging "actual cost" for copies of meeting recordings.
22. Plaintiff had the right to charged "actual cost" for the recordings.
23. The New Jersey Civil Rights Act protects all rights afforded under state or federal law.
24. In charging Plaintiff \$25 for an audiotape, Defendants imposed a charge greater than "actual cost", in violation of New Jersey law.

WHEREFORE, Plaintiff requests judgement as follows:

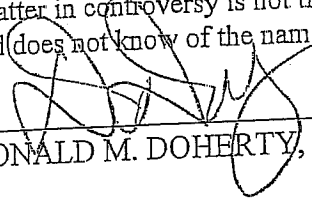
- a. Compelling Defendants to provide copies of audiotapes in a format able to accessed on audio equipment typically available in the consumer market place;
- b. Refunding the sums collected in excess of 'actual cost';
- c. Awarding counsel fees and costs of suit;
- d. Awarding other such relief as may be fair, equitable and necessary.



DONALD M. DOHERTY, JR., ESQ.

RULE 4:5-1 CERTIFICATION

The undersigned hereby certifies that the matter in controversy is not the subject of any other pending action or arbitration proceeding and the undersigned (does not know of the names of any other parties who should be joined in the action.



DONALD M. DOHERTY, JR., ESQ.

VERIFICATION

I, Karen Banda, do hereby verify the following statements on the following bases:

Paragraphs 1-16, 18 and 21 are made based upon my personal knowledge.

Paragraphs 19 and 22-24 are based upon information and belief, as I am not an attorney and this is my understanding of the law as it has been explained to me.

Paragraphs 17 and 20 are summaries incorporating the other paragraphs.

I certify the foregoing statements made by me are true and that, if the statements are willfully false or misleading, I understand that I am subject to punishment.



Karen Banda

FRIEDMAN DOHERTY, LLC

125 North Route 73
West Berlin, NJ 08091
(856) 988-7777

Attorneys for the Plaintiff Karen Banda

| | | |
|-------------------------------------|---|--|
| KAREN BANDA, | : | NEW JERSEY SUPERIOR COURT |
| | : | ESSEX COUNTY- LAW DIVISION |
| | : | |
| <i>Plaintiff,</i> | : | DOCKET NO. ESX-L-6099-09 |
| vs. | : | |
| | : | Civil Action |
| | : | |
| BLOOMFIELD TOWNSHIP and | : | |
| LOUISE M. PALAGANO, MUNICIPAL CLERK | : | Notice of Motion for Summary Judgment |
| OF BLOOMFIELD TOWNSHIP, | : | on Affirmative Defenses 2, 3, and 4 |
| | : | |
| <i>Defendants.</i> | : | |

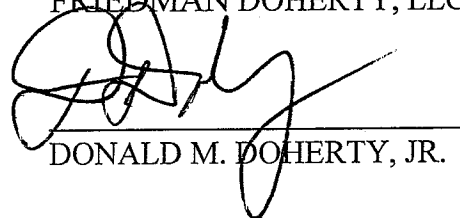
To: Steven J. Martino, Esquire
Iacullo Martino, LLC
247 Franklin Avenue
P.O. Box 110129
Nutley, New Jersey 07110

PLEASE TAKE NOTICE that on the 6th day of November 2009, the undersigned attorney for Plaintiff, Karen Banda, shall move before the Essex County Superior Court, County Courts Building 50 W. Market Street, Newark, New Jersey 07102 for an order for summary judgment on affirmative defenses 2, 3, and 4.

TAKE FURTHER NOTICE that in support of this motion Plaintiff will rely on the brief, and certification and supporting documents in support of the motion. Oral Argument is not requested unless opposed.

FRIEDMAN DOHERTY, LLC

By:



DONALD M. DOHERTY, JR.

Date: October 6, 2009

FRIEDMAN DOHERTY, LLC

Counsellors-At-Law
125 North Route 73
West Berlin, New Jersey 08091

Donald M. Doherty, Jr. •
Sander D. Friedman*
Wesley G. Hanna*

(856) 988-7777 telephone
(856) 988-7744 facsimile

Also Member of PA & FL Bar •
Also Member of PA Bar *

October 6, 2009

The Honorable Claude M Coleman,
Essex County Superior Court
465 martin Luther King Blvd.
Newark, NJ 07102

Re: Banda v. Bloomfield
Docket no: ESX-L-6099-09

Dear Judge Coleman:

Please accept this letter brief in lieu of a more formally compiled pleading. The Plaintiff in this Open Public Records Act case now moves for partial summary judgment on three of the Defendants' affirmative defenses.

BACKGROUND

Plaintiff Karen Banda requested copies of a meeting tape from Bloomfield on May 26, 2009.¹ The Defendants, Bloomfield and its Clerk, ultimately provided her the tape copy on June 22, 2009 far after OPRA's seven business day deadline. The next problem is that she was charged \$25 for a cassette tape. (*Compare Counsel Cert. Ex. 1 ¶5-8 with Ex. 2 admissions ¶5-8*) The biggest problem was that she was provided tapes made on high-speed recording equipment. As a result, she could not listen to the tapes without special equipment or presenting herself in town hall between 8:30 and 4:30, when she herself

¹ The tapes were of a Bloomfield Board of Health meeting and all requests are made through the Bloomfield Municipal Clerk, whose staff then makes the tapes.

was required to be at work. (*Compare Counsel Cert. Ex.1 ¶15 with Ex. 2 admission ¶15*)

Banda then sued on July 24, 2009 challenging that Bloomfield's practices violate OPRA, the \$25 tape copy charge was not "actual cost" and contending that OPRA requires records be made available in a format able to actually be accessed by citizens. These issues, interesting as they may be, are not currently before the Court. Banda's claims only seek relief under OPRA and the New Jersey Civil Civil Rights Act. (*Material Fact #4*)

Defendant filed their Answer on October 2, 2009 and served it on October 5. That Answer contains three affirmative defenses that Banda now seeks to strike because they are inapplicable as a matter of law. These challenged defenses are laches, estoppel and failure to exhaust administrative remedies. (*Counsel Cert. Ex., B*)

The Doctrine Of Laches Is Inapplicable To This Case

Under the doctrine of laches, a party will be denied enforcement of a known right where the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. The Supreme Court defines laches as "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." *Lavin v. Board of Education of Hackensack*, 90 N.J. 145, 151 (1982) (quoting from 2 Pomeroy Equity Jurisprudence § 419 at 171-72 (5th ed. 1941)); *See also, Knorr v. Smeal*, 178 N.J. 169, 180-81 (2003) Laches prevents parties from taking advantage of a time delay (or conduct) that prejudices the adversary.

This case was filed only 32 days after the offending tape was provided. *Material Fact #1 and Material Fact #2* The law grants Ms. Banda 45 days to file her OPRA claim. *Mason v. City of Hoboken*, 196 N.J. 51, 70 (2008) She had two years to file her New Jersey Civil Rights claim. *N.J.S.A. 2A:14-2* No reasonable mind could find that Ms. Banda engaged in any delay, much less an unreasonable delay. And Defendant cannot show prejudice, but it acted within the bounds of its own standard practice. Accordingly, the Second Affirmative Defense fails as a matter of law.

The Doctrine Of Estoppel Is Inapplicable To This Case

The Third Affirmative Defense asserts that “estoppel” bars the claim. There is no set of facts that could render this defense applicable.

“...The essential principle of the policy of estoppel . . . is that one may, by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct. An estoppel . . . may arise by silence or omission where one is under a duty to speak or act. It has to do with the inducement of conduct to action or non-action. One's act or acceptance may close his mouth to allege or prove the truth. The doing or forbearing to do an act induced by the conduct of another may work an estoppel to avoid wrong or injury ensuing from reasonable reliance upon such conduct. The repudiation of one's act done or position assumed is not permissible where that course would work injustice to another who, having the right to do so, has relied thereon....”

Middletown Tp. PBA v. Middletown Tp., 162 N.J. 361, 367 (2000)

This is simply not a defense in this case. Banda did nothing to induce the Defendants into charging her such an exorbitant sum for the tape or having them make it on a high speed recorder so that it is unintelligible. Banda was under no obligation to ascertain the “actual cost” of the tape prior to requesting it, nor did she request a high-speed tape only to spring a “gotcha” claim. Banda misled no one. And Defendants did not rely on anything she did. **The actions of the Defendants were imposed unilaterally as part of their standard operating procedures.** *Material Fact #3* This defense could never apply to the allegations made here.

There Is No Administrative Remedy Plaintiff Was Required To Exhaust

The Fourth Affirmative Defense contends that Banda failed to exhaust her administrative remedies before filing this case. Banda proceeds only under OPRA and the New Jersey Civil Rights Act. *Material Fact #4* Neither OPRA nor the New Jersey Civil Rights Act requires any predicate administrative procedures before a claimant can bring suit.

The Open Public Records Act allows claimants to pick either the Superior Court or the Government Records Council as the forum to air their claims for access. *N.J.S.A.*

47:1A-6 There is no mandate to participate in an administrative proceeding prior to filing suit.

The New Jersey Civil Rights similarly contains no limitation on a claimant's ability to file suit. *N.J.S.A. 10:6-2* reads:

- c. Any person....., may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.
- d. An action brought pursuant to this act may be filed in Superior Court. Upon application of any party, a jury trial shall be directed.

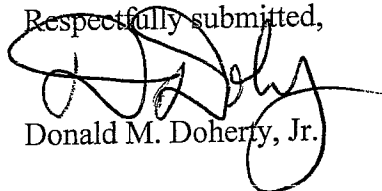
Banda proceeds only under these two laws. As there is no requirement for a pre-filing administrative process, this defense could never be applicable.

CONCLUSION

No matter what "facts" Defendants could proffer (without running afoul of frivolous pleading requirements), these asserted defenses will never be applicable. Nothing that could ever be learned in discovery would ever make them relevant. This case turns solely on Defendants' unilateral actions and their own everyday procedures.

Defendants are entitled to defend their practices and procedures on their face. Pleading irrelevant defenses only forces the needless expansion of this case.

Respectfully submitted,

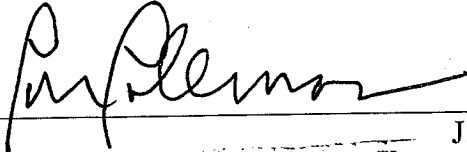


Donald M. Doherty, Jr.

DMD/j

ORDERED that plaintiff's claim be and is hereby dismissed with prejudice; and
it is further

ORDERED that a copy of this Order be served on all parties within 7 days
of the date hereof.



J.S.C.
CLAUDE M. COLEMAN, J.S.C.

* Even if the Tapes were inaudible of Plaintiff's
Machine, Plaintiff was granted Access to LPTen to the
TAPES AND an opportunity to Record the TAPES at a
speed and in a manner suitable for Plaintiff's Recorder.
The ^{actual} COST of Duplicating the tape is a dispute
of a material fact and not appropriate for summary
Judgment at this time.

FRIEDMAN DOHERTY, LLC
125 North Route 73
West Berlin, NJ 08091
(856) 988-7777
Attorneys for the Plaintiff Karen Banda

F I L E D
APR 29 2011
Francine A. Schott, J.S.C.

KAREN BANDA,

Plaintiff,

vs.

BLOOMFIELD TOWNSHIP and
LOUISE M. PALAGANO, MUNICIPAL CLERK
OF BLOOMFIELD TOWNSHIP,

Defendants.

NEW JERSEY SUPERIOR COURT
ESSEX COUNTY- LAW DIVISION

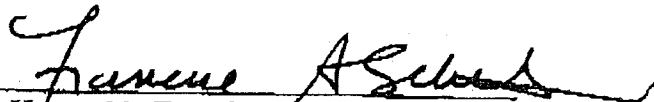
DOCKET NO. ESX-L-6099-09

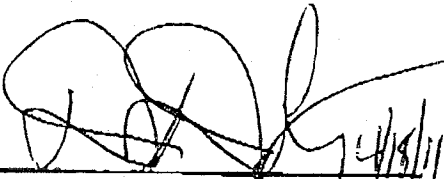
Consent Order Resolving Open Issues
and Closing Case

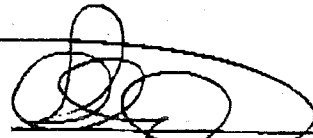
THIS MATTER having been opened to the Court by Plaintiff and it having been represented to the Court that the Plaintiff and Defendant have resolved the outstanding issues following the prior grant of summary judgment, the following Order is hereby entered

ON THIS 29 DAY OF April 2011, **ORDERED** that:

1. The balance of the Complaint, addressing the fee imposed on the Plaintiff for copies of tapes is hereby marked settled, and the case is dismissed with prejudice and closed.
2. Although the matter is being dismissed, either party has a right to appeal the Summary Judgment Order entered in this matter.


The Honorable Francine A. Schott, J.S.C.


Donald M. Doherty, Jr., Esq.
Attorney for the Plaintiff


Steven J. Marino, Esq.
Attorney for the Defendant Tp. of Bloomfield

OWNSHIP OF BLOOMFIELD

FINANCE DEPT. • MUNICIPAL BUILDING
BLOOMFIELD, N.J. 07003 • (973) 680-4038

VOUCHER

| |
|--|
| PURCHASE ORDER NO. |
| 60254 |
| <small>SHOW THIS NUMBER ON ALL INVOICES, PACKING LISTS, AND CORRESPONDENCE.</small> |
| <small>THIS ORDER IS SUBJECT TO THE TERMS AND CONDITIONS SHOWN. NO CHANGES MAY BE MADE WITHOUT WRITTEN CONSENT OF THE PURCHASER.</small> |

TO • **Friedman Doherty, LLC**
125 N Route 73
West Berlin, NJ 08091

SHIP TO • **TOWNSHIP OF BLOOMFIELD**
INSURANCE COMMISSION
MUNICIPAL PLAZA
BLOOMFIELD, NJ 07803

Account No. **11-12-22-056-000**


VENDOR #:

| QUANTITY | DESCRIPTION | UNIT COST | TOTAL |
|----------|--|-----------|-------------------|
| | Full and final payment for settlement agreement Regarding Banda v. Township of Bloomfield DOCKET # ESX-L-6099-09 | | |
| | TOTAL | | \$1,544.95 |

IMPORTANT: Required By N.J. Right To Know Law, Please send Material Safety Data Sheets (MSDS).

IMPORTANT: Sign And Return White Copy. * Keep Green Copy For Your Records.

NEW JERSEY STATE SALES TAX EXEMPTION CERTIFICATE NO. 22-6001664

| | | | |
|--|--------------|---|--|
| <p>OFFICER'S CERTIFICATION I, having knowledge of the facts, certify that the materials and supplies have been received or the services rendered; said certification being based on signed delivery slips or other reasonable procedures.</p> | | <p>Approved: _____ Township Administrator</p> | |
| DATE | SIGNATURE | | |
| <p style="text-align: center;">PAID</p> | | <p>* Claimant's Certification and Declaration</p> <p>I do solemnly declare and certify under the penalties of the law that the within bill is correct in all its particulars; that the articles have been furnished or services rendered as stated therein; that no bonus has been given or received by any person or persons within the knowledge of this claimant in connection with the above claim; that the amount therein stated is justly due and owing; and that the amount charged is a reasonable one.</p> | |
| DATE | CHECK NUMBER | <p>Signature Here: </p> | |
| | | <p>Date: <u>3/7/11</u></p> | <p>Official Position: <u>Member of LLC</u></p> |

VOUCHER COPY - PLEASE SIGN AT X AND RETURN WITH INVOICE FOR PAYMENT