

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

LEBANON TOWNSHIP POST 115 :
FIRST AID SQUAD, A NEW JERSEY :
NONPROFIT CORPORATION, AND :
SABATINO DE SANTIS, JR., : SUPERIOR COURT OF NEW JERSEY
Plaintiff, : LAW DIVISION, CIVIL PART
 : HUNTERDON COUNTY
vs. : DOCKET NO. HNT-L-232-10
 :
THE TOWNSHIP OF LEBANON, :
JAY D. WEEKS, IN HIS CAPACITY :
AS MAYOR, GEORGE PIAZZA, :
IN HIS CAPACITY AS TOWNSHIP :
COMMITTEEMAN, PATRICIA :
SCHRIVER, IN HER CAPACITY AS :
COMMITTEEWOMAN, AND THE :
TOWNSHIP COMMITTEE OF LEBANON :
Defendant :
 :
 : OPINION

Decided: June 11, 2010

BUCHSBAUM, PETER A., J.S.C.

This is a case about public meetings and ambulances.

Facts:

In February of 1970 the Lebanon Township Post 115 First Aid Squad (the Squad) became a corporation. Gabriel Cert., Exh. B. The purpose of the squad is to provide first aid and ambulance services. Id. Currently the Squad has an active membership of 40 person including 28 certified Emergency Medical Technicians (EMTs) and seven ambulance drivers. Verified Comp. ¶5. The Squad held two ambulances No. 19-53 and 19-51. Id. at ¶¶25-28. The Squad paid for ambulance no. 19-51. Id. at ¶16. The

Township and the Squad split the cost of no. 19-53 with the Squad paying \$45,000 of the approximately \$145,000 total. Id. at ¶17. The Township held title to both ambulances and provided insurance. Id. at ¶28. The parties dispute the condition and nature of the items kept within the ambulances. In their answer the defendants stated they lacked knowledge as to the Squad's allegation it paid for the ambulances. Ans. ¶¶16-17. In its papers with this application the defendants did not rebut this allegation.

Prior to the meeting which forms the basis of the plaintiffs' complaints, defendant Lebanon Township (the Township or Lebanon) and the Squad discussed the Squad's intention to [PAGE 2] begin charging for its services. Members of the Squad, plaintiff De Santis and member Andrea Hutchins, participated in executive sessions on November 4, 2009, January 20, 2010, February 3, 2010, February 17, 2010, March 3, 2010, and March 17, 2010.¹ George Cert., Exh. 7, 9-14 (unredacted). During the executive session discussing the Squad on November 16, 2009 Bill and Carol Faust were present. George Cert., Exh. 8. It is unclear whether the Fausts are members of the squad.

On April 7, 2010 defendant Township Committee of Lebanon (the Committee) held a regular meeting. George Cert. Exh. 15, Minutes. The regular meeting began at 7:00 p.m. with defendant Mayor Jay Weeks

¹ For the March meetings plaintiff De Santis was present without Ms. Hutchins. In addition, Committeemen Wunder was present at several of the meetings and until March 29, 2010 he was a member of the squad. See Sandorse Cert., Exh. E.

(Mayor Weeks) reciting the newspapers the meeting was published in compliance with the Open Public Meetings Act (OPMA). Id. At 7:36 p.m. the Committee voted to convene an executive session. Id. A review of the recordings of the meeting and a transcript from the recordings reveals the Township's attorney, Philip George, Esquire, stated the topics of executive session as "personnel, contracts, and pending and potential litigation." See Peles Cert., Exh. B., TR at 25:18-23. In reference to litigation, Mr. George stated "I don't know that there will be any action taken afterwards, but there may be action taken afterwards." Present during the executive session were the Township Clerk, Karen Sandorse, the Committee members, and the Township's attorney. Sandorse Cert. ¶30.

Around 8:30 p.m. the Committee voted to reconvene its regular meeting. George Cert. Exh. 15 at 5. No recording of the executive session appears, however, the minutes appear with the unredacted submission from counsel. George Cert., Exh. 14. The minutes do not reflect any discussion of a contract or of the Squad's equipment. Id. Mr. George described the discussion during the executive session as involving a clerk's position, the Tilcon litigation, well testing, and the Squad. Id. He noted that Committeeman Wunder recused himself during the session. Id. He also stated the Township would provide minutes after the conclusion of these matters in accordance with Paff v.

Robbinsville, which apparently is an unreported decision from the Law Division in Mercer County.

The Committee then discussed whether it had to vote on a resolution or first open for public comment. Id. Eventually, the Committee opened for public comment. Id. The recording reveals [PAGE 3] the Mayor waited for through approximately fifteen seconds of silence without comment. After a committeeman moved to vote, a member of the public was heard to ask what would happen to the Squad's ambulances. The Mayor responded the "ambulances are ours." The member of the public was heard to make further comments to which the Mayor eventually responded "you have had your say." It is unclear when the Township closed the meeting to public comment.

The Committee then approved Resolution 35-2010 (the Resolution). The Resolution delegates responsibility for all emergency or rescue services to the Lebanon Township Volunteer Fire Department (Fire Department). Immediately after the hearing, the Fire Chief, Warren Gabriel (Chief Gabriel) went to the Squad headquarters at the behest of the Mayor. Gabriel Cert. ¶¶1-3. Chief Gabriel is a "Life Member" of the Squad and possessed a key to the building. Id. at ¶¶2-4. He and two other members of the Fire Department entered the Squad's building and removed the ambulances. Id. at ¶¶4-7. In the presence of plaintiff Sabatino De Santis, Jr., Committeeman Wunder, and Police Officer Dennis Smith, Chief Gabriel denied breaking into the building and stated he

used his key. Id. at ¶8. He notes that as a member he was never asked to vote on issues as to the Squad's paid status. Id. at ¶¶14-16.

Plaintiff De Sanits is a member of the Squad. By letter of March 29, 2010 Committeeman Wunder resigned from the Squad on March 29, 2010. Sandorse Cert., Exh. E. On March 31, 2010 the Squad received a letter from the New Jersey Office of Emergency Medical Services. Sandorse Cert., F. The letter indicated a review of the Squad's application for a license, listed several requirements for licensure, and reminded plaintiff De Santis that "you cannot bill for service until your company is licensed." Id.

On May 3, 2010 the Township held a second public meeting to discuss the Squad. At this meeting Committeeman Morrison moved to change the order of business in order to push forward a motion rescinding the Resolution. His motion failed by a vote of three to two.

Procedural History:

On April 19, 2010 the Court signed an order to show cause. The Court ordered the defendants to appear and provide cause why an order should not be issued voiding Lebanon Township Resolution 35-2010, enjoining the defendants from use of [PAGE 4] ambulances 19-51 and 19-53, ordering the return of said ambulance, and granting other just relief. The Court ordered immediate relief so that the defendants "shall not damage ambulances 19-51 and 19-53."

Defendants' Arguments:

This text searchable document was created from the original, hard-copy document obtained from the Court, which is on-line at <http://ogtf.lpcnj.org/2012/2012219o4//HNTL00023210LEBTHESCAN.pdf> Bracketed page numbers denote the page numbers in the original document. While attempts have been made to ensure that the text within this version is identical to the original, such accuracy is not guaranteed.

In opposition to the order to show cause the defendants raise seven points of law. First, they argue the plaintiffs lack standing. They argue no facts in this case suggest that the Squad is bringing this suit with the authorization of its members. Second, the defendants argue they complied with OPMA at the April 7th meeting. The defendants note they provided the annual notices of their regularly scheduled public meetings and provide a link to their website indicating the meetings.² They defend their announcement prior to the executive session as to the topics for discussion. They rely on *Houman v. Mayor and Council of Borough of Pompton Lakes*, 155 N.J. Super. 129 (L. Div. 1977), to argue they provided proper descriptions of the executive session activities. They compare their description of "personnel," to the identical description used in *Houman* for appointment of outside counsel. They conclude the reference to contracting refers to the Squad's authority to start charging for its services under N.J.S.A. 15A:3-1(a)(7). In addition they note plaintiff De Santis requested the executive session.

In their third point, the defendants take issue with Committeeman Wunder's certification supporting the order to show cause on the basis of his recusal. In their fourth point the defendants argue legislative immunity protects them as individuals and therefore the Court lacks the

² See <http://www.lebanontownship.net/Minutes/Committee/01.06.10.htm> (last accessed 6/9/10).

power to rescind the Committee's vote. In their fifth point, the defendants object to the argument with the order to show cause that New Jersey law requires an ordinance designating a first responder. They assert they located no law ordering this requirement. In their sixth point, the defendant conclude the plaintiffs failed to demonstrate a basis for injunctive relief. They rely on the standards set forth in *Crowe v. Di Gioia*, 90 N.J. 126 (1982). Lastly, the defendants argue the plaintiffs did not demonstrate a basis for finding the ambulances should be held in a constructive trust. They rely on their assertions of compliance with OPMA and the standards for a constructive trust as discussed in *Cronheim v. Tennent*, 30 N.J. 360 (1959). [PAGE 5]

Plaintiffs' Arguments:

The plaintiffs' brief includes three points. First, they argue they have standing by virtue of Section 15 of OPMA which allows "any person" to bring an action. Second, they argue the Court should return the ambulances under *Cronheim*, supra. They argue the defendants' violation of OPMA satisfies the wrongful act requirement of *Cronheim*. They note they paid for one ambulance in full and the other partially from monies obtained through donations as shown by a 2007 audit indicating the source of their income. Lastly, the plaintiffs argue that neither the personnel nor the contracts exception to the public meetings requirement applies. They argue members of the Squad are not employees. They maintain that if they were employees the Township would

have had to provide notices under Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977), certif. denied 76 N.J. 328 (1978). They rely on plaintiff De Santis' certification to demonstrate the members of the Squad did not receive notices. Finally, the plaintiffs argue N.J.S.A. 10:4-12 does not apply because the Resolution did not involve any contract between the Township and the Squad. They note the proposed billing contract did not list the Township as a party. See George Cert., Exh. C. The plaintiffs conclude the Resolution should be invalidated because the defendants held an executive session contrary to OPMA.

Defendants' Sur-Reply

With the permission of the Court, the defendants submitted a two page sur-reply. The defendants argue the plaintiff's contention as to a failure to serve Rice notices is misplaced because they did not intend to take any actions against an employee as to wage, benefits, or other aspects of public employment. The defendants conclude that since the Executive session involved actions toward the Squad and not toward a public employee, a notice was not required. They thus appear to concede that the personnel basis for going into Executive Session is not applicable.

Analysis:

Standing under OPMA

N.J.S.A. 10:4-15 provides a right to challenge the results of any public meeting conducted contrary to the OPMA. N.J.S.A. 10:4-15(b) provides that "any party, including any member of the public, may institute a proceeding in lieu of prerogative writ [PAGE 6] in the Superior Court to challenge any action taken by a public body on the grounds that such action is void for the reasons stated in subsection a. of this section, and if the court shall find that the action was taken at a meeting which does not conform to the provisions of this act, the court shall declare such action void."

The defendants argue the plaintiffs lack standing based on a lack of authority from the Squad. The plaintiffs rely on the broad standing provisions of OPMA. Because plaintiff De Santis and the Squad fall within the broad definition of "any party, including any member of the public," N.J.S.A. 10:4-15(b), the Court finds they enjoy standing to bring this action. Furthermore, the Court does not find that legislative immunity would bar a remedy here because the individual defendants are being sued in the official capacities in a proceeding in lieu of prerogative writs. Furthermore, the language of OPMA provides the Court with the authority to declare an action void. See N.J.S.A. 10:4-15(b).

Closed Meetings under OPMA

N.J.S.A. 10:4-12(a) provides that except as provided in subsection (b), "all meetings of public bodies shall be open to the public at all times." The exceptions in section b include the following:

(1) confidential matters under federal law state statute or court rule, (2) a matter where release of funds from the United States would be impaired, (3) any matter where disclosure would equal an unwarranted invasion of individual privacy, (4) any collective bargaining agreement matters, (5) any matter involving the lease or purchase of real property with public funds or the investment of public funds, (6) techniques used in protecting public safety, (7) "pending or anticipated litigation or contract negotiation other than in subsection b.(4) herein in which the public body is, or may become a party," matters falling within the scope of attorney-client privilege, (8) employment of public officers or employees, and (9) deliberations which may result in a civil penalty or loss of license. N.J.S.A. 10:4-12(1-8).

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N.J.S.A. 10:4-13 provides the following requirements for executive sessions:

No public body shall exclude the public from any meeting to discuss any matter described in subsection 7. b. until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:

a. Stating the general nature of the subject to be discussed; and

b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

The Legislature enacted OPMA based on its finding that "secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." N.J.S.A. 10:4-7. The Legislature emphatically found and declared that:

the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement an proper functioning of the democratic process.

As a result of these strong public policies, courts should narrowly construe the exceptions to open public meetings. S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 492 (1991) (citing Rice v. Union County Regional High School Teachers Ass'n, 155 N.J. Super. 64, 70 (App. Div. 1977), certif. denied, 76 N.J. 238 (1978)). The exemption for personnel "focuses on free and uninhibited discussion about matters relating to the hiring, firing, performance, compensation, and discipline of public employees." S. Jersey Pub. Co., 124 N.J. at 493. The exemption at N.J.S.A. 10:4-12b(7), for litigation as it concerns the attorney-client privilege represents a duplication of the protections normally afforded by the attorney-client privilege and the work product doctrine. Gandolfi v. Town of Hammonton, 367 N.J. Super. 527, 539 (App. Div. 2004) (quoting Whispering Woods at Bamm Hollow v. Middletown Planning Bd., 220 N.J. Super. 161 (L. Div. 1987)).

[PAGE 8]

In Council of New Jersey State College Locals, NJSFT, AFT/AFL-CIO, Local 2364 v. Trenton State College Bd. of Trustees, 284 N.J. Super. 108, 111 (L. Div. 1995), the Board of Trustees held a closed session during a public meeting. Prior to closing the meeting the Board described the agenda as "personnel matters, labor relations, any pending litigation, and any other matters specifically exempted by the Open Public Meetings Act. It is anticipated that decisions made in closed session will be made public at future meetings." Id. The plaintiff argued this notice failed to comply with the description requirements of OPMA. Id. at 112-113. The court determined that a mere recitation of the exceptions listed in the statute could not comply with OPMA. Id. at 114. Because the Board's resolution did not mention the actual topics to be discussed, the court found it did not satisfy the requirements of OPMA. Id. The court ultimately found the Board cured the violation by holding a de novo proceeding. Id. at 116.

Similarly here the Committee did not provide a helpful description of the topics it would consider in the executive session. It merely stated the topics as personnel, contracts, and possibly litigation. See Peles Cert., Exh. B., TR at 25:18-23. This terse language provides no guidance as to the general nature of what the Committee actually discussed, the Squad and its status. The Committee's actions are particularly troublesome given that members of the Squad appeared at almost every other executive session. Because the Committee provided a

mere recitation of the exceptions in OPMA and not a general description of the topics of discussion, see *Council of New Jersey*, supra, 284 N.J. Super. at 114, the Committee violated OPMA.

In addition, the actual topics of the executive session fall outside the exceptions to the public meeting requirement of OPMA. The Court must consider these exceptions with a narrow view. *S. Jersey Pub. Co.*, supra, 124 N.J. at 492. The stated exceptions were personnel, contracts, and possibly litigation. The personnel exception would not apply because discussions about the Squad, an independent corporation, do not implicate "uninhibited discussion about matters relating to the hiring, firing, performance, compensation, and discipline of public employees." *Id.* at 493. Furthermore, as noted by the defendants, the executive session did not "have anything to do with any public employee." *Rep. Br.* at 2. The reliance on *Houman*, supra, is misplaced because that case involved the retention of outside counsel. Therefore, the personnel exception would not apply. [PAGE 9]

The defendants do not argue the attorney-client privilege applies. They do, however, argue the exception for contracts applies by virtue of N.J.S.A. 15A:3-1(a)(7) which would allow the Squad to enter into contracts. The plaintiffs argue this statute does not apply.

N.J.S.A. 15A:3-1(a)(7) provides that every corporation can enter into a contract or borrow money. Although this statute would provide the Squad with the ability to charge for its services, it does not

provide a basis for closing the public meeting of the Township. No Township contract was included nor were there any negotiations re same. Therefore the defendants violated OPMA by conducting a closed meeting that should have been public.

Constructive Trust

Courts apply a two prong test to determine whether to impose a constructive trust on property. Flanigan v. Munson, 175 N.J. 597, 608 (2003). First, the Court must reach a finding that a party has committed "a wrongful act." Id. (citing D'Ippolito v. Castoro, 51 N.J. 584, 589 (1968)). A wrongful act generally arises out of "fraud, mistake, undue influence, or breach of a confidential relationship." Id. Second, the wrongful act must result in a transfer of the property which unjustly enriches the recipient. Flanigan, supra, 175 N.J. at 608 (citing D'Ippolito, supra, 51 N.J. at 589). A constructive trust also arises where retention of the property results in an unjust enrichment. Id.

The plaintiffs argue for a constructive trust based on their payments toward the ambulances and the medical equipment within them. It is not necessary to address that issue now.

First the Court finds the defendants committed a wrongful act in violation of OPMA. Second, given that the Squad paid for the entirety of one ambulance and a portion of the other it appears the appropriate remedy is invalidation of the local action. While other remedies may be

available in different situations, here no such remedy appears appropriate, see *College Locals*, 284 N.J. Super. at 115-6. Given that the decision affected a substantial public interest and expectation as to the use of the equipment, it is appropriate to return the parties to the status quo before the Resolution. The equipment shall be returned and the squad shall carry out emergency services without charge pending further order of this Court. [PAGE 10]

This remedy is consistent with *Crowe v. DiGioia*, 90 N.J. 126 (1982), and cases under OPMA. Here there was a rather clear violation of the Act which implicates irreparable injury to the public policy of openness which the Act seeks to prevent.

Second, legal rights are not unclear for the reasons stated above. Third, the facts are not in dispute. It is clear what happened and also clear as to the Township's emergency services assignment both before and after the April 7 meeting. Finally, the relative hardship of the parties favors plaintiffs. They have been providing emergency services using equipment that they had paid for. They seek only to be able to continue the services. In contrast, maintenance of the status quo imposes no hardship to the defendant which just began the service. In reaching this determination the Court is not resolving the issue of payment for services or making any finding on that issue but only ordering return to the status quo which existed before April 7.

As to the remedy, *College Locals, supra*, and *Liebeskind v. Mayor and Municipal Council of Bayonne*, 265 N.J. Super. 389 (App. Div. 1993) along with *Gandolfi v. Town of Hammonton*, 367 N.J. Super. 527 (App. Div. 1994) suggest a redo as an alternative remedy based on amendments to the Act allowing for ratification of previous unlawful action. N.J.S.A. 10:4-15. Here, however, the status quo was changed drastically by the Board's action. This was no mere technical violation of the Act such as failure to put an item in the minutes as in *Liebeskind* but rather an undertaking of a decision in closed session, not justified either by the category or any exemption, and which resulted in immediate action.

Further on its own the Board refused to rescind it. Therefore, an attempt to redo has failed. In light of the drastic change wrought by the resolution the only appropriate remedy is a return to the pre-April 7 status quo pending a final hearing. Only such remedy in light of the acts here would satisfy the purposes of the statute.

Conclusion:

Based upon the foregoing, the Court will not dismiss the verified complaint and will instead sign the plaintiffs' proposed form of order, provided that plaintiff shall suffer no damages to the equipment, other than normal wear and tear.

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