

Memorandum of Decision on Motion

**NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS**

Marie Bailey

v.

Hunterdon County Agriculture Development Board

Docket No. HNT-L-354-12

Motion for Summary Judgment, Cross-motion for Summary Judgment

Opposed

Argued: October 26, 2012

Decided: October 26, 2012

The Honorable Peter A. Buchsbaum, J.S.C.

Facts and Procedural Posture:

The present action arises from a meeting held by defendant, allegedly in violation of the Open Public Meetings Act ("OPMA" or the "Act"). Plaintiff, Marie Bailey, alleges that defendant, Hunterdon County Agriculture Development Board ("CADB") held four meetings on May 22, 2012, June 14, 2012, July 12, 2012 and August 9, 2012 in violation of the OPMA and seeks a summary judgment to void and remand those meetings to the CADB to be heard *de novo*.

The relevant facts are as follows: On December 15 2011, defendant published its annual meeting notice in the Hunterdon County Democrat (the "Democrat"). The notice provided scheduled monthly meeting dates for the 2012 calendar year. The notice indicated that "no meeting" would be held in August 2012. On May 17, 2012, the Democrat published notice of a special meeting to be held on May 22, 2012. The Agenda indicated that the purpose of the meeting was to conduct a "[p]ublic [h]earing regarding Hionis Greenhouses' Site Specific Agricultural Management Practice application." See Cert. of William Millette, Schedule B. Plaintiff alleges the notice was sent to only one newspaper, the Democrat, in violation of N.J.S.A. 10:4-8(d). Defendant certifies that although the Notice indicates that notice was faxed to the Democrat, defendant also faxed notice to six other newspapers on the same date. See Cert. of William Millette, ¶5. Plaintiff attended the meeting on May 22, 2012 and voiced her objection to the meeting as a violation of

OPMA. Plaintiff's objection asserted that defendant was required to conduct all its meetings in accordance with OPMA and that it was improper for the Hunterdon County Planning Board to submit a notice of a meeting on behalf of defendant. See Cert. of Marie Bailey, ¶3. Plaintiff also argued defendant violated OPMA by failing to publish its meeting notice in at least two newspapers. Id. Furthermore, plaintiff objected to defendant's failure to include language in the notice indicating whether formal action would be taken at the meeting. Id. The meeting was held despite plaintiff's objections. The hearing was continued to the next scheduled regular meeting date of June 14, 2012.

On June 1, 2012, plaintiff filed a complaint against defendant, alleging violation of OPMA. On June 14, 2012, plaintiff attended defendant's regular meeting and once again voiced her objection to the meeting a violation of the OPMA. The hearing was once again continued to the next regular meeting on July 12, 2012. On July 12, 2012, the hearing was concluded. On August 2, 2012, defendant published notice in the Democrat of a special meeting to be held on August 9, 2012. The special meeting notice did not include an agenda. Defendant asserts that such notice was for a special meeting to memorialize the findings of the Hionis Greenhouse Right to Farm and Stonybrook Meadows Right to Farm hearings, which concluded at the July 2012 meeting. Defendants certify that the August 2, 2012 notice was also faxed to six other newspapers. See Cert. of William Millette, ¶9. Plaintiff alleges that no agenda for the meeting was ever posted and that she had to personally obtain an Agenda from defendant's offices. See Pl.'s Stmt. of Material Facts, ¶9.

Plaintiff attended the August 9th meeting and once again voiced her objection for the record. Plaintiff requested adjournment of the meeting to the September 2012 regular meeting since it was not previously on the annual calendar and was thus in violation of OPMA. Defendant declined plaintiff's request, and the meeting took place as planned.

Plaintiff further asserts that although defendant shares office space with the Hunterdon County Planning Board, the Planning Board is an independent public entity and the Board and defendant are not associated with nor reliant upon each other. See Pl.'s Stmt. of Material Facts, ¶12.

Plaintiff brings this motion for summary judgment asserting that defendant has violated the OPMA through its inadequate

meeting notices and as a result, all findings from the meetings held from May 2012 through August 2012 must be voided and the matters should be remanded to be heard *de novo*. Plaintiff asserts defendant's notices were deficient because, *inter alia*, they were published in only one newspaper and did not have specific language addressing whether formal action would take place at the meeting. Further, plaintiff asserts that defendant's failure to revise its annual meeting schedule to indicate the addition of the August 2012 meeting is in violation to the OPMA.

Defendant opposes plaintiff's motion, and has filed a cross-motion for summary judgment in its favor. Defendant contends that all meetings were held in compliance with the OPMA. Defendant states that the CADB was established by the governing board of Hunterdon County pursuant to N.J.S.A. 4:1C-14(a). Defendant asserts that all notices were posted outside of the Hunterdon County Planning Board offices, faxed to more than two County newspapers, and filed with the County Clerk, in accordance with N.J.S.A. 10:4-8(d). Defendant further contends that the purpose of the May 22, 2012 special meeting was to conduct the Hionis Greenhouses Right to Farm hearing and that no formal action was taken. Further, the August 9, 2012 meeting was a special meeting and did not require revisions to the annual meeting notice as asserted by plaintiff. Defendant asserts that the OPMA should be construed liberally to achieve the public policy of the Act, as stated in N.J.S.A. 10:4-21. Defendant contends that the public policy of the Act was accomplished for each meeting plaintiff contests, as the public was given adequate notice and able to attend. As such, defendant asserts no material facts are in dispute and there is no basis to void the specified meetings and no basis for plaintiff's complaint.

Finally, defendant contends that plaintiff has failed to name all necessary parties in her complaint. Defendant notes that if plaintiff's motion is granted and the meetings are voided, the approvals granted and the Resolutions passed at those meetings would also be void, thus affecting Hionis Greenhouses, Stonybrook Meadows, and other parties not named in this lawsuit. Defendant asserts plaintiff is required to join all indispensable parties affected by the findings at these four meetings before any relief can be granted for plaintiff.

Plaintiff also seeks reimbursement for the costs of the suit, including filing and motion fees.

Analysis:

A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "Summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged." *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 75 (1954) (citation omitted).

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 530 (1995). Accordingly, "when the evidence is 'so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (citation omitted).

Furthermore, where the moving party makes the requisite showing, it is incumbent upon the opposing party to come forward with competent proofs indicating that the facts are not as the moving party asserts. *Spiotta v. Wm. H. Wilson, Inc.*, 72 N.J. Super. 572, 581 (App. Div.), certif. denied, 37 N.J. 229 (1962). In considering the evidential materials presented, this Court's function is not to weigh the evidence and determine the truth of the matter, rather this court is to determine whether there is a genuine issue for trial. *Brill*, 142 N.J. at 540. (citation omitted).

The party presenting a summary judgment motion must provide a Statement of Material Facts containing citations to the record, as required by Rule 4:46-2(a):

The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall

identify the document and shall specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.

R. 4:46-2(a).

The party resisting a summary judgment motion must then provide responses to the moving party's Statement of Material Facts, which again must contain citations to the record. R. 4:46-2(b). Where the opposing party does not admit or deny each statement in the moving party's Statement of Material Facts with record citations, the moving party's facts are deemed admitted for the purposes of the summary judgment motion, as set forth in Rule 4:46-2(b):

A party opposing the [summary judgment] motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. . . . [A]ll material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation . . . demonstrating the existence of a genuine issue as to the fact.

Id.

Here, neither party has complied sufficiently with the requirements of Rule 4:46-2(a)-(b). Plaintiff provides a Statement of Material Facts. However, not all of plaintiff's statements contain citations to the record. See R. 4:46-2(a). The next time plaintiff files a motion for summary judgment, plaintiff shall provide citations to the record, which support each material fact. Defendant also fails to comply with the Rules of Court. Defendant denies Paragraph 3 and Paragraph 12 of plaintiff's Statement of Material Facts without providing citations to the record, in violation of the Rules. See R. 4:46-2(b). Defendant, too, must adhere to the requirements set forth in the Rule of Court in the future. Despite the parties' failure to satisfy Rules 4:46-2(a)-(b), the Court will proceed with the present matter on its merits.

The OPMA defines "adequate notice" as the following:

"Adequate notice" means written advance notice of at least 48 hours, giving the

time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegraphed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body and (3) filed with the clerk of the municipality when the public body's geographic boundaries are coextensive with that of a single municipality, with the clerk of the county when the public body's geographic boundaries are coextensive with that of a single county, and with the Secretary of State if the public body has Statewide jurisdiction. For any other public body the filing shall be with the clerk or chief administrative officer of such other public body and each municipal or county clerk of each municipality or county encompassed within the jurisdiction of such public body. Where annual notice or revisions thereof in compliance with section 13 of this act set forth the location of any meeting, no further notice shall be required for such meeting.

N.J.S.A. 10:4-8(d).

The purpose of the OPMA is to "insure the right of [all] citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business

affecting the public is discussed or acted upon in any way." N.J.S.A. 10:4-7. Additionally, "strict adherence to the letter of the law is required in considering whether a violation of the Act has occurred." *Polillo v. Dean*, 74 N.J. 562, 578 (1977). Further, "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 and proper functioning of the democratic process." N.J.S.A. 10:4-7. (Emphasis added).

Plaintiff contends that defendant improperly sent its notices of meetings to only one newspaper, in violation of the OPMA. Plaintiff cites *Roman v. Twp. of South Hackensack*, 302 N.J. Super. 568, 575 (App. Div. 1997) and *Lakewood v. Twp. of Lakewood*, 306 N.J. Super. 500 (L. Div. 1997) to support her argument that defendant's failure to publish its notice in at least two newspapers and its failure to indicate whether formal notice would occur at these meetings makes all of the meetings in violation of OPMA and subject to repudiation and remand. See Pl.'s Reply Brief, pgs. 11-13. Plaintiff asserts that *Lakewood* supports her assertion that defendant's failure to properly publish its meeting notice in at least two newspapers is a violation of the OPMA. Plaintiff further contends in her Reply Brief that although defendant has provided an affidavit of publication, it has done so only for the Democrat. There is no affidavit of publication for any other newspaper. Plaintiff further alleges that defendant's failure to include a copy of the faxed notices to the other newspapers further indicates that defendant is in violation of the Act.

First, *Lakewood* is not binding on this Court. Secondly, even the *Lakewood* court noted that actual publication is not mandatory in at least two papers. In *Lakewood*, the Court did not find the defendant in violation of the publication requirement because it published its notice in only one newspaper. Rather, the Court found defendant in violation because although it sent notice to two newspapers, it was aware that only one of those newspapers could feasibly publish the notice at least 48 hours in advance of the meeting. *Lakewood*, 306 N.J. Super. at 511. This conduct contradicted the spirit of the notice requirement in the OPMA.

In contrast, defendant in this current matter certifies that eight days before the May 22 meeting and two weeks before the August 9 meeting it faxed notice to six other newspapers, some of which were daily newspapers and quite capable of

publishing defendant's meeting notice within the prescribed 48 hours advance notice period. Millette Cert. ¶¶5, 9. While plaintiff is correct that defendant supplies an affidavit of publication for only one newspaper, the Democrat, the requirements set forth in N.J.S.A. 10:4-8(d) do not mandate actual publication. Plaintiff's assertion that defendant has not provided a copy of these faxes is not, by itself, a sure indicator of noncompliance with the Act. Defendant provides a certification that timely notices were sent to six other newspapers. See Cert. of William Millette, ¶3, ¶5 and ¶9. This is sufficient to at least create a fact issue as to whether such notices were in fact sent to the stated newspapers in time to be published.

Plaintiff similarly relies on *Roman* to support her assertion that strict adherence to the law is required and defendant's failure to provide adequate notice necessitates summary judgment in her favor as to timely publication. See Pl.'s Brief in Support of Motion for Summary Judgment, pg. 8-9. Defendant's publication in the Democrat and faxes to other newspapers are sufficient under the newspaper publication requirements of the OPMA at least to survive summary judgment even without proof of publication in other newspapers.¹

While plaintiff's newspaper publication argument does not merit summary judgment, of great concern is defendant's alleged violation of other notice requirements under N.J.S.A. 10:4-8(d). Although defendant is correct in noting that its August 9, 2012 was a special meeting and did not require revision of its annual meeting notice, the Court cannot ignore that both of defendant's special meeting notices failed to indicate whether formal action would be taken. N.J.S.A. 10:4-8(d).

Defendant asserts that no formal action was taken at the May 22 special meeting although evidence was presented at it; however the language of the statute indicates that the special meeting notice must state "whether formal action may or may not be taken." N.J.S.A. 10:4-8(d); see also *Roman*, 302 N.J. Super. at 575, even though annual meeting notices almost certainly do not have to so specify. *Lakewood*, supra, at 506. Both of defendant's special meeting notices do not indicate as such.

Defendant fails to address this particular deficiency, instead asserting that the Act should be construed liberally and

¹ Plaintiff's allied argument that notice from a planning board employee does not count likewise requires further factual documentation as to the precise relationships involved.

that the notices nonetheless accomplish the public policy of the Act. See Def.'s Brief in Support of Cross-Motion for Summary Judgment, pg. 8. This assertion is incorrect. The Supreme Court has held that substantial compliance with the Act does not negate any failure to adhere to each requirement set forth in the Act. *Polillo*, 74 N.J. at 577. Undoubtedly, defendant's notices are in violation of the Act by failing to state whether formal action may be taken at the upcoming meetings.

Further, the statute further demands that "all phases of deliberation" and "decision making" be open would be negated. N.J.S.A. 10:4-7. Thus, harm was done not only as to the August 9 meeting, at which a decision was made, but also when the May 22, 2012 special meeting was not properly noticed, since it clearly was part of the decision making process -- the Hionis hearing commenced with a few hours of testimony. Millette Cert. ¶6.

Furthermore, defendant's Notice for the August special meeting did not include any type of Agenda "to the extent known" at the time the notice was made, in violation of N.J.S.A. 10:4-8(d). See Cert. of William Millette, Schedule C. Defendant plainly indicates in its Brief that the purpose of the August meeting was to memorialize the findings of the Hionis Greenhouses Right to Farm hearing and Stonybrook Meadows Right to Farm hearing, both of which concluded at the July 2012 meeting. See Def.'s Brief in Support of Cross-Motion for Summary Judgment, pg. 8. Thus, an agenda or some indication of the meeting's purpose, to the extent known at the time of publication, should have been included in the notice published on August 2, 2012. See *McGovern v. Rutgers*, 211 N.J. 94, 111 (2012).

In *McGovern*, the Supreme Court found that the defendant held its special meeting in violation of the notice requirement by failing to include a detailed agenda "to the extent known" at the time of publication. Id. The defendant's notice indicated that it would act on a resolution in a closed session to discuss contract negotiation and attorney-client privilege. Id. However, at the time of publication of the notice, more information was known about the agenda for the meeting beyond contract negotiation and attorney-client privilege. Id. As such, the Supreme Court found that the defendant was in violation of N.J.S.A. 10:4-8 by failing to include an agenda "to the extent" known at time of publication. Id. Despite this violation, the court ultimately found that the Act provided no

remedy to plaintiff because no formal action that could be voided was taken at the disputed meeting.

Here, defendant failed to adhere to this requirement as well. In fact, defendant's agenda is not merely deficient -- it is nonexistent. Defendant's August 2012 notice does not provide any indication as to the purpose of the meeting and the matters to be addressed. This violates N.J.S.A. 10:4-8, given that it is clear that the agenda of the meeting was known prior to publication of the meeting notice.

Despite this failure to indicate whether formal action would be taken at the special meetings in dispute, and a failure to include an agenda on the August 2012 meeting notice, it is important to consider the public policy of OPMA when determining the proper remedy afforded to plaintiff. The Act provides the following:

Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section; and provided further that any action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in this act.

N.J.S.A. 10:4-15(a). This remedial measure provided in N.J.S.A. 10:4-15(a) seeks to "balance the rights of an informed citizenry against the need of government to function effectively." *Gandolfi v. Town of Hammonton*, 367 N.J. Super. 527, 540 (App. Div. 2004) (citations omitted). Furthermore, it is important to consider "the nature, quality and effect of noncompliance of the particular offending governmental body in fashioning the corrective measures which must be taken to conform with the statute." *Polillo*, 74 N.J. at 579.

Plaintiff asserts that all four meetings in violation of N.J.S.A. 10:4-8(d) should be repudiated and all findings voided and remanded to be heard completely *de novo*. This remedy goes too far. While this Court finds defendant is in violation of the Act due to its insufficient meeting notices for the **two** special meetings, this finding remains separate from the issue of the proper remedy to apply given the violation.

In this case, defendant asserts no formal action was taken at the May 2012 meeting. Plaintiff does not contest this assertion in her Reply Brief. The meetings held in June 2012 and July 2012 were hearings regarding the Hionis Greenhouses Right to Farm application and the Stonybrook Meadows Right to Farm application. Evidence was produced, testimony was given, and hearings were conducted. The hearings concluded at the July 2012 and findings were memorialized at the August 2012 special meeting.

This conduct by defendant resembles that of the defendant in *Polillo v. Dean*, 74 N.J. 562 (1977). In *Polillo*, the Supreme Court held that the defendant violated the adequate notice requirement of the Act by failing to adhere to the requirements set forth in the OPMA on a series of meetings involving a charter change. 74 N.J. at 579. While the court noted that the defendant's substantial compliance with the Act did not negate its clear violation of the notice requirement, it held that the substantial compliance was relevant in determining the appropriate remedy. Id. In deciding not to void completely the meetings in which testimony was given and evidence was produced, the Court noted that most of the defendant's meetings involved wide public participation and did not include secretive or executive action by the defendant. Id.

Furthermore, the Court noted that the meetings, though in violation of N.J.S.A. 10:4-8(d), served as a forum "for the presentation of the testimony and evidence of experts and other witnesses which have become part of a permanent and public record." Id. Accordingly, the Supreme Court found that the spirit of the OPMA was not undermined by the defendant's conduct, specifically, its failure to provide sufficient notice. The same appears true here.

In deciding to only invalidate the defendant's final governmental action, the *Polillo* Court held that it was unnecessary to invalidate each public meeting held in violation of the notice requirement, including those in which evidence was

received and testimony was given. Id. The Supreme Court directed defendant to re-do the final meeting in which formal action was taken. Id. at 579-580. The court also stated that the defendant could "utilize so much of the testimony and evidence which it acquired in the course of its original effort as it deem[ed] necessary and appropriate." Id. at 580. Furthermore, the Supreme Court stated that any final decision by the defendant must be in "strict conformity" with the OPMA by providing adequate notice to the public with a publicized agenda detailing which prior meeting would be utilized and what aspects of the defendant would rely upon in making its decision. Id. Additionally, the court held that the defendant could hold additional meetings to supplement its prior efforts, provided such meetings were in conformity with the OPMA. Finally, the court held that any final recommendation by defendant, after adoption of the findings of prior meetings or any additional meetings, "shall be adopted only at a concluding meeting or meetings which, to reiterate, satisfy the standards of the Act in every respect." Id.

This Court finds that the remedy provided in *Polillo* is appropriate in this circumstance. The hearing held May 22, 2012, was part of the decision making process; yet although in violation of the notice requirements of the OPMA, it did not include any formal action that can be voided. The August 2012 meeting, however, is also in violation and did contain formal action taken by defendant. As such, the findings and Resolutions passed at this meeting are deemed void.

Defendant may conduct another meeting, in accordance with the OPMA, to memorialize its findings and take formal action. Defendant may consider the evidence at the prior meetings in determining its final decision, provided notice is given to the public with a publicized agenda detailing which meetings will be considered and which aspects of the existing record will be utilized. Further, if defendant seeks to hold additional meetings in order to supplement its prior efforts, such meetings must be in strict conformance with the OPMA. Any final action by defendant shall be taken at a concluding meeting which, once again, must strictly comply with the OPMA. The OPMA states that the public has a right "to be present at all meetings of public bodies, and to witness in full detail all phases of deliberation, policy formulation and decision making of public bodies ..." N.J.S.A. 10:4-7. This remedy provided above will afford the public such a right.

Regarding, defendant's final contention, this Court must note that defendant's assertion that no relief may be granted due to plaintiff's failure to include all parties affected by the findings of the meetings is without merit. N.J.S.A. 10:4-15(b) states:

"Any party, including any member of the public, may institute a proceeding in lieu of prerogative writ 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 purpose of N.J.S.A. 10:4-15 is to provide remedial measures for the plaintiff as well as allow the public body to correct its deficiencies rather than permanently void all decisions made at nonconforming meetings. Thus, the dispute remains between plaintiff and the governmental body in violation of the Act. It is not necessary that plaintiff join all parties with an interest in the outcome. As such, plaintiff properly filed this proceeding in lieu of prerogative writ against defendant, the CADB.

Finally, although this Court is denying defendant's cross-motion for summary judgment and granting plaintiff's motion in part, it rejects any award of filing and motion fees to plaintiff. Unlike the Open Public Records Act, OPMA provides no provision for attorney's fees. Compare N.J.S.A. 47:1A-6. Plaintiff cites to no rule which provides any basis for said reimbursement.

Conclusion:

For the reasons provided above, plaintiff's motion for summary judgment is **GRANTED**, inasmuch as the decision made on August 9, 2012 must be voided under N.J.S.A. 10:4-15a, and defendant must adhere to the requirements set forth above on remand. Defendant's cross-motion for summary judgment is **DENIED**. The Board may undertake such further corrective proceedings as are described herein, and authorized by N.J.S.A. 10:4-15a.