

PASHMAN STEIN WALDER HAYDEN

A Professional Corporation

Court Plaza South

21 Main Street - Suite 200

Hackensack, New Jersey 07601

(201) 488-8200

Sean Mack, Esq. (#028191999)

Timothy P. Malone, Esq. (#909802012)

Attorneys for DefendantsLAWRENCE B. SEIDMAN,
Plaintiff,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION:
PASSAIC COUNTY

DOCKET NO. PAS-C-111-20

Civil Action**ORDER GRANTING DISMISSAL**

THIS MATTER being opened to the Court by Pashman Stein Walder Hayden, P.C., counsel for Defendants Spencer Savings Bank, S.L.A., Jose Guerrero, Peter J. Hayes, Nicholas LoRusso, Barry Minkin, and Albert D. Chamberlain (Sean Mack, Esq. appearing) by way of motion to dismiss Plaintiff's Second Amended Complaint, and the Court having considered the submissions and arguments of the parties, and for good cause shown;

IT IS on this 29th day of April, 2021,

ORDERED that:

1. Defendants' Motion to Dismiss is **GRANTED**;
2. All Counts of Plaintiff's Second Verified Amended Complaint are hereby dismissed with prejudice;

3. A copy of the within Order shall be served via email upon all counsel of record within seven (7) days of receipt by Defendants' counsel.

/s/ Frank Covello
HON. FRANK COVELLO, J.S.C.

OPPOSED

SEE ATTACHED STATEMENT OF REASONS

Lawrence B. Seidman vs. Spencer Savings Bank, S.L.A., et. al.**C-111-20****STATEMENT OF REASONS**

This matter is before the Court by way of Defendants', Spencer Savings Bank, S.L.A., Jose Guerrero, Peter J. Hayes, Nicholas Lorusso, Barry Minkin, and Albert D. Chamberlain, motion to dismiss Counts I through IV of Plaintiff's Complaint for failure to state a claim. Plaintiff Lawrence B. Seidman opposes the motion. For the reasons below, the motion is GRANTED.

FACTS

Spencer Savings Bank ("Spencer") is a mutual savings association governed by the New Jersey Savings and Loan Act ("SLA"), N.J.S.A. 17:12B-1, et seq. Its bylaws permit members to secure nominations to stand for election to serve on the Board provided the individual obtains the support of the lesser of 500 members or one percent (1%) of the membership. A prospective nominee must submit proof of the required endorsements to Spencer's Secretary at least 30 days prior to the Annual Meeting. Plaintiff Seidman did not receive a nomination to stand for election to serve on the Board prior to the 2021 Annual Meeting.

In August of 2020, Seidman requested that Spencer mail materials in support of his candidacy pursuant to N.J.S.A. 17:12B-118. The SLA requires that the member pay all costs and expenses of the mailing N.J.S.A. 17:12B-120. Spencer identified several issues with Seidman's proposed communication. Seidman subsequently requested a hearing before the Commissioner of the Department of Banking and Insurance. On December 15, 2020, the Commissioner rendered her final decision and ordered Seidman to make several specific revisions to his communication and the accompanying proxy to reflect that the communication was solely in support of Seidman's nomination – not his election to the Board.

In accordance with Spencer's bylaws, the deadline to submit proof of the required member endorsements to stand as a candidate for election to the Board at the 2021 Annual Meeting was December 22, 2020, 30 days prior to the Annual Meeting. Seidman did not submit materials in support of his nomination by the December 22, 2020 deadline. Rather, Seidman brought this action to enjoin the 2021 Annual Meeting and to permit him additional time to solicit support for his nomination. On January 14, 2021, Seidman filed an Amended Complaint with allegation regarding his desire to seek election at the 2022 Annual meeting.

STANDARD OF REVIEW

Faced with a motion to dismiss for failure to state a claim, a judge must assume the truth of the allegations and provide plaintiff with all reasonable inferences. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). The complaint must be searched "in depth and with liberality" to ascertain "whether a cause of action can be gleaned even from an obscure statement." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002).

Every reasonable inference is therefore accorded to the plaintiff and the motion granted only in rare instances and ordinarily without prejudice. Moreover, a complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by amendment of the complaint. . Clearly, however, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. Energy Rec. v. Dept Env. Prot., 320 N.J. Super. 447, 453 (App. Div. 2015).

ARGUMENTS

In support of their motion, Defendants argue that: 1) Count I of Plaintiff's complaint is premature because, despite repeated requests, Plaintiff has failed to provide Spencer with the

materials he intends it to mail; 2) The Complaint fails to state a claim for breach of fiduciary duty (Count II) and corporate waste (Count III) upon which relief may be granted; 3) Plaintiff's claim regarding Spencer's lobbying activities are legally barred by the Noerr-Pennington Doctrine; 4) Alternatively, if the Court finds that the Noerr-Pennington Doctrine does not bar Counts II and III, the injunctive relief sought on Count II must be dismissed because it would constitute an unlawful prior restraint on free speech; and 5) The Complaint fails to state a claim for relief that would preclude Spencer from indemnifying or providing its directors with a defense (Count IV).

In opposition to the motion, Plaintiff argues: 1) Count I is not premature or moot; 2) Claims for breaches of fiduciary duty and waste are adequately pleaded and establish a viable cause of action; and 3) The Director-Defendants are not entitled to indemnity.

ANALYSIS

Count I of Plaintiff's Amended Complaint asserting new claims related to Seidman's purported bid for election at the 2022 Annual Meeting seeks to hold Spencer liable for a failure to mail his nomination materials when Seidman himself, despite Spencer's repeated requests to the contrary to comply with his statutory obligation, has failed to provide the Bank with the proposed mailing in a form consistent with the Commissioner's final decision. Accordingly, his claims are not ripe for adjudication and must be dismissed. *See House of Fire Christian Church v. Zoning Bd. Of Adjustment Of City Of Clifton*, 379 N.J. Super. 526, 547 (App. Div. 2005) (observing that "the ripeness doctrine's 'basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements'" (*quoting Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347, 353-54 (2d Cir.2005))).

Seidman did not follow that timeline as he did not provide a revised mailing to Spencer or pay the estimated mailing costs after the Commissioner issued her decision in December

2020. Nor has he provided Spencer with the mailing he seeks to have Spencer send concerning the 2022 Annual Meeting. If Seidman does not trust Spencer to administer the election with integrity, Spencer agreed to engage an independent tabulator at his expense as part of the cost of his mailing. If Seidman does not want to pay for an independent tabulator, his proposed communication to members must then indicate that member responses are to be returned to Spencer's corporate secretary. He is not prematurely ask the Court to hold Spencer liable for something it cannot presently take action on because he has repeatedly refused to meet his statutory requirement to submit a complete copy of his mailing. Count I of the Amended Complaint therefore must be dismissed as unripe.

Seidman's attempt to hold Spencer liable in tort on Counts II and III is barred by United States Supreme Court precedent absolutely protecting the First Amendment right to engage in petitioning activity. The Noerr-Pennington doctrine bars claims which seek to impose liability based on a defendant's exercise of its First Amendment right to petition through lobbying government. Although the doctrine finds its origins in antitrust, courts, including those in New Jersey, have interpreted the doctrine as a constitutional, rather than statutory, principle and have subsequently expanded its scope to provide immunity from common law tort claims. 4 Main St. at Woolwich, LLC v. Ammons Supermarket, Inc., 451 N.J. Super. 135, 144 (App. Div. 2017) ("The doctrine's provenance lies in the field of antitrust law, but its reach has since then been extended to include common-law torts[.]"); Fraser v. Bovino, 317 N.J. Super. 23, 37 (App. Div. 1998) (finding that the justification for a broader application of the Noerr-Pennington doctrine is the recognition of "the fundamental values that undergird a citizen's right to communicate on issues of public import"); Vill. Supermarket, Inc. v. Mayfair Supermarkets, Inc., 269 N.J. Super. 224, 230 (Law. Div. 1993) (granting defendant's motion to dismiss because "[t]he essential First Amendment rights protected by

Noerr require its application to state tort claims such as [the plaintiff]’s and not only to antitrust suits as in Noerr”).

Spencer, like all organizations, has the First Amendment right to petition government to influence legislative policy unless that action is deemed a “sham.” Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60–61 (1993) Here, accepting the facts asserted in the Complaint as true, the Court cannot find Spencer liable for breach of fiduciary duty and corporate waste based on its legitimate and undisputed lobbying activities. Seidman does not contend that Spencer’s petitioning is a sham. To the contrary, he affirmatively asserts that Spencer’s activities are genuinely aimed at seeking to influence the Legislature to reject the Bill – that is not a sham. Thus, Counts II and III must be dismissed with prejudice.

Seidman claims the Directors are not entitled to indemnification or to be provided with a defense because their conduct was “intentionally wrongful.” The SLA, however, specifically requires a final adjudication of bad faith to preclude indemnification by a savings association for legal expenses incurred by a Director. The Act states:

Any person shall be indemnified or reimbursed by the association for reasonable expenses, including, but not limited to, attorney fees, actually incurred by him in connection with any action, suit or proceeding, instituted or threatened, judicial or administrative, civil or criminal, to which he is made a party by reason of his being or having been a director, officer or employee of an association; provided, however, that no person shall be so indemnified or reimbursed, nor shall he retain any advancement or allowance for indemnification which may have been made by the association in advance of final disposition in relation to such action, suit or proceeding in which, and to the extent that, he finally shall be adjudicated to have been guilty of a breach of good faith, to have been negligent in the performance of his duties or to have committed an action or failed to perform a duty for which there is a common law or statutory liability

N.J.S.A. 17:12B-73(B). Without a final adjudication of bad faith, there is nothing in the SLA that precludes indemnity or payment of legal expenses on behalf of the Directors. Thus, Count IV must be dismissed.

CONCLUSION

For the reasons stated above, the Defendants' Motion to Dismiss is GRANTED.