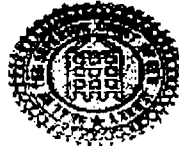


FACSIMILE TRANSMISSION



August 26, 2010

From: Reid Adler, Law Clerk to the Hon. Anne McDonnell, P.J.Cv.  
Chambers Phone: 856-853-3423 Chambers Fax: 856-853-3451

To: Katherine Morris 609-572-7561  
Richard Gallucci, Jr. 215-531-9160

Re: CUM-L-1230-09

Number of pages, including cover: 7

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## SUPERIOR COURT OF NEW JERSEY

ANNE MCDONNELL  
JUDGEPO Box 797  
WOODBURY, NJ 08096

NOT FOR PUBLICATION WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS

**BENCH MEMORANDUM**Trackracket, Inc., et al. v. New Jersey Motorsports Park and the City of Millville,  
CUM-L-1230-09

Argued: July 23, 2010

Decided: August 26, 2010

**Relief Requested**

Defendant City of Millville ("Millville") moves to dismiss Count IV with prejudice for failure to state a claim under R. 4:6-2(e) and failure to meet the time requirements of R. 4:69-1.

**Motion Record**

On December 23, 2009, plaintiffs filed a complaint against and New Jersey Motorsports Park ("NJMP") and Millville concerning the noise generated by NJMP. Pursuant to Count IV of the complaint, plaintiffs demand judgment against Millville as follows:

Mandatory relief pursuant to R. 4:69 (action in lieu of prerogative writs) requiring the City of Millville to enforce its existing public nuisance ordinance.

The complaint describes defendant NJMP as a \$100 million racing facility located in Millville New Jersey. The Track has two road courses and a high performance karting facility. Paragraph 13.

The complaint states that NJMP and its representatives gave public presentations and demonstrations as to the benefits of the Track, and specifically, how the initiative would be a [boon] for the local economy, while at the same time that the decibel levels generated from noise from the Track would not [affect] those residents exposed to the noise in any kind of meaningful way (i.e., that those residents' quality of life and their property values would not plummet.) Paragraph 24.

The complaint states that, specifically, between 2005 – 2007, the following (among other things) occurred to "pave" the way for the Track: (a) at a special planning board meeting, City approval is given to build the Track; (b) the Governor of New Jersey signs legislation allowing for the creation of the special tax district in Millville; (c) the City Commission introduces (and which is later approved) a 15 year tax abatement in lieu of taxes for the Track; and (d) the Federal Aviation Administration clears the sale of 139 acres of the City airport for use in construction for Phase 1 of the Track. Paragraph 26.

The complaint provides that Ordinance No. 23-2004 passed on August 8, 2004, states as follows:

A plan will be submitted that will diminish to the extent reasonably possible such sound or noise as shall be audible from activities or events beyond the property boundaries. Decimal standard shall be set as follows:

- A. Continuous airborne sound emitting from *the Airport Motorsports Entertainment District shall not exceed 80 dBA at the boundaries of the existing residential zoning districts R5, R10, R15, R20). Continuous airborne sound shall be the Leq measurement for a minimum of 20 minutes with the sound level meter set for "A" weighing in the slow response mode.*
- B. Races are motorsports related events taking place on the oval racetrack shall be exempt from noise standards set forth herein.

(Emphasis added). This new noise standard served only to undercut the existing noise ordinances of the City in favor of the Track. Paragraph 32.

The complaint states that the decibel levels are unacceptable and nearly unlivable. The Track exists as a public and private nuisance to the plaintiffs, and others, and its noise pollution must be curtailed. In addition, future phases cannot be allowed to be built without stringent noise pollution guidelines that are a reasonable/livable decibel limit (and not the absurd current limit, dictated by the ordinance. Paragraph 41.

Paragraphs 58 and 59 of the complaint identify the public nuisance ordinance which plaintiffs seek to compel Millville to enforce as follows:

For a nuisance to be a public nuisance it does not have to affect the whole municipality. It is public if the nuisance adversely affects the people or properties of a local neighborhood, or a portion of the public who comes and contact with it."

[Article V. Section 11-43 of the municipal code].

Public nuisance includes public nuisances as defined in the common law of New Jersey.

[Art. V. Section 11-44 of the municipal code].

Plaintiffs complain that the noise emanating from the operation of defendant NJMP constitutes a public nuisance contrary to Millville's public nuisance code and should be enjoined or abated. Despite numerous complaints and requests to enforce the applicable public nuisance ordinances, Millville has refused. Paragraphs 60 and 61.

#### **Standard of Review for R. 4:6-2(e) Motion**

Rule 4:6-2(e) permits a defendant to file a motion to dismiss a complaint which "fail[s] to state a claim upon which relief can be granted." When determining whether or not to

dismiss the complaint, the court must accept as true the factual allegations in the complaint and determine whether the allegations “suggest” a legal cause of action. Craig v. Suburban Cable Vision, Inc. 140 N.J. 623, 625-26 (1995). The court must consider only the pleadings and accept as true the facts as alleged by the plaintiff. See Rieder v. State Dept. of Transportation, 221 N.J. Super. 547 (App. Div. 1987). If, after accepting as true the facts alleged, the plaintiff’s complaint still states no basis for relief, and discovery would not provide one, dismissal of the complaint is appropriate. Camden County Energy Recovery Assoc., L.P. v. New Jersey Dep’t of Environmental Protection, 320 N.J. Super. 59, 64 (App. Div. 1999); Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div.), *certif. den.* 185 N.J. 297 (2005).

Motions to dismiss for failure to state a claim pursuant to R. 4:6-2(e) must be approached with “great caution” and “should be granted in only the rarest of circumstances.” Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989). The complaint must be searched:

...in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint’s allegations of fact required by the aforesaid principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.

[*Id.* at 746 (internal quotations and citations omitted); *see also* Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165-66 (2005).]

The complaint clearly sets forth at Count IV an action in lieu of prerogative writs seeking to compel Millville to enforce its public nuisance ordinance against defendant NJMP. The issue presented is whether the complaint makes clear that relief cannot be granted on that claim.

[I]n appropriate situations mandamus will lie to compel municipal officials to enforce ordinances, zoning and others, provided the plaintiff’s right and the defendant’s duty are clear and other adequate relief is unavailable. We consider the rule to be fully applicable in our State...

[Garrou v. Teaneck Tryon Co., 11 N.J. 294, 303 (1953).]

The writ of mandamus is subject to important and well-defined qualifications. A plaintiff’s right and the defendant’s duty must legally be clear. *Id.* at 302. Here, plaintiffs’ right to have the nuisance ordinance enforced against NJMP is not clear. Although Millville’s ordinance defines public nuisance broadly, Millville cannot be

compelled to enforce a general public nuisance ordinance against NJMP when it has specifically and legislatively exempted NJMP from the noise ordinance. Under the common approach to statutory construction, specific language takes precedence over more general language. Burnett v. County of Bergen, 198 N.J. 408, 424 (2009).

Mandamus is an extraordinary remedial process to compel the performance of a specific act or duty; and its issuance ordinarily involves the exercise of a sound discretion. Beronio v. Pension Com. of Hoboken, 130 N.J.L. 620, 623 (E. & A. 1943). Here, the Complaint sets forth both the public nuisance ordinance sought to be enforced and the ordinance establishing the noise exemption. Accordingly, based on the complaint, the Court denies the extraordinary relief of mandamus because Millville ought not to be compelled to enforce its noise ordinances against NJMP in light of the legislative exemption.

The court does not address the timeliness argument as plaintiffs are not challenging the validity of the ordinances passed by Millville. The court does not address the MLUL argument as it is made as to NJMP only. The court does not address the Tort Claims Act argument as plaintiffs' only claim against Millville is a count in lieu of prerogative writs and not a tort claim.

#### Conclusion

For the foregoing reasons, the Defendant Millville's motion to dismiss Count IV pursuant to R. 4:6-2(e) is granted. Count IV of the Complaint is dismissed with prejudice.

Katherine M. Morris, Esquire  
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 (609) 344-3161  
 Attorneys for Defendant City of Millville

TRACKRACKET, INC., a domestic nonprofit  
 association, MICHELLE POST, DAVID  
 CARROW, ELIZABETH MILNE and  
 BYRON ROBBINS

Plaintiffs,

v.

NEW JERSEY MOTORSPORTS PARK and  
 the CITY OF MILLVILLE,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
 LAW DIVISION  
 CUMBERLAND COUNTY

DOCKET NO. CUM-L-1230-09

Civil Action

**ORDER DISMISSING PLAINTIFFS'  
 COMPLAINT WITH PREJUDICE AS  
 AGAINST DEFENDANT CITY OF  
 MILLVILLE**

This matter having come before the Court upon the application of Katherine M. Morris, Esq., of Cooper Levenson April Niedelman & Wagenheim, attorneys for Defendant City of Millville, and upon notice to Oliver D. Griffin, Esq. and Richard D. Gallucci, Jr., Esq., of Spector Gadon & Rosen, P.C., attorneys for Plaintiffs' and Jeffrey A. DiLazzero, Esq., of Kavanagh, Kavanagh & DiLazzero, LLC, counsel for Defendant New Jersey Motorsports Park, for an Order to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted pursuant to New Jersey Court Rule 4:6-2(e); and the Court having reviewed the moving papers, any opposition filed thereto, and having heard the arguments as put forth by counsel, if any, and for good cause shown:

IT IS on this 26 day of <sup>August</sup>~~July~~, 2010 **ORDERED and ADJUDGED** as follows:

The Plaintiffs' Complaint against Defendant the City of Millville is hereby dismissed with prejudice.

**IT IS FURTHER ORDERED** that a copy of this Order shall be served upon all parties

within \_\_\_\_\_ days.

*Anne McDonnell*

J.S.C.

- Notice of Motion
- Movant's Certifications
- Movant's Brief
- Answering Certifications
- Answering Brief
- Cross Motion
- Movant's Reply
- Other Argued July 23, 2010  
Reasons set forth in Bench  
Memo of even date

CLAC: 450019.1