

PREPARED BY THE COURT

DOUGLAS RIZZO, Guardian of Fred Rizzo, and Individually, and ELIZABETH RIZZO, Guardian Ad Litem of VANESSA RIZZO and JEREMY RIZZO, infants and individually per quod,

Plaintiffs,

vs.

BERGEN COUNTY BOARD OF SOCIAL SERVICES, WILLIAM OSERIN, BETTINA SAVAGE, ELI M.S. FORMAN, EMIL RIZZO and JOHN DUNNIGAN,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: **BER-L-2926-12**

Civil Action

OPINION

ARGUED: June 6, 2014

DECIDED: June 10, 2014

William Gold, Esq., appearing on behalf of the Plaintiffs (Bendit Weinstock)

Thomas D. Flinn, Esq., appearing on behalf of Defendants Emil Rizzo and John Dunnigan (Garrity, Graham, Murphy, Garofalo & Flinn, P.C.)

Steven Tegrar, Esq., appearing on behalf of Defendant Eli M.S. Forman (Law Offices of Joseph Carolan)

Christopher Clausi, Esq., appearing on behalf of Defendants Bergen County Board of Social Services, William Oserin and Fatmata Savage (Catania & Ehrlich, P.C.)

INTRODUCTION

This matter comes before the Court pursuant to Michelle M. Schott, Esq., of Garrity, Graham, Murphy, Garofalo & Flinn, P.C., attorneys for Defendants Emil Rizzo and John Dunnigan on a motion for summary judgment. Two companion motions for summary judgment were filed by Steven J. Tegrar, Esq. of the Law Offices of Joseph Carolan, attorneys for

Defendant Eli M.S. Forman and Frank Catania Jr. Esq., of Catania & Ehrlich, P.C., attorneys for Defendants Bergen County Board of Social Services, William Oserin, and Fatmata Savage. A cross-motion was filed by William L. Gold, Esq., of Bendit Weinstock attorneys for Plaintiffs seeking partial summary judgment as to liability. Opposition was filed to all motions. Oral argument was heard on June 6, 2014.

FACTUAL BACKGROUND

Plaintiffs' Complaint stems from a family member's referral to the Bergen County Board of Social Services (hereafter "BCBSS") regarding possible abuse and neglect of octogenarian Fred Rizzo. Fred Rizzo and his brother Defendant Emil Rizzo operated for many years a very successful tool shop, called Madison Sprocket & Gear, Inc.. During the latter years of Fred's life, Fred became increasingly unable to care for the business. On or about August 16, 2007 Fred Rizzo signed over Power of Attorney to his only child, his son Plaintiff Douglas Rizzo. Thereafter, Doug Rizzo attempted to act on his father's behalf in the operation of the family business. Defendant Emil Rizzo brought forth a suit against Doug in 2009 asserting that his brother Fred was incapable of executing the Power of Attorney. That litigation entitled Madison Sprocket & Gear, Inc. and Douglas Realty, Inc. v. Douglas Rizzo, was eventually settled by the parties. During the course of the litigation and concerned with Plaintiff Douglas Rizzo's handling of this father's affairs, John Dunnigan, Emil Rizzo's son-in-law, contacted BCBSS on or about August 25, 2009. After receiving the referral BCBSS assigned social worker Ida Conde to investigate. Ms. Conde investigation revealed that Fred Rizzo appeared to be happy and well cared for, but noted that he appeared to suffer from dementia. Ms. Conde found that no further investigation was necessary and closed the file.

To comply with the terms of the settlement that would dissolve the business, Emil Rizzo was to pay \$100,000 to his brother Fred Rizzo. Defendant John Dunnigan agreed to furnish the funds for the settlement on behalf of his father-in-law. Prior to delivering the settlement check, Mr. Dunnigan contacted the BCBSS again. Mr. Dunnigan stated that he became concerned for Fred Rizzo's financial situation during the course of the litigation and was worried that the settlement check would be misappropriated. One of the concerns of Mr. Dunnigan was that a reverse mortgage in the amount of \$900,000 was taken out on Fred Rizzo's Franklin Lakes home.

Additionally, during the course of the business dissolution Mr. Dunnigan became aware that taxes were due on Fred Rizzo's home for 2008 and 2009 that were not satisfied for over a year. Mr. Dunnigan also worried that Fred Rizzo was being isolated from his brother Emil Rizzo and the rest of his family. Emil Rizzo was interested in his brother's well-being and had voiced concerns over his weight loss. The extent of Mr. Dunnigan and Emil Rizzo's involvement concluded by contacting BCBSS as concerned family members.

BCBSS assigned this second referral to social worker and co-Defendant William Oserin. On or about September 22, 2010 Mr. Oserin visited Fred Rizzo's home but did not find anyone there. Mr. Oserin returned a few days later on September 27, 2010 and again there was no answer at the front door. Mr. Oserin then proceeded to the back door of the house where he saw Fred Rizzo through a window and Fred Rizzo allowed him into the home. During the initial visit, Mr. Oserin asked Fred Rizzo a series of routine questions to inquire into this mental capacity and memory. Mr. Oserin noted that Fred Rizzo was home alone with no visible telephone access. On December 8, 2010 Mr. Oserin returned to visit Fred Rizzo who provided Mr. Oserin with a tour of the home. During the visit, Mr. Oserin telephoned Doug Rizzo who arrived shortly later and

showed Mr. Oserin that the home did have a working telephone located down a flight of stairs in this unfinished basement. A year prior, Fred Rizzo had sustained a fall in the basement of the home. On February 25, 2011 Mr. Oserin again visited the Rizzo home, this time accompanied by BCBSS intern co-Defendant, Fatmata Savage. There was no answer at the front door and aware of Fred Rizzo's fall history and that he was often left alone during the day, Mr. Oserin and Ms. Savage pushed open the unlocked front door. They were eventually greeted by Doug Rizzo's son, Jeremy, who was home at the time. Shortly thereafter, Doug Rizzo returned home and asked Mr. Oserin and Ms. Savage to leave the home.

On or about February 26, 2011, BCBSS filed a Complaint to remove Doug Rizzo as Fred Rizzo's power of attorney, because Doug Rizzo was interfering with the investigation and had failed to rectify concerns that BCBSS had about Fred Rizzo's isolation. The Hon. Peter E. Doyne, A.J.S.C., appointed Neil Tortora, Esq. as counsel for Fred Rizzo in BER-P-198-11. After a thorough investigation, Mr. Tortora recommended that Doug Rizzo's power of attorney remain as it "does not seem patently absurd", however, Mr. Tortora opined that Fred Rizzo be declared incapacitated and that Doug Rizzo be prohibited from incurring additional debt on behalf of Fred Rizzo without court approval.

As part of BCBSS's investigation, Defendant Dr. Eli Forman was contracted to perform a competency exam, the scope of which is limited to a mini mental status examination. On or about April 15, 2011 Dr. Forman knocked on the front door of the Rizzo residence but did not receive an answer. Dr. Forman then went to the backdoor of the home, where he saw Plaintiff Doug Rizzo's daughter, Vanessa, through the window and motioned for her to go to the front door. Vanessa Rizzo, fifteen at the time, informed Dr. Forman that she could not open the door to strangers. Vanessa then called her father, Doug Rizzo, who instructed Vanessa not to allow

Dr. Forman inside and to tell him to make an appointment to see Fred Rizzo. Dr. Forman informed Vanessa that the police would be called if he was unable to speak with Fred Rizzo. Shortly after, Police Office Gerard Gansel of the Franklin Lakes Police Department arrived and advised Vanessa that she was going to have to let them inside. Vanessa stepped aside and said “okay”, however, Plaintiffs contend that Vanessa was visibly upset at this time. Officer Gansel waited in the foyer while Dr. Forman interviewed Fred Rizzo in the kitchen. Plaintiff Doug Rizzo returned home and told Dr. Forman and Officer Gansel they had to leave.

On June 21, 2013, the Hon. Mark M. Russello, J.S.C. (ret.) dismissed all claims against Officer Gansel and the Franklin Lakes Police Department in a well-reasoned opinion that was placed on the record.

RULE OF LAW

The New Jersey procedural rules state that a court shall grant 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.” N.J.S.A. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under N.J.S.A. § 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on N.J.S.A. § 4:37-2(b) or N.J.S.A. § 4:40-1, or a judgment notwithstanding the verdict under N.J.S.A. § 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that

“there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a ‘genuine’ issue of material fact for purposes of N.J.S.A. § 4:46-2.” Id. at 540.

DECISION

A. Defendants John Dunnigan and Emil Rizzo

The New Jersey Adult Protective Services Act (hereafter the “Act”) provides specific immunity for good faith reports of abuse to the authorities. N.J.S.A. 52:27D-406-425. N.J.S.A. 52:27D-409(c) states that, “a person who reports information pursuant to this act, or provides information concerning the abuse of a vulnerable adult to the county adult protective services provider, or testifies at a grand jury, judicial or administrative proceeding resulting from the report, is immune from civil and criminal liability arising from the report, information, or testimony, unless the person acts in bad faith or with malicious purpose.” The statute goes on to define a “vulnerable adult” as an adult who is eighteen years or older, “who resides in a community setting and who, because of a physical or mental illness, disability or deficiency, lacks sufficient understanding or capacity to make, communicate, or carry out decisions concerning his well-being and is the subject of abuse, neglect or exploitation...”. N.J.S.A. 52:27D-407.

Fred Rizzo was a vulnerable adult for the purposes of the Act. Fred Rizzo began to display signs of dementia as early as 2006. On August 16, 2007 Fred Rizzo had given his son, Douglas, Power of Attorney over Fred’s affairs. Defendants Dunnigan and Emil Rizzo had witnessed Fred Rizzo’s declining mental state and were aware that Fred Rizzo was not of sound mind.

During the course of the dissolution of Madison Sprocket and Gear Inc., Mr. Dunnigan was knowledgeable about certain financial documents that led him to a reasonable belief that Fred Rizzo was being financially exploited. Mr. Dunnigan was distressed by the questionable circumstances that surrounded Fred Rizzo's finances, including vast credit card debt, the reverse mortgage on the home, delinquent taxes and creditors calling Mr. Dunnigan's house looking for Fred Rizzo.

With a surfeit of suspect information related to Fred Rizzo's finances and mental capacity, Mr. Dunnigan had reasonable cause to believe that Fred Rizzo may have been exploited. Additionally, as previously stated in the factual background, there was a good faith basis to believe that Fred Rizzo was being neglected because he was being isolated from his extended family. Defendant Emil Rizzo, Fred Rizzo's brother, was concerned about Fred's well-being. The combination of the isolation and the wary financial situation, led to a good faith basis for John Dunnigan and Emil Rizzo to contact BCBSS with these valid concerns.

The Court acknowledges this State's strong public policy in reporting suspected abuse and neglected as codified in the Act. The facts in this matter do not demonstrate malice or bad faith on behalf of Mr. Dunnigan or Emil Rizzo, and therefore those Defendants are entitled to the benefit of the clear immunity set forth in N.J.S.A. 52:27D-409(c). John Dunnigan and Emil Rizzo had a valid basis for suspecting exploitation and neglect and contacted the proper authorities to voice their concerns. Their involvement ceased when they simply reported suspected abuse of an elderly family member. They are entitled to be protected from retaliatory lawsuits by the clear immunities provided under the law. Therefore, the causes of action against John Dunnigan and Emil Rizzo are dismissed with prejudice.

B. Defendants BCBSS, William Oserin and Fatmata Savage

The Plaintiffs cause of action for violation of their civil rights arise from an alleged civil trespass. The Court notes that while the Plaintiffs have brought a civil action for trespass against the Defendants BCBSS, Eli M.S. Forman, William Oserin and Fatmata Savage (collectively the “BCBSS Defendants”), no municipal charges for criminal trespass were ever filed. Trespass is “an unlawful act committed with violence, actual or implied, causing injury to the person, property, or relative rights of another.” State v. Besson, 110 N.J.Super. 528, 538, 266 A.2d 175 (Law Div.1970) (quoting Black's Law Dictionary (4th ed.), at 1674). Under a trespass theory, a plaintiff may “assert a claim for whatever damages the facts may lawfully warrant.” Szymczak v. LaFerrara, 280 N.J. Super. 223, 233, 655 A.2d 76 (App.Div.1995) (quoting Marder v. Realty Construction Co., 43 N.J. 508, 511, 205 A.2d 744 (1964)). Thus, a plaintiff may claim damages from the loss in value to the land trespassed upon.

In the case at hand, the actions of the BCBSS Defendants did not amount to a trespass. The Plaintiffs allegations that a trespass was committed when the BCBSS Defendants walked to the back door of the home or when a fifteen year old allowed them access to the home are without merit. The BCBSS Defendants were employed to investigate potential abuse and neglect of Fred Rizzo. Their reasonable behavior of walking along the side of the house to check the back door after there was no answer at the front door does not constitute a trespass. There is no claim that there was damage to any property, the BCBSS Defendants were not informed that access to the back door was forbidden and when told to leave by Doug Rizzo they promptly complied.

Additionally, this Court has determined that the BCBSS Defendants are afforded qualified immunity from liability for civil damages and therefore summary judgment in favor of the BCBSS Defendants is granted.

In order to state a claim pursuant to 42 U.S.C. §1983 a litigant must provide two elements: (1) that he/she was deprived of a federal right secured by the Constitution; and (2) that the action was performed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 42 n.3 (1988); Rezem Family Assoc., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011); Kirk v. City of Newark, 109 N.J. 173, 185 (1988).

In T&M Homes v. Mansfield, 162 N.J. Super. 497 (Law. Div. 1978) the court decided that public officials were absolutely immune from suit under the Civil Rights Act, at least as to claims for compensatory damages, while municipalities were afforded qualified immunity. The rules of qualified immunity are set forth in Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), and in Endress v. Brookdale, 144 N.J. Super. 109 (App.Div.1976). The latter court said:

There should have been a consideration of the objective and subjective criteria of good faith mandated by Wood v. Strickland; that is, the subjective aspect of whether the official acted sincerely and with a belief that he was doing right, and not with a malicious intention to cause a deprivation of constitutional rights; and, if that test was met, the objective standard of whether the official knew or reasonably should have known that his act would violate the clearly established constitutional rights of plaintiff. Id. at 136-137.

New Jersey courts have adopted the "objective reasonableness" standard of Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). See Hayes v. Mercer County, 217 N.J. Super. 614, 526 A.2d 737 (App.Div.1987). The Hayes Court explained: "To prevail on a motion for summary judgment, a public employee need not establish his subjective, i.e., actual, good faith if his conduct was objectively reasonable." Id. at 622, 526 A.2d 737. In Harlow the

Supreme Court sought to avoid the disruption of effective government caused by litigation through resolution on summary judgment. It held, therefore, that a public official is immune from liability unless he or she violates a clearly established law of which a reasonable person would have known. 457 U.S. at 817-818, 102 S.Ct. at 2737-38.

In light of Harlow and its progeny, Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the test becomes whether a public employee would have reasonably believed that his or her actions were lawful in light of clearly established law. Anderson, *supra*, 107 S.Ct. at 3040. The law violated must be sufficiently clear that a reasonable public employee would understand that what he or she is doing violates that law. The unlawfulness must be apparent from preexisting law. Id. at 3039.

In the case at bar, the Plaintiffs have continually alleged subjective bad faith and malice on the part of all Defendants in this action. However, the Plaintiffs arguments have been devoid of any facts to support bad faith and malice. The BCBSS Defendants were conducting an investigation into suspected abuse of Fred Rizzo. Mr. Oserin, Ms. Savage and Dr. Forman were not behaving unreasonably when they entered the home to interview Fred Rizzo. In fact, based upon the well-reasoned opinion of the Hon. Mark M. Russello, J.S.C. (ret.) the police officer that escorted Dr. Forman into the residence was found to be protected by qualified immunity. It would be unjust and contradictory to find that Dr. Forman is not protected by the same reasoning.

Furthermore, Mr. Oserin and Ms. Savage's entrance into the home through the unlocked front door does not support a finding of bad faith and malice that would strip them of their qualified immunity. Mr. Oserin and Ms. Savage, a college intern, were aware of Fred Rizzo's

mental state and physical limitations when they decided to open the door and check on his well-being. Fred Rizzo had not responded to the door bell, and rather than ignore the strong possibility that Fred had suffered some injury or fall while left home alone, Mr. Oserin and Ms. Savage acted in good faith and entered the home to check on Fred's welfare. Ms. Oserin and Ms. Savage were executing their statutorily mandated duties to investigate abuse and neglect in good faith and are therefore cloaked in qualified immunity and entitled to summary judgment.

In conclusion, the Defendants motions for summary judgment are **GRANTED** for the aforementioned reasons.

HON. ROBERT C. WILSON