IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

DeSIMONE, INC. and	:	November 2001
LONE STAR STEAKHOUSE & SALOON	:	No. 000207
OF PENNSYLVANIA, INC.	:	
	:	
v.	:	
	:	Control # 30436
CITY OF PHILADELPHIA,	:	
PHILADELPHIA AUTHORITY FOR	:	
INDUSTRIAL DEVELOPMENT and	:	
BRIAN J. O'NEILL	:	Commerce Program
	:	

MEMORANDUM OPINION

I. INTRODUCTION

Councilman Brian J. O'Neill ("O'Neill") has filed a Motion for Judgment on the Pleadings asserting that he has absolute legislative and governmental immunity to plaintiffs' claims of tortious interference with contractual relations. O'Neill also filed a motion to stay discovery pending resolution of this motion. In tandem, these motions raise serious, subtle issues that must necessarily be resolved through a process of additional discovery.

The Motion for Judgment on the Pleadings is denied because on the present record certain pleadings focus on activities that on their face fall outside the scope of legislative or governmental immunity. This Motion also raises issues of material fact as to the exact nature of defendant O'Neill's

actions so that it cannot be determined as a matter of law that the defendant, as moving party, is entitled to judgment.

Defendant's Motion to Stay Discovery is also denied and additional discrete discovery may proceed. In so doing, discovery may not invade the sphere of Councilman O'Neill's legitimate legislative activity.[1] Unfortunately, at this preliminary stage in the litigation it is not possible to map out the precise contours of the permissible discovery. Rather, those parameters may have to be decided on an issue by issue basis.

II. BACKGROUND

The dispute among the parties centers on the efforts of plaintiff DeSimone, Inc. ("DeSimone") to sublease property from plaintiff Lone Star Steakhouse and Saloon of Pennsylvania ("Lone Star"). The property at issue lies within the Tenth Councilmanic district of defendant O'Neill and plaintiffs allege that he interfered with their attempts to assign the sublease of this property. O'Neill is being sued in both his individual and official capacities. Complaint, ¶ 5. The pleadings outline the genesis of this dispute.

In 1981, 3.5 acres of land owned by the City of Philadelphia (the "City") was leased to the Philadelphia Authority for Industrial Development ("PAID") so that the parcel could be subleased for commercial or commercially-related development. Plaintiffs' Second Amended Complaint (hereinafter "Complaint"), ¶¶ 8,9. The leasehold is zoned "C-7 Commercial District," which allows for the sale of automobiles and parts as well as private open-air parking lots. Complaint, ¶ 31. Plaintiffs allege that

[1] For a discussion of the delicate nature of discovery on this issue of legislative immunity, see the transcript of the hearing held on this issue. 3/19/02 N.T. at 13-14.

the lease contains no further designation or restriction on the use of the premises, and contains no requirement for the consent or notification of the City or any other person or entity, when PAID agrees to the assignment of any sublease of the premises. Id., ¶ 10, Exhibit A.

PAID initially in 1981 subleased the premises to the Howard Johnson Corporation, which, in turn, leased a portion of the premises, approximately 1.8 acres, to Friendly Ice Cream ("Friendly"). Id., ¶¶ 11, 21. The sublease agreement provides for approval by the sublessor of any sublease and states that such consent must not be unreasonably withheld. Id., ¶ 12, Exhibit C. Friendly constructed a restaurant on that parcel, which continued to operate at all relevant times. In 1985, the Howard Johnson Corporation assigned all of its interests in the sublease, including the Friendly parcel, to The Ground Round, Inc., a Delaware Corporation and a wholly-owned subsidiary of Howard Johnson, which subsequently assigned the entire sublease, with the approval of PAID, to Plaintiff Lone Star in 1996. Id., ¶¶ 22-24.

Lone Star operated a restaurant on the remaining parcel that was not occupied by Friendly Ice Cream until January 5, 2000. Id., ¶¶ 27,28. On or about July 6, 2000, Lone Star and DeSimone entered into an agreement for sale and purchase of assets whereby DeSimone would purchase all of Lone Star's assets in its premises including its interest as sublessee. Id., ¶29. DeSimone planned to operate an automobile showroom and service facility on the Lone Star subparcel. Id., ¶ 30. The agreement of sale between Lone Star and DeSimone was contingent upon Lone Star's sublessor approving the assignment of Lone Star's interests to DeSimone. Id., ¶ 33.

To obtain approval of the sublease, the plaintiffs attended a meeting on July 20, 2000 with

various individuals representing the City and PAID, including James Tyrrell ("Tyrrell")[2], for the City of Philadelphia, Division of Aviation. According to plaintiffs, Tyrrell told them that it was the practice of the City to seek O'Neill's approval for all proposals involving the use of land adjoining Northeast Airport, which is in O'Neill's councilmanic district. Id. ¶¶ 42, 43. More specifically, plaintiffs allege:

> 42. At this July 20, 2000 meeting, James M. Tyrrell stated that although City Council approval is not required, Mr. Tyrrell had an informal understanding with defendant, City Councilman Brian J. O'Neill, that all proposals for use of land adjoining Northeast Airport must be submitted to and approved by Brian J. O'Neill, and that it was the practice of the defendant City's Division of Aviation to adhere to this informal understanding.
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> 43. At this July 20, 2000 meeting, James M. Tyrrell stated that the Sublease could not be assigned to plaintiff DeSimone, Inc. without the approval of defendant Brian J.O'Neill. Mr. Tyrrell further advised Mr. Gerson that there was no legal requirement that the approval of defendant Brian J. O'Neill be obtained in order for the Sublease to be assigned, but that nonetheless such approval would be required by PAID. It should be noted that the Premises are located in defendant O'Neill's City councilmanic district. When Mr. Gerson asked why defendant O'Neill had to approve the project, Mr. Tyrrell told Mr. Gerson that it was the "unwritten law." Accordingly, Mr. Tyrrell made it clear that DeSimone Inc. would first have to deal directly with defendant Brian J. O'Neill in order to obtain consent to have the Sublease assigned from plaintiff Lone Star to plaintiff DeSimone, Inc. Complaint, ¶¶ 42-43.

After this July 20th meeting, DeSimone persisted in efforts directed at the City and PAID to obtain approval of the sublease assignment but received a letter from James Tyrrell dated August 16, 2000 stating that the Airport was not interested "at this point in moving forward" with DeSimone's proposal. Tyrrell also wrote that if circumstances changed, the Airport would "be in touch with you." Id., ¶ 48. Plaintiff DeSimone then arranged for a meeting between its attorney and O'Neill. Id. A

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[2] The Complaint characterizes James Tyrrell as the "Deputy Director, Aviation, Property Management and Business Development, for the City's Commerce Department, Division of Aviation. Complaint ¶ 34.

representative of O'Neill met with DeSimone's attorney on August 24, 2000, and told DeSimone's attorney that he did not believe that O'Neill was opposed to the project. Id., ¶ 50.

On October 17, 2000, despite continued efforts by the Plaintiffs to obtain the City's approval, an employee of Plaintiff Lone Star, Karon Perrill, was told by James Tyrrell that the "deal is dead" because the "people are against it." Id., ¶¶ 58- 60. Lone Star was also told by Tyrrell that what was needed "to get the deal moving" was O'Neill's approval. Id., ¶ 62. Plaintiffs allege that Mr. Tyrrell also indicated that the City favored an alternative sublessor, the American Heritage Federal Credit Union (the "Credit Union"), who had submitted a sublease proposal to Lone Star. Id., ¶ 63. The President and Chief Operating Officer of the Credit Union is purportedly a friend of Councilman O'Neill as well as a major contributor to O'Neill's campaign for City Council. He allegedly is also a client of O'Neill's law firm. Id., ¶¶ 65, 116, 119, 124.

Lone Star and DeSimone had a sixty day period for due diligence in their agreement of July 6, 2000, during which time they needed to secure approval of the assignment. Id., ¶ 50. Notwithstanding the absence of such approval, Plaintiffs closed on their agreement on December 13, 2000, giving DeSimone the right to operate on the property. Id., ¶ 68. By letter dated January 4, 2001, Lone Star notified PAID that it intended to renew the Sublease for five years commencing on November 1, 2001. Id., ¶ 70. PAID acknowledged Lone Star's timely renewal, and did not give any indication that it did not have the authority to renew because its lease with the City had expired. Id., ¶ 74. Until Plaintiffs learned on November 5, 2001 that the City was at that point Lone Star's sublessor, Lone Star communicated with PAID as its sublessor and made out checks to PAID, which accepted them. Id., ¶ 75. Lone Star has since December 2001 been paying its rent directly to the City, Aviation Division,

which has been accepting the checks. Id., ¶ 109.

Throughout January of 2001, DeSimone applied for a number of permits for auto sales and leasing on the premises and for a building permit to perform interior and exterior alterations at the site that were approved by the City's licenses and inspections department Id., ¶¶ 71-73. A subsequent application for building an addition on the premises was rejected in late January 2001. DeSimone alleges he was told that the rejection was due to lack of a permit to operate an automobile dealership. Id., ¶ 80. The originally approved licenses were subsequently revoked in mid-March 2001. Id., ¶¶ 83, 93, 110. On April 16, 2001, a representative of the City's Aviation Division appeared at the DeSimone work site allegedly at the direction of Councilman O'Neill and told the workers, who were performing jobs related to the previously approved addition, that they had to cease work because they were operating without a permit. Id., ¶ 86. On April 30, 2001 the City issued a Cease Operations Order, which prevented DeSimone from engaging in any activity on the property. Id., ¶ 95. The City claimed that DeSimone was operating without the required permits. Id., ¶ 94.

On May 24, 2001, O'Neill introduced a Bill No. 10368 (the "Bill") to the Philadelphia City Council to change the zoning and planning of C-7 districts, such as the one where the premises at issue are located, to prohibit the operation of an automobile sales lot. Id., ¶ 96-97. The Bill was passed by City Council in November 2001. Id., ¶ 101. Plaintiffs allege that numerous automobile dealers complained about this Bill because it adversely affected their businesses. Consequently, O'Neill requested that the Bill be recalled and it did not become an ordinance. Id. ¶ 104. Upon learning that PAID was no longer Lone Star's sublessor, on November 6, 2001, DeSimone had filed another application for City use and occupancy to operate an automobile sales business. Id., ¶ 103. That

application was approved the same day. Id.

On November 29, 2001, O'Neill introduced an amended version of the Bill, which would only prevent automobile sales operations of businesses that applied for use and occupancy at a date later than November 1, 2001. Id., ¶ 106. Purportedly, O'Neill was aware that as of November 1, 2001, DeSimone did not have the necessary certificates and permits to operate his business. Id., ¶ 107. Plaintiffs allege that O'Neill had contacted the City and PAID in order to prevent the requested assignment of the sublease from Lone Star to DeSimone. Id., ¶ 123. Plaintiffs further allege that the City representative who prevented the continuation of the work on DeSimone's addition told the workers there that he was being sent by a City Councilman, purportedly O'Neill. Id., ¶ 86.

O'Neill concedes that he has no right to either approve or disapprove any proposal for the use of the land adjoining the Northeast Airport. Answer and New Matter of Defendant Bryan O'Neill ("O'Neill's Answer"), ¶ 42. O'Neill denies that his representative stated that he did not believe that O'Neill was opposed to the project. O'Neill's Answer, ¶ 50. He further denies knowledge of a contract between DeSimone and Lone Star, and any intention to interfere with such contract, and denies that he intended any harm to anyone. Id., ¶¶ 210, 107. O'Neill admits that he spoke with the City and PAID regarding the assignment of the sublease and claims immunity as to the substance of the communication with the City and PAID. Id., ¶ 123.

II. DISCUSSION

A. Legal Standards for Judgment on the Pleadings

Rule 1034 of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] provides that "[a]fter the

relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a). In ruling on a motion for judgment on the pleadings, the court should confine itself to the pleadings, such as the complaint, answer, reply to new matter and any documents or exhibits properly attached to them. A motion for judgment on the pleadings may only be granted where "the pleadings demonstrate that no genuine issue of facts exists, and the moving party is entitled to judgment as a matter of law." Kelly v. Nationwide Ins. Co., 414 Pa. Super. 6, 10, 606 A.2d 470, 471 (1992). See also, Kotovosky v. Ski Liberty Operating Corp., 412 Pa. Super. 442, 445, 603 A.2d 663, 664 (1992), app. denied, 530 Pa. 660, 609 A.2d 168 (1992).

On a motion for judgment on the pleadings, which is similar to a demurrer, the court accepts as true all well-pleaded facts of the non-moving party, but only those facts specifically admitted by the nonmoving party may be considered against him. Mellon Bank v. National Union Ins. Company of Pittsburgh, 768 A.2d 865, 868 (Pa. Super. 2001). Such a motion may only be granted in cases "where, on the facts averred, the law says with certainty that no recovery is possible." Lindstrom v. City of Corry, 563 Pa. 579, 583, 763 A.2d 394, 396 (2000). There should be no issue of material fact and the law should be so clear that a trial would be a fruitless exercise. Ridge v. State Employees Retirement Board, 690 A.2d 1312, 1314 n. 5 (Pa. Cmwlth.1997) (citations omitted).

B. Legal Standards for Legislative Immunity

Defendant O'Neill premises his claim to legislative and governmental immunity on two grounds. First, he invokes the Speech and Debate Clause of the United States Constitution (Art.I, section 6) and the Pennsylvania Constitution (Art. II, section 15). He also asserts the immunity afforded high public

officials under Pennsylvania precedent and the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. section 8541. For clarity, these claims will be analyzed separately.

1. Legislative Immunity Under the Speech and Debate Clauses of the United States and Pennsylvania Constitutions

The roots of legislative immunity can be traced back to the Parliamentary struggles of the Sixteenth and Seventeenth Centuries[3] and the Speech and Debate Clause of the United States Constitution.[4] Recognizing this long heritage, the United States Supreme Court in Tenney v. Brandhove, 341 U.S. 367 (1951) emphasized the underlying purpose of legislative immunity:

> The reason for the privilege is clear. It is well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the federal constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.'

Id. at 373 (citations omitted).

The Tenney court offered guidance on determining the scope of this legislative immunity when it emphasized the need to focus on "whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity." Id. at 376. Subsequent opinions by the Supreme Court have likewise emphasized the need to focus on this "sphere of legitimate legislative activity." In Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998), the Court noted that legislative immunity applied to local as

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[3] Tenney v. Brandhove, 341 U.S. 367, 372 (1951).

[4] This Article provides that Senators and Representatives "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place." U.S.CONST. art. I, section 6, cl. 1.

well as to federal, state, or regional legislators and "attaches to all actions taken 'in the sphere of legitimate legislative activity.'" The Bogan court also emphasized that "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the person performing it."[5]

The Third Circuit likewise took this functional approach of focusing on the act at issue when it was asked to determine whether individual Justices of the Pennsylvania Supreme Court could claim legislative immunity for their reorganization of the First Judicial District by order of March 26, 1996 that eliminated the position of Executive Administrator to create an Administrative Governing Board. See Gallas v. The Supreme Court of Pennsylvania, 211 F.3d 760, 773-77 (3d Cir. 2000). In concluding that these Justices could claim legislative immunity, the Gallas court applied a two-pronged test for legislative activity:

> First, the act must be "substantively" legislative, i.e. legislative in character. Legislative acts are those which involve policy-making decision [sic] of a general scope or, to put it another way, legislation involves line-drawing. Where the decision affects a small number or a single individual, the legislative power is not implicated, and the act takes on the nature of administration. In addition, the act must be "procedurally" legislative, that is, passed by means of established legislative procedures. This principle requires that constitutionally accepted procedures of enacting the legislation must be followed in order to assure that the act is a legitimate, reasoned decision representing the will of the people which the governing body has been chosen to serve. Gallas, 211 F.3d at 774 (citations omitted).

The Pennsylvania Constitution also recognizes legislative immunity. Pa.Const. Art. II, section

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[5] Id. at 55. The DeSimone complaint alleges that O'Neill's motive for opposing assignment of the plaintiffs' sublease was to favor Bruce K. Foulke and the American Heritage Federal Credit Union which were interested in the Lone Star subparcel as the site for a branch office. The complaint further alleges that Foulke was not only O'Neill's friend and a contributor to his campaign for City Council but also a client of his law firm. Complaint ¶¶ 65, 113-25. Under Bogan and controlling precedent, however, such allegations as to motive are irrelevant in determining whether O'Neill can claim legislative immunity. See, e.g. Tenney, 341 U.S. at 376 ("the claim of unworthy purpose does not destroy the privilege").

15. As the United States Supreme Court noted in its historical analysis of legislative immunity in Tenney, Pennsylvania was among those original states that specifically protected legislative freedom in its Constitution of 1790. [6] More recently, the Pennsylvania Supreme Court in Consumers Education and Protective Association v. Nolan, 470 Pa. 372, 382-3, 368 A.2d 675, 681 (1977) noted that "we find no basis for distinguishing the scope of the Pennsylvania Speech and Debate Clause applicable to members of the General Assembly from that of the federal clause applicable to members of Congress." Thus, the Pennsylvania Supreme Court in analyzing the scope of legislative immunity also focuses on whether a particular action falls within the "legitimate legislative sphere." Id., 470 Pa. at 383, 368 A.2d at 681.

In applying this test to particular cases, Pennsylvania courts consistently conclude that actions related to the passage of legislation or legislative procedure fall within the sphere of legitimate legislative activity. See, e.g., Consumers Education and Protective Assoc. v. Nolan, 470 Pa. 372, 368 A.2d 675 (1977)(action by taxpayers against state senator for referring nomination for Pennsylvania Public Utility Commission to Senate floor for a vote should be dismissed because the Senator's actions fell within the legitimate sphere of legislative activity); Consumer Party of Pa. v. Commonwealth, 510 Pa. 158, 171-75 , 507 A.2d 323, 329-31 (taxpayer action against the state legislature for enacting Public Official Compensation Law of 1983 should be dismissed because the act of passing legislation falls within the

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[6] Tenney, 341 U.S. at 374, n.3 (citing PA. CONST. 1790, art. I, § 15). The Pennsylvania Constitution presently provides: "The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and returning from same; and for any speech or debate in either House they shall not be questioned in any other place." PA. CONST. Art. II, § 15.

"legitimate legislative sphere"); Lincoln Party v. General Assembly, 682 A.2d 1326 (Pa. Cmwlth. 1996)(state legislators are immune under the Speech and Debate Clause to lawsuit challenging vote on proposed constitutional amendment).

Courts have drawn subtle lines, however, as to immunity under the Speech and Debate Clause for activities outside the legislative chamber. In Hamilton v. Hennessey, 783 A.2d 852 (Pa. Cmwlth. 2001), for instance, the Commonwealth Court refused to extend legislative immunity to newsletters issued by a state representative because the preparation of the particular newsletter "although 'related' to official business, was not a protected activity." Id. at 855 (adopting opinion of Judge Morgan). Similarly, in Lunderstadt v. Colafella, 885 F.2d 66, 77-78 (3d Cir. 1989), the Third Circuit concluded that legislative immunity did not extend to the allegedly defamatory comments by counsel for a legislative committee at a news conference convened to respond to a political adversary. See also Dickey v. CBS, 387 F.Supp. 1332 (E.D.Pa. 1975)(United States Representative is not immune from testifying as a nonparty witness concerning a television speech because that is political rather than legislative activity).

Under this precedent, it is clear that as a City Councilman, defendant O'Neill is entitled to legislative immunity so long as his actions fall within the sphere of legitimate legislative activity. The allegations in the DeSimone complaint must therefore be scrutinized to determine whether O'Neill can claim this immunity. The complaint focuses on three kinds of activities by O'Neill: (1) the alleged requirement that the assignment of the Sublease between DeSimone and Lone Star had to be approved

by O'Neill[7]; (2) the alleged interference directed by defendant with work at the premises due to a lack of a permit;[8] and (3) the introduction of Council Bill No. 10368 on May 24, 2001 to amend the Philadelphia Code so that automobile dealerships could not be operated on property zoned C-7 Commercial Districts.[9] At oral argument on the discovery issue, plaintiff's counsel conceded that "we cannot inquire into the actual introduction of the legislation. We cannot inquire into the shepherding through City Council and so forth." 3/19/2002 N.T. at 13. In this vein, plaintiff's counsel stated that they could not inquire into O'Neill's conversations with other councilmen or members of the Executive Department relating to the actual Bill. Id. at 14. Plaintiffs, however, refuse to concede that conversations with officials unrelated to the legislation should be immune. Id. at 15. This court agrees with these distinctions: Councilman O'Neill's actions related to the introduction and shepherding of Bill 10368 would clearly fall within a sphere of legitimate legislative activity. The main thrust of plaintiffs' focus, however, is on the activities of O'Neill prior to or distinct from the introduction of the May 24, 2001 Bill.

The parties present conflicting characterizations of O'Neill's activities prior to the introduction of his Bill. According to defendant O'Neill, plaintiffs are trying to impose liability on him for "his behind-the-scenes lobbying against DeSimone's auto dealership in his district through his sponsorship of a City Council Bill having the same effect." Defendant's Memorandum at 1. Plaintiffs counter that the gravamen of their complaint focuses not on the legislation introduced by O'Neill but rather on

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[7] See, e.g., Complaint, ¶¶ 42-43, 49-50, 62, 123.

[8] Complaint, ¶ 86.

[9] See, e.g., Complaint, ¶¶ 96- 101.

"O'Neill's prior actions outside City Council in successfully interfering with, and usurping, the executive branch administrative process by which the City Commerce Department and PAID are to approve plaintiffs' requested assignment" of the sublease at issue. Plaintiffs' Reply Memorandum at 2.

Plaintiffs thus allege that they were told that it was an "unwritten rule" that O'Neill's approval had be obtained for assignment of their sublease. They also assert that there was an informal understanding by the City's Division of Aviation that O'Neill's approval had to be obtained for all land use proposals for land adjoining the Northeast Airport:

> 42. At this July 20, 2000 Meeting, James M. Tyrrell stated that although City Council approval is not required, Mr. Tyrrell had an informal understanding with defendant, City Councilman Brian J. O'Neill, that all proposals for use of land adjoining Northeast Airport must be submitted to and approved by defendant Brian J. O'Neill and that it was the practice of the defendant City's Division of Aviation to adhere to this informal understanding.
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> 43. At this July 20, 2000 meeting, James M. Tyrrell stated that the Sublease could not be assigned to plaintiff DeSimone, Inc. without the approval of Brian J. O'Neill. Mr. Tyrrell further advised Mr. Gerson that there was no legal requirement that the approval of defendant Brian J. O'Neill be obtained in order for the Sublease to be assigned, but that nonetheless such approval would be required by PAID. It should be noted that the Premises are located in defendant O'Neill's City councilmanic district. When Mr. Gerson asked why Defendant O'Neill had to approve the project, Mr. Tyrrell told Mr. Gerson that it was the "unwritten law." Accordingly, Mr. Tyrrell made it clear that DeSimone Inc. would first have to deal directly with defendant Brian O'Neill in order to obtain consent to have the Sublease assigned from plaintiff Lone Star to plaintiff De Simone, Inc. Complaint, ¶¶ 42-43.

Plaintiffs also more directly allege actions by defendant O'Neill in opposition to the assignment of their sublease:

> 123. Upon information and belief, defendant Brian J. O'Neill contacted defendants City and PAID and told defendant City and PAID that it should not approve the requested assignment of the Sublease from plaintiff Lone Star to plaintiff DeSimone, Inc. Complaint, ¶ 123.

On their face, these allegations go beyond mere lobbying by one legislator with another for

passage of a piece of legislation. As plaintiffs argue, these allegations suggest direct interference with executive or administrative decision making that would appear to be beyond the scope of legislative activity. The Philadelphia Home Rule Charter outlines the varying roles of the legislative and executive branches. It provides, for instance, that the legislative power of the City "shall [sic] exclusively vested in and exercised by a Council." Phila. Home Rule Charter, § 1.1-101. The executive and administrative power of the City, in contrast, "shall be exclusively vested in and exercised by a Mayor and such other officers, departments, board and commissions as are designated and authorized by this chapter." Id., § 1.1-102(1). Finally, the Home Rule Charter explicitly prohibits a councilman from interfering with the performance of duties by "any other employees in any department, board or commission of the City." Id. at § 10.10-100.

This mere delineation of legislative, executive and administrative spheres in the Home Rule Charter, however, is suggestive rather than dispositive as to the precise scope of a councilman's legitimate legislative sphere. It needs to be fleshed out with relevant precedent. To support his claim of legislative immunity, O'Neill cites Union Newspapers Inc. v. Roberts, 777 A.2d 1225 (Pa. Cmwlth. 2001). This case, however is factually inapposite. In Union Newspapers, plaintiff newspapers sought to compel Lawrence Roberts, a member of the Pennsylvania General Assembly, to make available telephone records for which he had been reimbursed with general funds allocated by the General Assembly. In concluding that these records were immune, the Commonwealth Court relied primarily on federal precedent and emphasized "that there needs to be protection of 'the integrity of the legislative process,' discussions with other lawmakers and constituents is surely included within the ambit of 'legislative process.' Therefore, we hold that business telephone calls made by members of the

General Assembly fall within the meaning of 'legitimate legislative activity.'" Union Newspapers, 777 A.2d at 1233 (emphasis added)(citation omitted). The allegations in the DeSimone complaint, however, do not focus on "business" conversations with constituents or other lawmakers but rather on "unwritten laws" extending the authority of a legislator councilman to the administrative or executive decisions by other city departments. Hence, Union Newspapers is not applicable.

Another case that O'Neill relies upon is Bogan v. Scott Harris, 523 U.S. 44 (1998) which concluded that a city council vice president and mayor were entitled to absolute legislative immunity despite allegations that they had eliminated the plaintiff's city job due to racial animus and in retaliation for filing a complaint against an ally of the defendants. Defendant's Memorandum at 10. But, as O'Neill concedes, the job at issue in Bogan was eliminated through the enactment of an ordinance that had been voted on by the defendant city council vice president. The act at issue thus clearly fell within the scope of legitimate legislative activity since, as the Bogan court emphasized, "the acts of voting for an ordinance were, in form, quintessentially legislative." Bogan, 523 U.S. at 55. Bogan thus offers little guidance as to the allegations concerning O'Neill's activities prior to and in distinction from the May Bill he introduced.

More to the point is the precedent cited by the plaintiffs. Carver v. Forester, 102 F.3d 96 (3d Cir. 1996), for instance, focuses on whether certain actions of a County Commissioner can be separated from his subsequent legislative acts of voting as a Salary Board Member to eliminate the plaintiffs' employment positions. The Third Circuit concluded that these two periods of differing activity could be distinguished: while legislative immunity might apply to the act of the Salary Board Member in voting to eliminate plaintiffs' positions, as a County Commissioner he "is not entitled to

legislative immunity for any non-legislative actions he took to abolish plaintiffs' positions." Carver, 102 F.3d at 100. In reaching this conclusion, the Carver court applied the 2-pronged test that was also invoked in the Gallas opinion for determining whether an act is legislative: "To be legislative, the act must be (1) substantively legislative, such as 'policy-making of a general purpose' or 'line-drawing'; and (2) procedurally legislative, such that it is 'passed by means of established legislative procedures.'" Id. at 100.

Under this test, the allegations concerning O'Neill's personal intermeddling in the approval of the assignment of a particular sublease by PAID or a city department would fall outside both the substantive and procedural legislative realm. Such an intrusion, if shown, would constitute neither policy-making of a general purpose nor line drawing. Nor would such an "unwritten law" satisfy the procedurally legislative prong since it clearly would not be "passed by means of established legislative purposes. More ominously, such activity would likewise run afoul of the prohibitions in the Philadelphia Home Rule Charter that preclude Councilmen from interfering with the duties of employees in the executive or administrative branches:

> 2. An effective civil service regime and principles of employment on merit preclude a legislator from soliciting or recommending the appointment of any person to a civil service position. Councilmen appropriate funds to City agencies and are in a position to affect in that manner and other ways administrative operations. . . .
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> 3. For comparable reasons, Councilmen are emphatically prohibited from interfering with the performance of the duties of any employees in the executive and administrative branch of the City government. An employee should perform his duties as required by law and his superiors and not because of fear of legislative retaliation, whether or not such fear is in fact warranted.
> Phila. Home Rule Charter, section 10.10-100, Notes
> (emphasis added).

For these reasons, allegations in the DeSimone complaint concerning defendant O'Neill's

actions prior to and distinct from the introduction of his Bill fall outside the sphere of legitimate legislative activity, thereby precluding the entry of judgment on the pleadings as to O'Neill's claim for absolute legislative immunity.

2. Absolute Privilege for High Public Officials Under Pennsylvania Law

The Pennsylvania common law absolute privilege for high public officials, which O'Neill also claims, "exempts a high public official from all civil suits for damages." Durham v. McElynn, 565 Pa. 163, 164, 772 A.2d 68, 69 (2001)(quoting Matson v. Margiotti, 371 Pa. 188, 194, 88 A.2d 892, 895 (1952)). According to the Pennsylvania Supreme Court, the "determination of whether a particular public officer is protected by absolute privilege should depend on the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions." Lindner v. Mollan, 544 Pa. 487, 496, 677 A.2d 1194, 1198 (1996) (citing Montgomery v. City of Philadelphia, 392 Pa. 178, 140 A.2d 100, 103 (1958)).

This privilege has been applied to mayors, township supervisors, the Pennsylvania Attorney General, a County Attorney, and Revenue Commissioner of Philadelphia. See Lindner, 544 Pa. at 496 , 677 A.2d at 1198-99 (listing cases). At least two courts have applied this immunity to councilmen. Satterfield v. Borough of Schuylkill Haven, 12 F.Supp. 2d 423, 442 (E.D.Pa. 1998); Kelleher v. City of Reading, 2001 WL 1132401, *4 (E.D. Pa. 2001). Although this doctrine was initially applied in the context of defamation suits, it has been applied to claims for tortious interference with contracts. Kelleher, 2001 WL 1132401 at *4 ; Holt v. Northwest Pennsylvania Training Partnership, 694 A.2d 1134, 1139-40 (Pa. Cmwlth. 1997)(tortious interference with employment contract).

The scope of this immunity was outlined by the Pennsylvania Supreme Court in the context of a

defamation action as follows:

> Absolute privilege, as its name implies, is unlimited and exempts a high public official from all civil suits for damages arising out of false defamatory statements and even from statements or actions motivated by malice, *provided the statements are made or the actions are taken in the course of the official's duties or powers and within the scope of his authority, or as it is sometimes expressed, within his jurisdiction.* Matson v. Margiotti, 371 Pa. 188, 193-94, 88 A.2d 892, 895 (1952)(italics in original)(citations omitted).

In a recent analysis of the scope of this absolute privilege afforded high officials, the Pennsylvania Supreme Court in Lindner v. Mollan, 544 Pa. 487, 489, 677 A.2d 1194, 1195 (1996) concluded that this doctrine could be invoked by a Mayor who was subject to a slander/libel action for comments he had made to a councilman. The Mayor in Lindner, while attending a Borough Council Meeting to discuss financial affairs and the borough deficit, told a councilman that he was "the village idiot" and had "been dipping from the till." Id. at 489, 677 A.2d at 1195. In explaining its conclusion that the Mayor was immune to a libel suit for these comments, the Lindner court emphasized that the Mayor made these comments to the councilman in the scope of his official duties since the parties had been engaged in discussions concerning the financial affairs of the borough. The court noted that the Mayor had statutory authority over the borough's fiscal affairs and was permitted to attend meetings of the Borough council. Id. at 497-98, 677 A.2d at 1199.

Applying this analysis to the instant case leads to the conclusion that Councilman O'Neill cannot claim absolute immunity as a high official as to the allegations that his approval was required for assignment of the sublease because such authority would be outside the scope of his authority. In fact, O'Neill admitted this in his Answer. In responding to the allegations in paragraph 42 of the DeSimone Complaint that James Tyrrell had an informal understanding with councilman O'Neill that all proposals

for use of land adjoining the Northeast Airport had to be approved by him, O'Neill responds as follows:

> 42. Denied. After reasonable investigation, O'Neill is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph of the Complaint and the same are, therefore, denied. **By way of further answer, O'Neill has no right to approve or disapprove any proposal for the use of the land adjoining the Northeast Airport.** O'Neill Answer, ¶ 42 (emphasis added).

With this statement, O'Neill concedes that the allegations concerning the requirement for his approval of land adjoining the Northeast Airport such as the sublease in dispute raise issues that are outside the councilman's area of authority or jurisdiction[10]. Hence, as to those allegations no absolute immunity can attach. Obviously, however, the councilman denies the existence of such an agreement, thereby raising issues of fact.

Conclusion

The allegations concerning Councilman O'Neill's talks or interference with City officials concerning assignment of the sublease between the plaintiffs raise unresolved material issues of fact as to whether the claimed immunity applies. These allegations also raise sub-issues such as at what juncture and for what purposes these talks were conducted. The justiciable issue thus is narrow and relates to the specific conduct of the defendant. Discovery is therefore necessary to determine whether the alleged conduct falls within the sphere of legitimate legislative activity.

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[10] Despite the admission in paragraph 42 of his pleading, O'Neill subsequently suggests that "it is absurd to assert that, upon being contacted by the City, O'Neill's stating his and his constituent's feelings against the proposed assignment of a sublease was not an act 'resulting from the nature, and in execution of' Councilman O'Neill's office." Defendant's Reply Memorandum at 3. These seemingly contradictory positions suggest some of the factual issues that need to be resolved.

As discovery proceeds, facts may emerge that will more clearly define the scope of Councilman O'Neill's legislative immunity. Based on those facts, it is conceivable that different areas of immunity might be asserted. The process is necessarily fluid and dynamic. At this preliminary stage in the litigation, however, material issues of fact preclude a conclusion as a matter of law that defendant O'Neill is immune to suit for the alleged activities that are distinct from his introduction and subsequent sponsorship of Bill 010368 through City Council. Ridge v. State Employees Retirement Board, 690 A.2d 1312, 1314 n. 5 (Pa. Cmwlth. 1997) (citations omitted); Beardell v. Western Wayne School District, 91 Pa. Cmwlth. 348, 354, 496 A.2d. 1373, 1376 (1984)(motion for judgment on the pleadings may only be granted when no material facts are at issue).

Date: May 7, 2002

BY THE COURT:

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JOHN W. HERRON, J.