

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

LEE KENWORTHY, as the administrator
of the ESTATE OF SHAYLING
KENWORTHY and LEE KENWORTHY,
individually,

Plaintiff,

v.

LYNDHURST POLICE DEPARTMENT;
et als.,

Defendants.

Civil Action No:
2:18-cv-12822 (MCA)(JAD)

Civil Action

**MOTION RETURN DATE:
January 7, 2018**

(Document Electronically Filed)

**BRIEF IN SUPPORT OF DEFENDANT HOUSING AUTHORITY OF
BERGEN COUNTY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT
PURSUANT TO FED. R. CIV. PROC. 12(b)(1) AND 12(b)(6)**

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PRELIMINARY STATEMENT

Defendant Housing Authority of Bergen County (“Defendant” or “HABC”) respectfully submits this Brief In Support Of Its Motion To Dismiss, Pursuant To Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6), the August 16, 2018 *pro se* Complaint filed by plaintiff Lee Kenworthy (“Plaintiff”), both in his individual capacity and as administrator *ad prosequendum* on behalf of the estate of his deceased wife, Shayling Kenworthy (“the decedent”), purporting to assert state law claims of negligence and wrongful death against various defendants including HABC.

Plaintiff’s Complaint arises out of an August 17, 2016 incident that occurred at 287 Castle Terrance, Lyndhurst, New Jersey (“the apartment”) – the address of an apartment that Plaintiff and the decedent rented from owners/co-defendants Ann and Robert Martin (“the Martins”) and Richard and Lauren Anderson (“the Andersons”). HABC has never owned, controlled or maintained an interest in that property. Plaintiff claims the apartment was in disrepair and unsanitary conditions, which triggered the decedent suffering an asthma attack which, in pertinent part, combined with the alleged failure to provide medical assistance by the Lyndhurst Defendants (defined *infra*), ultimately resulted in her death.

As against Defendant HABC specifically, Plaintiff’s sole allegations consist of unsupported conclusory assertions that defendant Robert Martin had “involvement in sitting on a board” for HABC (see Complaint, attached to the

accompanying Certification of Christopher J. Turano, Esq. [“Turano Cert.”] as Exhibit A, First Count, ¶ 8) and that HABC was “negligent in [its] failure to properly inspect and pass the house as a government subsidized approved home as required by law.” See id., Fourth Count, ¶ 1.

Plaintiff’s Complaint must be dismissed as against HABC for a multitude of reasons. First, this Court does not have jurisdiction to hear this case. More specifically, subject matter jurisdiction is lacking because Plaintiff has not asserted a violation under the United States Constitution or a federal statute so as to provide federal question jurisdiction; diversity jurisdiction is lacking because the requisite complete diversity amongst the parties is lacking and a loss of greater than \$75,000.00 is not alleged; and HABC is not the United States government, thus rendering jurisdiction pursuant to 28 U.S.C. § 1342 lacking. Second, assuming arguendo there were jurisdiction, Plaintiff has failed to allege facts sufficient to plead any cognizable cause of action against the HABC. Finally, even further assuming arguendo this Court were to construe the Complaint as having sufficiently alleged a cause of action against HABC, such claims would constitute state law claims barred by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.

Accordingly, for all of the reasons to be discussed herein in detail, HABC’s motion must be granted and the Court must dismiss Plaintiff’s Complaint as against HABC with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

STATEMENT OF FACTS

On August 16, 2018, Plaintiff filed his Complaint in the United States District Court for the District of New Jersey. See Turano Cert., Exhibit A. Plaintiff alleges that he and the decedent rented the apartment from the Martin Defendants and the Anderson Defendants. See id., Statement of Claim, ¶ 1.

Plaintiff is a resident of Whiting, New Jersey (see id., cover page), and has alleged that all of the defendants – except for defendant Adapt Pharma¹ – either reside, work or are headquartered in New Jersey. See id., The Parties And Facts Common To All Counts, ¶¶ 2-10. In addition, Plaintiff claims that this Court has jurisdiction over this matter based on inclusion of a United States Government defendant. See id., Basis For Jurisdiction section. In his entire Complaint, Plaintiff makes no claim under the United States Constitution or any federal statute. See id.

With respect to the substantive allegations of the Complaint, Plaintiff alleges the apartment “was in disrepair when rented, fully covered with animal fur, feces, and urine to which decedent had a terrible allergy to same.” See id., Statement of Claim, ¶ 2. Plaintiff further alleges that he and the decedent complained about

¹ Although not relevant for purposes of this motion as to whether diversity jurisdiction exists sufficient for Plaintiff to maintain his Complaint insofar as concerns HABC, Plaintiff alleges defendant Adapt Pharma is headquartered at 100 Matsonford Road, Building 4, Suite 201, Radnor, PA 19087. See id., The Parties And Facts Common To All Counts, ¶ 11.

these conditions to the Martin Defendants and the Anderson defendants on multiple occasions, but that the apartment's owners refused to correct those conditions. See id., Statement of Claim, ¶ 3.

With respect to the Lyndhurst Defendants,² Plaintiff alleges (insofar as the undersigned can decipher the run-on allegations against said defendants) that the Lyndhurst Police Department failed to act upon and file charges against Robert Martin (for Martin's "threats of retaliation, charges and coming after" Plaintiff and his wife), willfully ignored a crime and obstructed justice causing Plaintiff and his family to relocate to hotels out of fear. See id., Statement of Claim, ¶ 4. Plaintiff also alleges, among other non-sensical ramblings, that "defendants" filed false charges against Plaintiff, the decedent and their family in order to make Plaintiff and the decedent "remain silent" and pay rent in advance. See id., Statement of Claim, ¶ 5.

Plaintiff alleges that on August 17, 2016, he and his wife "were moving their items out of the apartment when the decedent began to have an asthma attack due to the deteriorating conditions of the apartment." See id., Statement of Claim, ¶ 6. Plaintiff further alleges the Lyndhurst Police Department "were summoned by a 911 call and the individual defendant officers, Officer Reina and Officer Haggerty,

² The "Lyndhurst Defendants" shall refer collectively to defendants Lyndhurst Police Department, Officer Philip Reina, Police Officer Haggerty, Lyndhurst Chief of Police James O'Connor, Sergeant Richard Pizzuti, Lyndhurst Township Ambulance Squad and the Township of Lyndhurst.

arrived at the scene.” See id., Statement of Claim, ¶ 7. Plaintiff further alleges that the individual officers offered no assistance to the decedent, who was suffering from an “acute asthma attack” (see id., Statement of Claim, ¶ 8), and that the “Lyndhurst Ambulance Squad” arrived and failed to perform any assistance to the defendant while she was suffering from an asthma attack. See id., Statement of Claim, ¶ 9. Plaintiff further alleges that the decedent “was eventually transferred to Meadowlands Medical Center where she was pronounced dead, however, decedent was dead at the premises wherein no medical treatment was provided.” See id., Statement of Claim, ¶ 10.

Plaintiff’s First Count, as to the Martin defendants and the Anderson defendants, alleges that said defendants were negligent “in failing to provide a clean apartment free of animal fur, feces and urine, decedent was caused to suffer pain, asthma attacks, and on August 17, 2016, her death.” See id., First Count, ¶ 7. Plaintiff further alleges, in connection with his First Count, that defendant Robert Martin has “involvement in sitting on a board for [HABC]” which “should have been stated and disclosed as well as the house being government subsidized under the [HABC] which plaintiff and the decedent were suing as the defendants were aware of the ongoing lawsuit.” See id., First Count, ¶ 8.

Plaintiff’s Second Count, as to all public entities and public individual defendants, alleges that these defendants acted negligently and “palpably

unreasonabl[y]” in arriving at the scene, witnessing the decedent in a helpless state unable to breathe, and “failing to assist decedent while she was having an asthma attack” which resulted in her death. See id., Second Count, ¶¶ 2-6.

Plaintiff’s Third Count, as to the individual officers, claims that the individual police officer defendants of the Lyndhurst Police Department deprived Plaintiff and the decedent of their rights under the New Jersey Constitution and N.J.S.A. 10:6-2, the New Jersey Civil Rights Act. See id., Third Count, ¶¶ 1-3. Plaintiff further alleges in his Third Count that the individual officers falsified evidence and reports in addition to engaging in misconduct. See id., Third Count, ¶¶ 4-5. Plaintiff further alleges in this Count that the individual officers were negligent in administering Naloxene to the decedent and that they were improperly trained in the use of Naloxene. See id., Third Count, ¶¶ 6-8.

Plaintiff’s Fourth Count constitutes his only claim against HABC, and the entirety of it reads that HABC was “negligent in their failure to properly inspect and pass the house as a government subsidized approved home as required by law.” See id., Fourth Count, ¶ 1.

Finally, Plaintiff’s Fifth Count, as to defendant Adapt Pharma, the alleged “producer” of Naloxene, alleges that Adapt Pharma in its “rollout and training of officers in administering Naloxene did not properly inform officers or medical personnel of the detrimental and lethal effects [its] product has on people with

asthma and respiratory issues, thereby causing harm and bodily injury by withholding side effects.” See id., Fifth Count, ¶ 1.

LEGAL ARGUMENT

POINT I

PLAINTIFF’S COMPLAINT MUST BE DISMISSED PURSUANT TO FED. R. CIV. PROC. 12(b)(1) BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION.

It is well-settled that federal courts have limited jurisdiction which has been defined by Congress and authorized by statute. Huber v. Taylor, 519 F. Supp. 2d 542, 554 (W.D. PA. 2007), rev’d o.g. 532 F.3d 237 (3d Cir. 2008); see also Bowles v. Russell, 551 U.S. 205, 212-213, 127 S. Ct. 2360, 2365, 168 L. Ed. 2d 96, 104 (2007); see also Exxon Mobile Corp v. Allapattah Servs., 545 U.S. 546, 553, 125 S. Ct. 2611, 2617, 162 L. Ed. 2d 502, 517 (2005). In Arbaugh v. Y & H Corp., 546 U.S. 500, 513, 126 S. Ct. 1235, 1244, 163 L. Ed. 2d, 1097, 1109 (2006), the Supreme Court of the United States opined as follows:

[G]rants of federal court subject matter jurisdiction are contained in 28 U.S.C. §§ 1331 and 1332. Section 1331 provides for “federal question” jurisdiction, and § 1332 for “diversity of citizenship” jurisdiction. A plaintiff properly invokes §1331 when she pleads a colorable claim “arising under” the Constitution or laws of the United States. See Bell v. Hood, 327 U.S. 678, 681-685, 66 S. Ct. 773, 775-777, 90 L. Ed. 939, 942-945 (1946). She invokes §1332 jurisdiction when she presents a claim between parties of diverse citizenship that exceeds the required jurisdictional amount, currently \$75,000. See § 1332.

Furthermore, pursuant to 28 U.S.C. § 1342 and 28 U.S.C. § 1343, respectively, federal courts also retain jurisdiction when the United States is a defendant, or when the complainant seeks to recover damages under federal law resulting from a “deprivation of a right or privilege of a citizen of the United States.”

Simply put, Plaintiff has failed to set forth any allegations sufficient to establish any of the aforementioned jurisdictional bases to confer subject matter jurisdiction upon this Court, and thus his Complaint must be dismissed.

A. Plaintiff Has Failed To Allege Facts Sufficient To Support The Existence Of Federal Question Jurisdiction As To His Claim Against HABC.

Under Article III of the United States Constitution, federal courts can hear “all cases, in law and equity, arising under this Constitution, [and] the laws of the United States...” U.S. Const, Art III, Sec 2. The Supreme Court has interpreted this clause broadly, finding that it allows federal courts to hear any case in which there is a federal ingredient. Osborn v. Bank of the United States, 9 Wheat. (22 U.S.) 738 (1824). For federal question jurisdiction to exist, the requirements of 28 U.S.C § 1331 must also be met. Pursuant to 28 U.S.C. § 1331, “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

Here, Plaintiff’s Complaint fails to allege, reference, or even allude to for that matter, a violation of any federal law or any provision of the United States

Constitution by any defendant, much less defendant HABC. Rather, as to HABC specifically, Count Four (against HABC) purportedly asserts a negligence claim, which is a state law cause of action. In fact, other than seemingly attempting to assert the elements of state law negligence causes of action in some counts, the only instance in which Plaintiff attempts to specify the law under which his claims are asserted is in Count Three (not against HABC), where he alleges violations of N.J.S.A. 10:6-2, the New Jersey Civil Rights Act, and the New Jersey State Constitution – both state law claims. Thus, this Court lacks federal question jurisdiction over any of Plaintiff's claims.

B. Plaintiff Has Failed To Allege Facts Sufficient To Support The Existence Of Diversity Jurisdiction As To His Claim Against HABC.

Pursuant to 28 U.S.C. § 1332, federal district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and the lawsuit is between:

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

In other words, 28 U.S.C. § 1332(a) requires that for diversity jurisdiction to exist, there must be complete diversity between citizens of different states. See, e.g., Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89, 126 S. Ct. 606, 613, 163 L. Ed. 2d 415, 424-25 (2005). Complete diversity necessitates that, in instances with multiple plaintiffs or defendants, no plaintiff can be a citizen of the same state as any defendant. Zambelli Fireworks Mfg. Co. v. Wood, 592 F. 3d 412, 419 (3d Cir. 2010); Exxon Mobil Corp. v. Allapattah Servs. Inc., *supra*, 545 U.S. at 553, 125 S. Ct. at 2617, 162 L. Ed. 2d 517; Kaufman v. Allstate N.J. Ins. Co., 561 F.3d 144, 148 (3d Cir. 2009).

Here, the elements of diversity jurisdiction are lacking. Plaintiff has not made a demand in the Complaint in excess of the threshold amount of \$75,000.00 (or any demand for that matter). Moreover, by Plaintiff's own allegations (*see* Turano Cert., Exhibit A, The Parties And Facts Common To All Counts, ¶¶ 1-11), Plaintiff and all but one of the defendants (Adapt Pharma) are unambiguously citizens of the State of New Jersey. Because Plaintiff is a citizen of the same state (New Jersey) as all but one of the defendants, complete diversity does not exist. As such, this Court does not have diversity jurisdiction to hear this matter.

C. Plaintiff Has Failed To Allege Facts Sufficient To Support The Existence Of Jurisdiction As To His Claim Against HABC Pursuant To 28 U.S.C. §

1345 or 28 U.S.C. § 1346.

Pursuant to 28 U.S.C. § 1345 and 28 U.S.C. § 1346, respectively, the district courts retain jurisdiction when the United States Government is a plaintiff or a defendant. While Plaintiff claims that this Court has jurisdiction over this matter based on the inclusion of the United States Government as a defendant, none of the defendants in this action are the United States governmental entity. HABC specifically is a New Jersey state entity completely independent of, and with no connection whatsoever to, the United States government.

D. Plaintiff Has Failed To Allege Facts Sufficient To Support The Existence Of Jurisdiction As To His Claim Against HABC Pursuant To 28 U.S.C. § 1343.

Pursuant to 28 U.S.C. § 1343, the district court has subject matter jurisdiction in civil rights actions:

- 1) To recover damages for injury to his person or property because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in 42 U.S.C. § 1985;
- 2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in 42 U.S.C. § 1985 which he had knowledge were about to occur and power to prevent;
- 3) To redress the deprivation [...] of any right [...] secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

- 4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Here, Plaintiff has not alleged that HABC, or any other defendant for that matter, deprived Plaintiff or the decedent of any right or privilege under the United States Constitution, nor has Plaintiff alleged that HABC or any other defendants violated 42 U.S.C. § 1985 or any other federal statute. Thus, 28 U.S.C. § 1343 does not confer subject matter jurisdiction upon this Court.

E. Plaintiff Has Failed To Allege Facts Sufficient To Support The Existence Of Jurisdiction As To His Claim Against HABC Pursuant To 28 U.S.C. § 1330 Through 28 U.S.C. § 1369.

28 U.S.C. § 1330 through 28 U.S.C. § 1369 prescribe a number of other grounds for conferring subject matter jurisdiction on the federal district courts. For brevity's sake, HABC respectfully submits that Plaintiff has failed to make allegations sufficient to confer subject matter jurisdiction upon this Court pursuant to any of those statutes.

F. HABC Respectfully Adopts, And Incorporates Herein By Reference, The Arguments Made By "The Lyndhurst Defendants" In Point I, B And C, Of Their Motion To Dismiss Plaintiff's Complaint (ECF No. 6-2).

HABC respectfully adopts, relies upon and hereby incorporates by reference the arguments made in Point I, Sections B and C, of the Lyndhurst Defendants' brief in support of their Motion to Dismiss Plaintiff's Complaint (ECF No. 6-2) insofar as they may apply to Plaintiff's claim in his Complaint as to HABC.

POINT II

IN THE ALTERNATIVE, PLAINTIFF'S COMPLAINT MUST BE DISMISSED PURSUANT TO FED. R. CIV. PROC. 12(b)(6) BECAUSE IT FAILS TO STATE A COGNIZABLE CLAIM AGAINST HABC

In the alternative, Plaintiff's Complaint must be dismissed pursuant to Fed. R. Civ. Proc. 12(b)(6) because Plaintiff has failed to plead facts sufficient to assert any type of cognizable claim against HABC under law.

A. The Standard Of Review On A Motion To Dismiss Pursuant To Fed. R. Civ. Proc. 12(b)(6).

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual matter, presumptively accepted as true at this stage, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ibid. "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, supra, 550 U.S. at 555, 127 S. Ct. at 1965.

Reviewing the standard set forth in Iqbal, supra, the Third Circuit noted in Santiago v. Warminster Twp., 629 F.3d 121, 129-30 (3d Cir. 2010) that:

[T]o determine the sufficiency of a complaint, a court

must take three steps: First, the court must “tak[e] note of the elements a plaintiff must plead to state a claim.” Iqbal, 129 S. Ct. at 1947. Second, the court should identify allegations that, “because they are no more than conclusions, are not entitled to the assumption of truth.” Id. at 1950. Finally, “where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.” Id.

In Phillips v. Cnty. of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008), the Third Circuit also noted that Twombly “can be summed up thus: stating a claim requires a complaint with enough factual matter (taken as true) to suggest the required element[s]” which “does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.” Phillips, supra, 515 F.3d at 234 (citing Twombly, supra, 550 U.S. at 555, 127 S. Ct. 1955) (emphasis added). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” Twombly, supra, 550 U.S. at 555, 127 S. Ct. 1955. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” Id. at 557, 127 S. Ct. 1955.

B. Plaintiff’s Complaint Must Be Dismissed Insofar As It Attempts To Assert Claims Against HABC Because Plaintiff Has Failed to Allege Facts Sufficient To Plead Any Cognizable Cause Of Action Against HABC.

Plaintiff’s sole substantive allegations against HABC consist of the stray unsupported contentions that defendant Robert Martin had “involvement in sitting

on a board” for HABC “as well as the house being government subsidized under [HABC] which plaintiff and decedent were suing as the defendants were aware of the ongoing lawsuit (see Turano Cert., Exhibit A, First Count, ¶ 8); and that HABC was “negligent in [its] failure to properly inspect and pass the house as a government subsidized approved home as required by law.” See id., Fourth Count, ¶ 1. As discussed previously, it is clear that Plaintiff has not alleged any violation of federal law insofar as concerns HABC, and the aforementioned allegations seemingly attempt to plead a state law negligence claim against HABC.³

However, Plaintiff has failed to plead facts which, even if true, state a cognizable claim against HABC. First, Plaintiff has not alleged that HABC owned, or has any other interest in, the apartment such that it would confer any duty of care on HABC in relation to Plaintiff and the decedent. In fact, Plaintiff himself pleads that the apartment was owned not by HABC, but rather by the Martins and the Andersons. See Turano Cert., Exhibit A, The Parties And Facts Common To All Counts, ¶ 9; Statement Of Claim, ¶ 1. And in actual point of fact, HABC does not own or control the apartment in any manner.⁴ Second, even

³ Under New Jersey state law, “[t]he requisite elements of a negligence cause of action are: (1) the existence of a duty; (2) the breach of that duty; and (3) proximate causation of damages.” LaBracio Family P'ship v. 1239 Roosevelt Ave., Inc., 340 N.J. Super. 155, 161 (App. Div. 2001).

⁴ HABC’s public website lists its properties at <http://habcnj.org/ourbuildings/>. 287 Castle Terrance, Lyndhurst, New Jersey is not listed anywhere as being owned,

assuming arguendo the truth of Plaintiff's allegation that HABC "subsidized" the apartment (which it did not), Plaintiff has failed to thereafter plead a factual basis sufficient to establish a duty on the part of HABC to have intervened and/or taken any action in relation to the events of August 17, 2016 (as alleged by Plaintiff) and/or the private landlord-tenant relationship amongst the owners of the apartment, Plaintiff and the decedent.

Finally, Plaintiff's sole allegation in his Fourth Count against HABC – that it was "negligent in its failure to properly inspect and pass the house as a government subsidized approved home as required by law" – fails to plead a negligence claim for a variety of reasons. Plaintiff does not make any allegations supporting the existence of any duty on HABC's part to "inspect" and/or "pass" the apartment, a property which (by Plaintiff's own allegations) HABC does not own (i.e., what is the required "law" Plaintiff alludes to in his allegation); any specificity as to the criteria upon which HABC would be doing and/or any obligations HABC would be required to meet in so "inspecting" and/or "passing" the house; any specific acts undertaken by HABC constituting a negligent failure to "inspect" and/or "pass" the apartment; and finally, Plaintiff has wholly failed to

operated, controlled or maintained in any way by HABC. Because the properties owned by HABC is a matter of public record, this Court may accordingly take judicial notice of the same.

plead any facts establishing how HABC's allegedly negligent action proximately caused to the events of August 17, 2016 and/or his wife's passing.

Thus, because Plaintiff's Complaint fails to allege facts sufficient to assert all the required elements of a state law negligence claim, it must be dismissed insofar as it asserts claims against HABC.

C. Assuming Arguendo Plaintiff's Complaint Can Be Construed To Assert A Cognizable Claim Or Claims Against HABC, Any Such Claims Must Be Dismissed As Being Barred By The New Jersey Tort Claims Act.

Even further assuming arguendo this Court were to construe the Complaint as having sufficiently alleged a negligence claim against HABC, such claim would constitute a state law claim barred by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.

Enacted in 1972, the Tort Claims Act (the "Act" or "TCA") was the New Jersey Legislature's response to the New Jersey Supreme Court's abrogation of the venerable doctrine of sovereign immunity in Willis v. Dept. of Cons. & Ec. Dev., 55 N.J. 534 (1970). The legislative declaration that prefaces the Act declares:

[T]he Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this state that public entities shall only be

liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All the provisions of this act should be construed with a view to carry out the above legislative declaration.

[N.J.S.A. 59:1-2.]

Consistent with this declaration of public policy, the TCA follows a basic approach of providing immunity to all public entities except where liability is expressly allowed. As N.J.S.A. 59:2-1 makes clear, the “default” mode of the TCA is immunity, not liability:

- a. Except as otherwise provided by this act, a public entity is not liable for an injury whether such injury arises out of an act or omission of the public entity or a public employee or any person.
- b. Any liability of a public entity established by this Act is subject to any immunity of the public entity.

Giving force to the legislative will, the New Jersey Supreme Court has frequently noted that the founding premise of the TCA is to re-establish immunity for all governmental bodies. “The guiding principle of the Act is that immunity from tort liability is the rule and liability is the exception.” Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 457 (2009) (quoting Coyne v. N.J. State Dept. of Transp., 182 N.J. 481, 488 (2005)); see also Smith v. Fireworks by Girone, 180 N.J. 199, 207 (2004) (the “dominant theme of the [Act] was to reestablish the immunity of all governmental bodies in New Jersey, subject only to the [Act]’s

specific liability provisions”). As a public entity, HABC clearly falls under the ambit of the TCA.

a. Plaintiff Is Barred By His Failure to Comply With The TCA’s Procedural Requirements For Filing A Notice Of Tort Claim Against HABC.

Here, Plaintiff has failed to plead facts establishing compliance with the TCA’s procedural requirements – specifically, that Plaintiff ever filed a Notice of Tort Claim for his alleged claims against HABC at any point, much less within the 90-day time period prescribed by N.J.S.A. 59:8-8(a) – and thus any claims against HABC must be dismissed on that basis.

Pursuant to N.J.S.A. 59:8-3, no suit shall be brought against a public entity or employee unless a claimant has first furnished the appropriate public entity with a notice of claim meeting the requirements of N.J.S.A. 59:8-4. Not only must the notice of claim be filed in the appropriate form, but “the claimant shall be forever barred from recovering against a public entity or public employee if he failed to file his claim with the public entity within 90 days of the accrual of his claim except as otherwise provided in 59:8-9.” N.J.S.A. 59:8-8(a). “Accrual” of a claim occurs when the tort is committed or is the date on which the incident occurs. N.J.S.A. 59:8-1. Failure to satisfy the requirement of N.J.S.A. 59:8-8(a) constitutes an absolute bar to recovery against a public entity where the TCA is

applicable. Karcezewski v. Nowicki, 188 N.J. Super. 355, 357 (App. Div. 1982); Milacci v. Mato Realty Co., Inc., 217 N.J. Super. 297 (App. Div. 1987).

Plaintiff's failure to file a Notice of Tort Claim in compliance with the TCA's provision is undisputed, and even if Plaintiff sought leave to file a late notice of claim now, more than two years after the incident, that motion would be denied by the Court in accordance with the unequivocal provisions of N.J.S.A. 59:8-9 ("in no event may any suit against a public entity ... arising under this act be filed later than two years from the time of the accrual of the claim").

b. Plaintiff Is Substantively Barred By The TCA's Immunity Provisions Which Apply To HABC.

In addition, Plaintiff's claims against HABC would be substantively barred by the TCA. Plaintiff's claim against HABC could arguably be construed to, and appear to, arise from a purported failure by HABC to intervene and take corrective action with respect to a dangerous condition relating to the apartment. When alleged dangerous conditions of public property are at issue, N.J.S.A. 59:4-2 controls and provides as follows:

A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created a dangerous condition; or

b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property of the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

This statutory provision of the TCA provides that a public entity may be held liable only for a dangerous condition of its own property, rather than that owned or controlled by other parties. See also N.J.S.A. 59:4-1(c) (defining “public property to mean “real or personal property owned or controlled by the public entity) (emphasis added). There is no statutory basis for extending a public entity’s liability to property owned and maintained by another entity or person. See Danow v. Penn Central Transp. Co., 153 N.J. Super. 597 (Law Div. 1977) (“The word ‘controlled’ in N.J.S.A. 59:4-1(c) should not be construed as extending beyond possessory control.”).

Plaintiff’s claim against HABC falls squarely within these TCA immunities. Plaintiff alleges that HABC was “negligent in their failure to properly inspect and pass the house as a government subsidized approved home as required by law,” resulting in the dangerous conditions that led to his wife’s death. However,

Plaintiff's Complaint is devoid of any allegations that HABC owned or controlled the apartment, establishing that any "dangerous condition" existed on the property, that HABC had notice of these alleged dangerous conditions, and/or that HABC's actions in relation thereto were "palpably unreasonable."

Moreover, assuming arguendo that the apartment was a property subject to inspection by HABC, as alleged by Plaintiff, Plaintiff's claim against HABC would be barred pursuant to N.J.S.A. 59:2-6, which provides that "a public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property[.]"

CONCLUSION

For all of the aforementioned reasons, defendant Housing Authority of Bergen County ("HABC") respectfully requests that this Court grant its Motion To Dismiss Plaintiff's Complaint in its entirety and enter an Order dismissing Plaintiff's Complaint against HABC with prejudice.

Respectfully submitted,

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CHRISTOPHER J. TURANO, ESQ.

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