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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0713-15T3

APPROVED FOR PUBLICATION

July 25, 2017

APPELLATE DIVISION

MAIN STREET AT WOOLWICH, LLC, WOOLWICH COMMONS, LLC, and WOOLWICH CROSSINGS, LLC,

Plaintiffs-Appellants,

v.

AMMONS SUPERMARKET, INC., BENJAMIN AMMONS, R.S. GASIOROWSKI, ESQUIRE, and GASIOROWSKI & HOLOBINKO,

Defendants-Respondents.

Argued November 29, 2016 – Decided July 25, 2017

Before Judges Messano, Espinosa, and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1477-14.

Marc B. Kaplin (Kaplin Stewart Meloff Reiter & Stein, P.C.) of the Pennsylvania bar, admitted pro hac vice, argued the cause for appellants (Kaplin Stewart Meloff Reiter & Stein, P.C., attorneys; Daniel R. Utain and Mr. Kaplin, on the briefs).

Theodora McCormick argued the cause for respondents Ammons Supermarket, Inc. and Benjamin Ammons (Epstein Becker & Green, P.C., attorneys; Anthony Argiropoulos and Ms. McCormick, on the brief).

Christopher J. Carey argued the cause for respondents R.S. Gasiorowski, Esq. and Gasiorowski & Holobinko (Graham Curtin, P.A., attorneys; Mr. Carey, of counsel and on the brief; Jared J. Limbach, on the brief).

The opinion of the court was delivered by

GUADAGNO, J.A.D. (retired and assigned on recall).

Plaintiffs, Main Street at Woolwich, LLC (Main Street), Woolwich Commons, LLC (Commons), and Woolwich Crossings, LLC (Crossings), successfully defended against litigation brought by defendants Ammons Supermarket, Inc. and Benjamin Ammons (Ammons defendants) challenging the approval of a general development plan (GDP) submitted by plaintiffs to build a shopping complex in Woolwich Township (Woolwich Shopping Complex or Complex). Plaintiffs then filed a three-count complaint against the Ammons defendants, their attorney, R.S. Gasiorowski, and his firm, Gasiorowski & Holobinko (collectively Gasiorowski), alleging malicious abuse of process (count one), tortious interference with a prospective contract (count two), and civil conspiracy (count three). Plaintiffs claimed defendants filed "sham litigation," intended solely to prevent competition with their supermarket.

The motion judge found defendants' litigation challenging the GDP was protected by the Noerr-Pennington doctrine[1] and was not objectively baseless. The judge dismissed plaintiffs' complaint pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief can be granted.

While we agree with the motion judge that the Noerr-Pennington doctrine applies here, the judge provided no support for her conclusion that the Ammons challenge to the GDP was not objectively baseless, and she failed to consider the findings of a prior judge who dismissed the complaint. In addition, and as a matter of first impression, we adopt the holding in Hanover 3201 Realty, LLC v. Village Supermarkets, Inc., 806 F.3d 162, 180 (3d Cir. 2015), cert. denied, ___ U.S. ___, 136 S. Ct. 2451, 195 L. Ed. 2d 264 (2016), and conclude that the motion judge was required to consider the allegations in plaintiffs' complaint that the Ammons action was part of a pattern of sham litigation brought by defendants for the purpose of injuring market rivals rather than to redress actual grievances.

[1] The Noerr-Pennington doctrine draws its name from the United States Supreme Court opinions in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), and provides that those who petition the government for redress are generally afforded immunity unless the action is objectively baseless.

We note that Rule 4:6-2(e) motions to dismiss "should be granted in only the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989); see also Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993). The Rule requires that plaintiffs must receive "every reasonable inference of fact" and a reviewing court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart, supra, 116 N.J. at 746 (quoting DiCristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)).

Applying the Printing Mart standard, we are satisfied that sufficient facts were alleged to suggest defendants engaged in sham litigation for the sole purpose of impeding the development of plaintiffs' shopping center and to stifle competition.

I.

Plaintiffs Main Street, Commons, and Crossings are the collective owners of 244 acres of land in Woolwich Township. In 2007, plaintiffs began efforts to develop the property as a shopping complex. In 2008, the New Jersey State Planning Committee approved the Township's petition for initial plan endorsement which designated areas of the town as the regional

center. The Township then amended its zoning ordinance to create zoning, subdivision, and land development regulations for the regional center and re-zoned the property to accommodate the Complex.

In 2009, plaintiffs submitted a GDP to Woolwich Township seeking to develop approximately 1,500,000 square feet of commercial and retail space on the property. The GDP proposed the construction of Main Street, Commons, and Crossings, as three separate retail and commercial developments. In 2010, the Woolwich Township Joint Land Use Board (Board) approved the GDP permitting Main Street, Commons, and Crossings to be developed in three phases. At the time of the approval, there was no mention of which stores would occupy the Complex.

In April 2012, Commons submitted an application for site plan approval for the development of the first phase of the Complex. From the proposed site plan, it was learned for the first time that a Wal-Mart Supercenter would be located within the Commons. Because the proposed square footage of the Wal-Mart exceeded that which was contained in the original GDP, plaintiffs sought to amend the GDP. In December 2012, the Board approved an amended GDP which increased the building area and added forty-one acres to the Crossings development parcel. On

October 3, 2013, the Board approved the plaintiffs' unopposed final site plan.

On January 17, 2013, Gasiorowski filed a complaint in lieu of prerogative writs on behalf of the Ammons defendants against plaintiffs and the Board. The complaint asserted improper change of the phasing dates of the Complex; inadequate water and sewer resources; improper addition of acreage to the Crossings parcel; violations of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163; inadequate proof to support the variances and waivers; failure to comply with notice requirements; and failure to set forth findings of fact and conclusions of law.

Frank Pagano, a Woolwich Township resident and a member of the United Food and Commercial Workers Union, filed a similar lawsuit. The Ammons and Pagano complaints were subsequently consolidated.

On April 24, 2014, the Chancery Judge[2] granted summary judgment to defendants and dismissed both complaints with prejudice. On May 28, 2014, Gasiorowski filed a notice of appeal on behalf of the Ammons defendants arguing that the GDP

[2] The summary judgment motion was heard in the Law Division by the Presiding Judge of the Chancery Division (herein the Chancery Judge).

was void, therefore rendering the amended GDP invalid, and that the Board committed errors during the approval process. Pagano did not appeal from the dismissal.

While the Ammons appeal was pending, Richard Matwes, a Senior Real Estate Director of the Wakefern Food Corporation (Wakefern),[3] telephoned Steven Wolfson, a representative of plaintiffs, and inquired whether plaintiffs would be willing to lease space at the Complex to the Ammons defendants.

On August 7, 2015, we affirmed the Chancery Judge's decision to grant summary judgment. We rejected Ammons' claim that the Board did not have authority to consider the original GDP or its amendments, and found several of Ammons' arguments to be without sufficient merit to warrant discussion. Pagano v. Woolwich Twp. Joint Land Use Bd., No. A-4432-13 (App. Div. Aug. 7, 2015) (slip op. at 13, 17).

On October 21, 2014, plaintiffs filed a complaint against Ammons and Gasiorowski alleging malicious abuse of process in filing the Ammons lawsuit; tortious interference with prospective business contracts, specifically the prospective tenants in the Woolwich Shopping Complex; and civil conspiracy

[3] Plaintiffs allege the Ammons defendants are members of Wakefern, a retailer-owned food cooperative, and own and operate a number of ShopRite supermarkets in New Jersey and Pennsylvania.

to employ sham litigation to impede, hinder, and delay competing developments such as Wal-Mart.

On September 18, 2015, a different judge (motion judge) heard arguments on defendants' motions to dismiss and determined that defendants enjoyed immunity conferred by the Noerr-Pennington doctrine, and plaintiffs failed to prove the sham exception to that doctrine as the complaint was not objectively baseless. The motion judge dismissed the complaint as to all defendants.

On appeal, plaintiffs argue that their complaint is not barred by Noerr-Pennington as it falls under the sham exception; the Ammons litigation was objectively baseless; the Noerr-Pennington doctrine is not applicable to plaintiffs' claim for abuse of process; and the complaint stated valid claims for malicious abuse of process, tortious interference with prospective business contracts, and civil conspiracy.

II.

The Noerr-Pennington doctrine holds that petitioners for "government . . . redress are generally immune from antitrust liability" when defending against antitrust claims predicated on this petitioning activity. Prof'l Real Estate Inv'rs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 113 S. Ct. 1920, 1926, 123 L. Ed. 2d 611, 621 (1993) (PRE). "The

doctrine's provenance lies in the field of antitrust law, but its reach has since then been extended to include common-law torts such as malicious prosecution and abuse of process." Nader v. Democratic Nat'l Comm., 555 F. Supp. 2d 137, 157 (D.D.C. 2008) (citing Whelan v. Abell, 48 F.3d 1247, 1254 (D.C. Cir. 1995)), aff'd, 567 F.3d 692 (D.C. Cir. 2009).

New Jersey courts have recognized the Noerr-Pennington doctrine and applied it to afford immunity to those who petition the government for redress. See Structure Bldg. Corp. v. Abella, 377 N.J. Super. 467, 471 (App. Div. 2005) (Noerr-Pennington doctrine affords immunity to persons who object to land use applications); Fraser v. Bovino, 317 N.J. Super. 23, 37-38 (App. Div. 1998) (objectors to land use applications are immune from tort liability under the Noerr-Pennington doctrine unless "the conduct at issue 'is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.'" (quoting PRE, supra, at 60-61, 113 S. Ct. at 1928, 123 L. Ed. 2d at 624)), certif. denied, 160 N.J. 476 (1999).

However, the Noerr-Pennington doctrine does not provide putative plaintiffs with an unlimited right to challenge competitors. Sham litigation receives no protection, and the presumption of immunity is dispelled when a lawsuit is "objectively baseless in the sense that no reasonable litigant

could realistically expect success on the merits" and is brought with the specific intent to further wrongful conduct "through the 'use [of] the governmental process—as opposed to the outcome of that process.'" PRE, supra, 508 U.S. at 60-61, 113 S. Ct. at 1928, 123 L. Ed. 2d at 624 (alteration in original) (emphasis omitted) (quoting City of Columbia v. Omni Outdoor Advert., 499 U.S. 365, 380, 111 S. Ct. 1344, 1354, 113 L. Ed. 2d 382, 398 (1991)). The second prong of the test is only reached if the challenged litigation is found to be objectively meritless under the first prong. Id. at 60, 113 S. Ct. at 1928, 123 L. Ed. 2d at 624.

Sham litigation is found where a defendant's activities are "not genuinely aimed at procuring favorable government action," Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 n.4, 108 S. Ct. 1931, 1937 n.4, 100 L. Ed. 2d 497, 505 n.4 (1988), and may be "evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims." Otter Tail Power Co. v. United States, 410 U.S. 366, 380, 93 S. Ct. 1022, 1031, 35 L. Ed. 2d 359, 369 (1973).

In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 613, 30 L. Ed. 2d 642, 648 (1972), the Court discussed repetitive meritless claims:

> One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of

> baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

California Motor "recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade." USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council, 31 F.3d 800, 811 (9th Cir. 1994). In USS-POSCO, the Ninth Circuit held that "[w]hen dealing with a series of lawsuits, the question is not whether any one of them has merit . . . but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." Ibid.

In determining whether the petitioning activity is a sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor, courts must first examine "whether there is a single

filing or a series of filings." Hanover, supra, 806 F.3d at 180.

Hanover involved a claim that the owner of a ShopRite near Morristown and its subsidiary filed numerous administrative and court challenges to Hanover 3201 Realty's (Hanover Realty) permit applications to develop a Wegmans approximately two miles away. Id. at 166-67. Hanover Realty sued the defendants in federal district court alleging violations of the Sherman Act,[4] and claiming the defendants' filings were baseless and intended only to frustrate the entry of a competing Wegmans into the market. Id. at 170. The complaint also alleged five state-law violations. Ibid.

The district judge dismissed the suit, holding that Hanover Realty lacked antitrust standing as it was not a competitor, consumer, or participant in the restrained markets and thus did not sustain the type of injury the antitrust laws were intended to prevent. Ibid. After dismissing the Sherman Act claims, the judge declined to exercise supplemental jurisdiction as to the state-law claims. Ibid.

Hanover Realty appealed and the Third Circuit determined that Hanover Realty demonstrated antitrust injuries:

[4] 15 U.S.C.A. §2.

> The end goal of Defendants' alleged anticompetitive conduct was to injure Wegmans, a prospective competitor. To keep Wegmans out of the market, Defendants sought to impose costs not on their competitor, but on Hanover Realty, the party tasked with obtaining the necessary permits before construction could begin. . . . And Defendants would succeed in their scheme either by inflicting such high costs on Hanover Realty that it was forced to abandon the project or by delaying the project long enough so that Wegmans would back out of the agreement. In both scenarios, injuring Hanover Realty was the very means by which Defendants could get to Wegmans; Hanover Realty's injury was necessary to Defendants' plan.
>
> [Id. at 174.]

The defendants in Hanover argued their petitioning activity was protected by the Noerr-Pennington doctrine. Id. at 178. The Third Circuit discussed both California Motor and Professional Real Estate and determined that, in assessing whether the defendants engaged in sham litigation, courts should first determine whether there is a single filing or a series of filings:

> Where there is only one alleged sham petition, Professional Real Estate's exacting two-step test properly places a heavy thumb on the scale in favor of the defendant. With only one "data point," it is difficult to determine with any precision whether the petition was anticompetitive. . . . In contrast, a more flexible standard is appropriate when dealing with a pattern of petitioning. . . .

> Accordingly, when a party alleges a series of legal proceedings, . . . the sham litigation standard from California Motor should govern. This inquiry asks whether a series of petitions were filed with or without regard to merit and for the purpose of using the governmental process (as opposed to the outcome of that process) to harm a market rival and restrain trade. In deciding whether there was such a policy of filing petitions with or without regard to merit, a court should perform a holistic review that may include looking at the defendant's filing success—i.e., win-loss percentage—as circumstantial evidence of the defendant's subjective motivations.
>
> [Id. at 180-81.]

Here, plaintiffs' complaint alleges Gasiorowski and Ammons, through their actions in this case and their association with Wakefern, engaged in an extensive course of conduct, including sham litigation, to interfere with the development of supermarkets that would compete with ShopRite stores. Plaintiffs provided the following examples of alleged attempts by defendants to thwart ShopRite competitors: opposing the expansion of a Wal-Mart in Hamilton Township; opposing development of a shopping center in Egg Harbor Township which would include a Wal-Mart and appealing the approvals; opposing the conversion of a vacant store in Springfield Township to a Stop & Shop supermarket and appealing approvals; opposing the development of a shopping center in Linden which would include a Wal-Mart; opposing the construction of Wal-Marts in Old Bridge,

Manchester Township, and Middle Township; opposing a redevelopment plan in Harrison Township permitting the construction of a supermarket; appealing the issuance of an accessory use certificate issued for a Philadelphia, Pennsylvania Wal-Mart; opposing the upgrade to a Stop & Shop supermarket in Westfield Township; opposing the expansion of Wal-Marts in Cinnaminson and Millville; opposing the construction of an Aldi supermarket in Union Township; opposing a shopping center which would include a Wegmans in Moorestown; challenging a land use approval granted to the developer of a shopping complex in Clark Township; and opposing the expansion of a Kings supermarket in Bernardsville.

In determining whether defendants were protected by the Noerr-Pennington doctrine, the motion judge considered only the merits of this action:

> Now, I recognize that there is an exception to the Noerr-Pennington Doctrine under the sham exception. But one has to be concerned whether we have such an exception as noted in this case. The lawsuit, the Court finds, to qualify as a sham must be objectively baseless. The Court is not to consider the underlying motivation. And I have to determine under this Doctrine whether this is just an exercise of a legitimate right by a Defendant in this matter who had standing to voice his concerns.
>
> I find that the Defendant did have standing that he should have been able to

> voice his concerns. I think despite the fact that we have a denial in the Appellate Division, I still find that these Defendants were exercising what is permissible under the law.
>
> The mere fact that the Defendants appealed is not in any way an abuse of this process. They were not in any way, shape or form using the Court process to [effectuate] an illegal goal.
>
> I find that the Noerr-Pennington Doctrine is applicable in this matter. It is there for a reason. And it is to place the Defendants in a position that they can enjoy immunity from claims for damages based upon that exercise of their right to object. And I believe that these Defendants did have such a right in this instance.
>
> Even under the standard that I have to employ, I find that the Plaintiff has failed to demonstrate that there was an abuse of process. And, therefore, I am dismissing that claim.

While the motion judge purported to apply the "objectively baseless" test set forth in Professional Real Estate, she provided only cursory and unsupported conclusions in finding defendants exercised a "permissible right" in filing this litigation.

There is no indication the motion judge considered the conclusions of the Chancery Judge who dismissed the Ammons/Pagano complaint, or our opinion affirming that decision. The Chancery Judge found the Woolwich ordinance was valid, the initial GDP was proper, and the challenge to the GDP was time-

barred. In addition, the Chancery Judge found the Ammons/Pagano plaintiffs "were aware of Woolwich's interpretation of the ordinance at the time the original GDP was approved;" their challenge to the Board's action adding 41,000 acres to the project was without merit; and their challenge to the water and sewer issues were "not supported by the MLUL or the case law."

On appeal, we affirmed the Chancery Judge's decision that the appeal regarding the original GDP was untimely, the amended GDP was valid, and found that defendants' remaining arguments raised on appeal were meritless and did not warrant discussion. Pagano, supra, slip op. at 13-17.

From the record before us, we find no support for the motion judge's finding that the Ammons/Pagano complaint raised "real concerns about the validity of the Woolwich GDP ordinance." Moreover, the motion judge did not mention, let alone consider, plaintiffs' claims that this action was part of a pattern of successive filings, used by ShopRite/Wakefern as an anticompetitive weapon for the purpose of injuring market rivals. Had the motion judge examined the filings referenced in plaintiffs' complaint and found "[a] high percentage of meritless or objectively baseless proceedings," it would "tend to support a finding that the filings were not brought to redress any actual grievances." Hanover, supra, 806 F.3d at 181.

In Waugh Chapel South, LLC v. United Food & Commercial Workers Union Local 27, 728 F.3d 354, 364 (4th Cir. 2013), the Fourth Circuit held that when applying California Motor "the subjective motive of the litigant and the objective merits of the suits are relevant, but other signs of bad-faith litigation . . . may also be probative of an abuse of the adjudicatory process." The Waugh Chapel panel affirmed a finding of sham litigation where only one of fourteen proceedings were successful. Id. at 365.

While the circuit court decisions in Hanover and Waugh Chapel do not have binding effect, see Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 79-80 (1990), we accord them "due respect" and adopt their reasoning here. Guided by these principles, we conclude that the motion judge failed to consider plaintiffs' claim that defendants had engaged in sham litigation for the purpose of gaining a competitive advantage.

III.

Plaintiffs also maintain that Noerr-Pennington does not apply to claims of malicious abuse of process and the trial court erred in finding that defendants are protected by the doctrine. Defendants' motion to dismiss alleged that plaintiffs' malicious abuse of process claims were barred by the Noerr-Pennington doctrine. Alternatively, defendants argue that

plaintiffs have failed to allege that defendants "caused any judicial process to issue improperly." After determining that defendants were immune under Noerr-Pennington, the motion judge found simply that plaintiffs failed to demonstrate that there was an abuse of process.

As we are remanding the matter for the court to consider plaintiffs' claim that defendants engaged in a pattern of sham litigation, we need not address the insufficiency claims as to the three counts in plaintiffs' complaint. However, we provide the following guidance.

IV.

"The gist of the tort of malicious abuse of process is . . . the misuse, or 'misapplying process justified in itself for an end other than that which it was designed to accomplish.'" Baglini v. Lauletta, 338 N.J. Super. 282, 293 (App. Div.) (quoting Prosser & Keeton on Torts § 121 at 897 (5th ed. 1984)), certif. denied, 169 N.J. 607, appeal dismissed, 169 N.J. 608 (2001). To establish malicious abuse of process, it must be shown that the defendant "perform[ed] further acts after the issuance of process which represent the perversion or abuse of the legitimate purposes of that process." Penwag Prop. Co. v. Landau, 148 N.J. Super. 493, 499 (App. Div. 1977), aff'd, 76 N.J. 595 (1978).

In Tedards v. Auty, 232 N.J. Super. 541, 543-44 (App. Div. 1989), an attorney obtained a writ in a matrimonial matter resulting in the plaintiff's incarceration. The attorney then made misrepresentations to a judge which resulted in the setting of a substantial bail before the plaintiff's release. Id. at 544, 548. After the plaintiff brought an action for abuse of process, the trial judge granted the defendant's motion for summary judgment. Id. at 549-51. We reversed, because the misrepresentations made after the writ was obtained satisfied the "further acts" requirement. Id. at 550-51.

Here, plaintiffs' complaint alleges improper use of the legal process by filing the Ammons lawsuit with knowledge that the claims were without merit. The further acts alleged include the filing of the appeal and approaching a representative of plaintiffs to lease space at Commons while the appeal was pending. Plaintiffs argue that this action undermines defendants' claim that they opposed the development in good faith and clearly demonstrates that defendants only engaged in litigation for competitive advantage. Plaintiffs also point to the timing of the litigation, noting that defendants did not appeal the original GDP approval and only initiated litigation after learning a ShopRite competitor would be a tenant at Commons.

On remand, the court must consider each of these claims and afford plaintiffs every reasonable inference of fact. Printing Mart, supra, 116 N.J. at 746.

V.

Plaintiffs argue the motion judge's dismissal of their tortious interference claim is clearly erroneous. To survive defendants' motion to dismiss, plaintiffs' tortious interference claim must rest on facts plausibly supporting a conclusion that defendants' actions were "improper" or "wrongful." Nostrame v. Santiago, 213 N.J. 109, 123 (2013). In determining whether the conduct complained of is improper, there must be "an evaluation of the nature of and motive behind the conduct, the interests advanced and interfered with, societal interests that bear on the rights of each party, the proximate relationship between the conduct and the interference, and the relationship between the parties." Id. at 122 (citing Restatement (Second) of Torts §767 (1979)).

We note that no appeals were taken from the approval of the original GDP plan and it was not until after plaintiffs identified Wal-Mart as a tenant in the Commons development in April 2012 that the Ammons defendants retained Gasiorowski to challenge the amended GDP approval. That litigation began in January 2013 and continued until August 2015, when we affirmed

the order dismissing the Ammons complaint. Plaintiffs' complaint alleges that during the two-and-one-half-year pendency of this litigation, they were unable to proceed with the development of Commons, could not enter into leases with prospective tenants, and lost "credibility in the marketplace."

VI.

The motion judge found that her dismissal of the tortious interference and malicious abuse of process claims precluded an independent cause of action for the civil conspiracy claim.

A civil conspiracy occurs when "two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." Morgan v. Union Cty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993) (quoting Rotermund v. U.S. Steel Corp., 474 F.2d 1139, 1145 (8th Cir. 1973)), certif. denied, 135 N.J. 468 (1994).

On remand, if plaintiffs have sufficiently pled claims for tortious interference or malicious abuse of process, either may serve as the underlying tort required for a claim for civil conspiracy.

VII.

Finally, Gasiorowski alleges that plaintiffs' claims against him are premature as the Ammons defendants have not asserted an advice of counsel defense. This claim was not raised before the motion judge and is not properly before us. See State v. Robinson, 200 N.J. 1, 20-22 (2009).

VIII.

The September 18, 2015 orders dismissing plaintiffs' complaint are reversed and the matter is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.