SUPREME COURT OF NEW JERSEY
C-607 September term 2019
083394

Michael S. Barth
Plaintiff-Petitioner,

FILED FEB 20 2020 s/Heather J. Baker/s CLERK

v.

Bernards Township Planning Board,
Defendant-Respondent.

A petition for certification of the judgment in A-000744-18 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS the Honorable Jaynee La Vecchia, Presiding Justice, at Trenton, this 19th day of February, 2020.

s/s Heather J. Baker/s
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-1092 September term 2018
082540

Michael S. Barth
Plaintiff-Movant,

FILED May 24 2019 s/Heather J. Baker/s CLERK

v.

ORDER

Bernards Township Planning Board,
and the Islamic Society of Basking Ridge, Inc.,
Defendants-Respondents.

It is ORDERED that the motion to stay the Appellate Division's briefing schedule is dismissed as moot, the Court having filed its opinion in Piscitelli v. City of Garfield Zoning Board of Adjustment __ N.J. ___ (2019).

WITNESS the Honorable Stuart Rabner, Chief Justice, at Trenton, this 24th day of May, 2019.

s/s Heather J. Baker/s
CLERK OF THE SUPREME COURT

Filed, Clerk of the Appellate Division, July 31, 2019

Order on Motion

Michael S. Barth	Superior Court of New Jersey
v	Appellate Division
Bernards Township	Docket No A-000744-18T3
Planning Board	Motion No. M-008072-18
	Before Part D
	Judge(s) Carmen H. Alvarez
	Hany A. Mawla
Motions Filed: 07/03/2019	By: Michael Barth
Answer(s) 07/18/2019	By: Bernards Township Planning Board
07/18/2019	By; Islamic Society of Basking Ridge, Inc.

Submitted to Court: July 22, 2019

ORDER

This matter having been duly presented to this court, it is, on this 30th day of July, 2019, hereby ordered as follows:

Motion by Appellant
Motion to File these pleadings of July 2, 2019 as within time - DENIED
Motion to Extent time to File these pleadings of July 2, 2019 - DENIED
Motion for Reconsideration of the Appellate Division June 123, 2019 Orders - DENIED
Motion to file June 17, 2019 pleadings as within time - DENIED
Motion to extend the time to file to the June 3, 2019 - DENIED
Motion to file the June 3, 2019 Brief and Appendix - DENIED
Motion to Reinstate Appeal – DENIED

For the Court: s/Carmen H. Alvarez, P.J.A.D.

Filed, Clerk of the Appellate Division, June 12, 2019

Order on Motion

Michael S. Barth	Superior Court of New Jersey
v	Appellate Division
Bernards Township	Docket No A-000744-18T3
Planning Board	Motion No. M-007107-18
	Before Part D
	Judge(s) Carmen H. Alvarez
	Hany A. Mawla
Motions Filed: 05/20/2019	By: Bernards Township Planning Board, Islamic Society of Basking Ridge, Inc.
Answer(s) 05/28/2019	By: Michael Barth

Submitted to Court: June 10, 2019

ORDER

This matter having been duly presented to this court, it is, on this 12th day of June, 2019, hereby ordered as follows:

Motion by Respondent
Motion to Dismiss appeal for failure to prosecute (Joint Motion by Defendants/Respondents)

GRANTED

Supplemental

For the Court: s/Carmen H. Alvarez, P.J.A.D.

Filed, Clerk of the Appellate Division, June 12, 2019

Order on Motion

Michael S. Barth	Superior Court of New Jersey
v	Appellate Division
Bernards Township	Docket No A-000744-18T3
Planning Board	Motion No. M-007107-18
	Before Part D
	Judge(s) Carmen H. Alvarez
	Hany A. Mawla

Motion Filed 06/04/2019 By: Michael Barth

Answer(s) Filed: 06/07/2019 By: Islamic Society of Basking Ridge, Inc.

Submitted to Court: June 10, 2019

ORDER

This matter having been duly presented to this court, it is, on this 12th day of June, 2019, hereby ordered as follows:

Motion by Appellant
Motion for Reconsideration – DENIED
Motion to file as within time a motion for Reconsideration – DENIED

Supplemental

For the Court: s/Carmen H. Alvarez, P.J.A.D.

Filed, Clerk of the Appellate Division, February 08, 2019

Order on Motion

Michael S. Barth	Superior Court of New Jersey
v	Appellate Division
Bernards Township	Docket No A-000744-18T3
Planning Board	Motion No. M-003583-18
	Before Part D
	Judge(s) Carmen Messano

Motion Filed 01/14/2019	By: Michael Barth
Answer(s): 01/22/2019	By: Bernards Township Planning Board
Filed: 01/23/2019	By: Islamic Society of Basking Ridge, Inc.

Submitted to Court: February 07, 2019

ORDER

This matter having been duly presented to this court, it is, on this 8th day of February, 2019, hereby ordered as follows:

Motion by Appellant
Motion Staying Briefing Schedule – DENIED
Supplemental: Appellant's brief is due march 1, 2019. There shall be no extensions.

For the Court: s/Carmen Messano, P.J.A.D.

Filed, Clerk of the Appellate Division, November 19, 2019

Order on Motion

Michael S. Barth	Superior Court of New Jersey
v	Appellate Division
Bernards Township	Docket No A-000744-18T3
Planning Board	Motion No. M-001624-18
	Before Part D
	Judge(s) Carmen Messano
	Hany A. Mawla
Motion Filed 10/30/2018	By: Michael Barth
Answers(s): 11/13/2018	By: Islamic Society of Basking Ridge, Inc.
Filed: 11/09/2018	Bernards Township Planning Board

Submitted to Court: November 19, 2018

ORDER

This matter having been duly presented to this court, it is, on this 19th day of November, 2018, hereby ordered as follows:

Motion to Stay Orders Below - DENIED
And a Preliminary Injunction Pursuant to R. 2:18-1 – DENIED

Supplemental:

For the Court: s/Carmen MAH. Alvarez, P.J.A.D.

2018 WL 3637515 - NOT FOR PUBLICATION
United States District Court, D. New Jersey.
Jeffrey W. PLAZA, Plaintiff,
v.
BERNARDS TOWNSHIP PLANNING BOARD, et al., Defendants.
Michael S. Barth, Plaintiff,
v.
Bernards Township Planning Board, et al., Defendants.
Civil Action No. 17-11466 (MAS) (LHG), Civil Action. No.17-13154 (MAS) (LHG) - Signed 07/31/2018
Attorneys and Law Firms: Michael S. Barth, Far Hills, NJ, pro se.; Eric L. Harrison, Methfessel & Werbel, Esqs., Edison, NJ; David J. Baron, Robert Louis Toll, Hogan Lovells US LLP, NY, NY, for Defendant. Jeffrey W. Plaza, Levy, Ehrlich & Petriello, PC, Newark, NJ, for Plaintiff.

MEMORANDUM OPINION

Michael A. Shipp, United States District Judge

*1 This matter comes before the Court on two motions in related cases: (i) Plaintiff Jeffrey W. Plaza's ("Plaza") motion to remand his case, Civ. No. 17-11466 ("Plaza Action") to the Superior Court of New Jersey, Law Division, Somerset County for lack of subject matter jurisdiction (ECF No. 10);1 and (ii) Plaintiff Michael S. Barth's ("Barth") motion to remand his case, Civ. No. 17-13154 ("Barth Action") to the Superior Court of New Jersey, Law Division, Somerset County for lack of subject matter jurisdiction (17-13154 ECF No. 7). In the Plaza Action, Defendants Bernards Township Planning Board ("Planning Board") and the Islamic Society of Basking Ridge, Inc. ("ISBR") (collectively, "Defendants") filed opposition (ECF No. 14) and Plaza replied (ECF No. 19). In the Barth Action, Defendants filed opposition (17-13154 ECF No. 13) and Barth did not file a reply. The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Civil Rule 78.1. For the reasons set forth below, Plaza's and Barth's motions are granted.

I. Background

The Plaza and Barth Actions stem from a prior federal lawsuit in the District of New Jersey involving Defendants, The Islamic Society of Basking Ridge, et al v. Township of Bernards, et al., docket number 16-1369 ("Original Action"). See generally Islamic Soc' y of Basking Ridge v. Twp. of Bernards, 226 F. Supp. 3d 320 (D.N.J. 2016). The ISBR sought to construct a mosque in Bernards Township, but the Planning Board denied its application. (Compl. ¶¶ 6-9, ECF No. 1-3.) The ISBR then filed a lawsuit against the Bernards Township Committee and the Planning Board, alleging violations of the Religious Land Use and Institutionalized Persons Act, the First and Fourteenth Amendments of the United States Constitution, the New Jersey Constitution, and New Jersey state law. (Id. ¶ 10.)

The parties in the Original Action eventually entered into a settlement agreement ("Settlement Agreement"). (Id. ¶ 11.) Further, individual committee members of both the Township Committee and the Planning Board agreed to the terms of the Settlement Agreement.2 (Id.) The Settlement Agreement, which set forth the next steps in the planning and construction of the mosque, also provided the Township and the Planning Board with a general release of any and all claims against them. (Id. ¶¶ 12-14.) The general release, however, was conditioned upon the Planning Board's approval of the Settlement Agreement. (Id. ¶ 17.)

A. Plaza Action

*2 Plaza, proceeding pro se, filed a complaint against Defendants in the Superior Court of New Jersey, Law Division, Somerset County, alleging violations of the New Jersey Municipal Land Use Law ("MLUL"), the New Jersey Local Government Ethics Law ("LGEL"), and New Jersey common law, as well as violations of the Planning Board's Rules and Regulations. (See generally Compl.) On November 9, 2017, Defendants removed the action to this Court citing 28 U.S.C. § 1441 as the basis for jurisdiction (Notice of Removal 1, ECF No. 1), and then each filed

motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), claiming that Plaintiff had failed to state a claim upon which relief could be grantee. (Planning Board's Mot. to Dismiss 1, ECF No. 7; ISBR's Mot. to Dismiss 1, ECF No. 9.)

Following Defendants' motions, Plaza filed a motion to remand to state court, arguing that the action involves solely state law claims and the Court, therefore, has no subject matter jurisdiction over the non-diverse parties. (Plaza's Mot. to Remand 1, ECF No. 10.) Plaintiff then moved to stay all proceedings pending the Court's determination on Plaza's motion to remand. (Plaza's Mot. to Stay 1, ECF No. 11.) The Court, on January 22, 2018, granted Plaintiff's motion to stay and administratively terminated Defendants' motions to dismiss, pending a decision on Plaza's motion to remand. (Order, ECF No. 22.)

B. Barth Action

Barth, pro se plaintiff, filed a Complaint in Lieu of Prerogative Writs against Defendants in the Superior Court of New Jersey, Law Division, Somerset County. (See generally Barth Compl., 17-13154 ECF No. 1-1.) Barth's complaint pertains to the Settlement Agreement the parties reached in the Original Action, as well as the steps and procedures taken by Township and Planning Board committee members in achieving that result. Barth alleges, although without citing specific statutory authority, that: (1) "the Settlement Agreement ... created a conflict of interest for some Planning Board members voting at the Whispering Woods hearing"; (2) "the Planning Board ignored ISBR's alleged lack of standing to file a site plan application"; (3) the Whispering Woods hearing mandated by the Settlement Agreement was procedurally flawed; and (4) the Planning Board's decision to approve the ISBR's revised site plan was unreasonable because ISBR's site plan presented a public safety hazard. (Defs.' Barth Action Opp'n Br. 8, 17-13154 ECF No. 13; see also Barth Compl.)

Following Barth's filing, the Planning Board removed the action to federal court, pursuant to 28 U.S.C. § 1441 (Notice of Removal 1, 17-13154 ECF No. 1), and subsequently filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), claiming that Barth had failed to state a claim upon which relief could be granted. (Planning Board's Mot. to Dismiss 1, 17-13154 ECF No. 6.) Barth then filed a motion to remand the case to state court, arguing that the action involves state law claims and the Court, therefore, has no subject matter jurisdiction over the non-diverse parties. (Barth's Mot. to Remand, 17-13154 ECF No. 7.) Barth then moved to stay all proceedings pending the Court's determination on Barth's motion to remand. (Barth's Mot. to Stay, 17-13154 ECF No. 8.) The Court, on January 22, 2018, granted Barth's motion to stay and administratively terminated the Planning Board's motion to dismiss pending a decision on Barth's motion to remand. (Order, 17-13154 ECF No. 12.) Following the Court's order staying proceedings, Plaintiff filed a motion for recusal and a motion to strike Defendants' jointly filed opposition as untimely. (Barth's Mot. for Recusal; Barth's Mot. to Strike, 17-13154 ECF No. 15.)

II. Legal Standard

A. Removal

*3 A party may remove an action from state court to any federal court in which there is original jurisdiction. 28 U.S.C. § 1441(a). There are two types of original jurisdiction, or subject matter jurisdiction. The first, federal question jurisdiction, exists when a civil action arises "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The second, diversity jurisdiction, is established when the amount in controversy exceeds $75,000 and the parties are of completely diverse citizenship. 28 U.S.C. § 1332, Parties removing an action to federal court, therefore, are tasked with establishing that "[f]ederal subject matter jurisdiction exists and that removal is proper." Gateway 2000 v. Cyrix Corp., 942 F. Supp. 985, 989 (D.N.J.

1996); Dukes v. U.S. Healthcare, 57 F.3d 350, 359 (3d Cir. 1995); Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29(3d Cir. 1985).

At all stages of a litigation, the removing party bears the burden of demonstrating that the federal court has subject matter jurisdiction over the action. See Frederico v. Home Depot, 507 F.3d 188, 193 (3d Cir. 2007); Samuel-Bassett v. Kia Motors Am., Inc., 357 F.3d 392, 396 (3d Cir. 2004). Accordingly, when presented with an argument for remand, "the burden of establishing removal jurisdiction rests with the defendant." Dukes, 57 F.3d at 359. Removal statutes are strictly construed–when doubt exists as to the propriety of removal; remand is favored. Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA, 779 F.3d 214, 218 (3d Cir. 2015) (citing Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985)).

B. Federal Question Jurisdiction

In these cases, because there are no allegations that the parties are diverse, removal is permissible only if federal question jurisdiction exists pursuant to 28 U.S.C. § 1331. "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). "[T]he plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Kline v. Sec. Guards, Inc., 386 F.3d 246, 252 (3d Cir. 2004) (quoting Caterpillar, 482 U.S. at 392). A defense to a plaintiff's state law action, therefore, "ordinarily does not appear on the face of the well-pleaded complaint, and ... usually is insufficient to warrant removal to federal court. Dukes, 57 F.3d at 353; Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6 (2003) ("As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.").

III. Discussion

A. Parties' Positions

i. Plaza Action

Plaza alleges that, because a condition of the ISBR's general release was the approval of the Settlement Agreement, the individual Planning Board and Township committee members who agreed to the terms of the Settlement Agreement had a conflict of interest and should not have been permitted to enter into the Settlement Agreement. (Plaza's Moving Br., 2, ECF No. 10-1.) According to Plaza, "[b]y making the individual benefit of the [general release] contingent on the approval of [ISBR's renewed mosque application], the [Settlement Agreement] gave each such Board member an improper and unlawful reason to approve the Revised Application, namely to obtain a release of all personal claims that ISBR ... may have had against them." (Id) This conflict, according to Plaza, was in violation of the MLUL, LGEL, and New Jersey common law. (Id. at 3.) "For that reason, the actions taken by the [C]onflicted Board [M]embers in approving the [Settlement Agreement] constituted an abuse of New Jersey municipal land use powers bestowed upon them and are a legal nullity." (Id.)

*4 Plaza contends that, although Defendants allege this case involves the performance of a federally-mandated settlement agreement, federal question jurisdiction has not been established. (Id. at 10.) According to Plaza, the action only involves issues of state law, and "the potential effects on the [Settlement Agreement] of a federal lawsuit simply did not present a federal question." (Id. at 13.) Moreover, Plaza states that "Defendants do not cite a single authority for the proposition that, whether expressly or implicitly contained in an order or settlement agreement incorporated therein, that a federal district court has the authority to assert ancillary jurisdiction over the subsequent state law claims of third parties who did not participate in either the underlying litigation or resulting settlement agreement." (Plaza's Reply Br. 2, ECF No. 19.)

Defendants, on the other hand, contend that the Court's order, which retained jurisdiction over all matters relating to the Settlement Agreement, created ancillary jurisdiction over Plaza's claims and, therefore, the Court has subject matter jurisdiction over the present action. (Defs.' Plaza Action Opp'n Br. 6, ECF No. 14.) Defendants cite to provisions of the Settlement Agreement that they assert vest this Court with jurisdiction. (Id. at 3-4) Further, Defendants claim that the Court had subject-matter jurisdiction over the Original Action and, because the Settlement Agreement was a federal court order in the Original Action, the "state law claims [Plaza] has raised constitute a direct attack on the federal court Order, thereby providing this Court with ancillary jurisdiction." (Id. at 7.)

ii. Barth Action

Barth contends that, because the complaint only alleges state law claims, there is no basis for the Court to exercise federal question jurisdiction over the non-diverse parties. (Barth's Mot. to Remand 3, 17-13154 ECF No. 7.) The only authority Barth cites is Smith v. Township of Bernards, a case previously before this Court that also dealt with state law claims involving the Settlement Agreement. See generally Smith v. Twp. of Bernards, No. 17-4551, 2017 WL 5892202 (D.N.J. Nov. 29, 2017). Barth argues that, like the plaintiff in the Smith action, whose motion to remand was granted for lack of subject matter jurisdiction, the current action lacks a federal question and should, therefore, be remanded to state court. (Barth's Mot. to Remand 3.)

Defendants raise similar arguments in opposition as they raised in the Plaza Action, contending that the Court's order, which retained jurisdiction over all matters relating to the Settlement Agreement, created ancillary jurisdiction over Barth's claims and, therefore, establishes the Court as a suitable forum for the present action. (Defs.' Barth Action Opp'n Br. 7.) Further, Defendants claim that the Court had subject-matter jurisdiction over the Original Action and, because the Settlement Agreement was a federal court order

stemming from the Original Action, Barth's state law claims attack both the federal court order and the Planning Board's approval and provide the Court with ancillary jurisdiction. (Id. at 9, 13-14)

B. Analysis

i. Federal Question Jurisdiction: Well-Pleaded Complaint Rule

Plaza's allegations are based on violations of the MLUL, LGEL, and New Jersey common law, which are all state law claims. (Compl. ¶¶ 27-43.) Defendants' justification for removal is based upon the Settlement Agreement, which was incorporated into a federal order of this Court. (Defs.' Plaza Opp'n Br. 6-7.) By challenging the validity of the Settlement Agreement and the procedure used to obtain it, Defendants argue that Plaza's Complaint raises a federal question and is, therefore, subject to the Court's jurisdiction. (Id.) Similarly, Barth's allegations are based on several inappropriate actions and conflicts of Defendants, none of which fall under federal law. (See generally Barth Compl.) Defendants' justification for removal is based upon the Settlement Agreement, which was entered as a federal order from this Court. (Defs.' Barth Opp'n Br. 8-9.) By challenging the validity of the Settlement Agreement and the procedure used to obtain it, Defendants argue that Barth's Complaint raises a federal question and is, therefore, subject to the Court's jurisdiction. (Id.) Defendants, however, have cited no case that stands for the proposition that the Settlement Agreement falls under the class of laws that establishes federal question jurisdiction under § 1331 or Article III.3

ii. Substantial Federal Question

*5 "[E]ven if the cause of action is based on state law, there is a 'special and small category of cases in which [federal question] jurisdiction still lies.' " Goldman v. Citigroup Glob. Mkts., Inc., 834 F.3d 242, 249 (2016) (quoting Gunn v. Minton, 568 U.S. 251, 258 (2013)). In that small category, federal jurisdiction applies to state law claims if a federal issue is: "(1) necessarily raised, (2) actually

disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Gunn, 568 U.S. at 258. When all four of these elements are met, subject matter jurisdiction is proper over a state law claim. Id.

To establish federal question jurisdiction based on a substantial federal issue, "an element of the [plaintiff's] state law claim [must] require[ ] construction of federal law." MHA LLC v. Healthfirst, Inc., 629 F. App'x 409, 412-13 (3d Cir. 2015); Grable & Sons Metal Prods, v. Darue Eng'g & Mfg., 545 U.S. 308, 314-15 (2005) (finding federal jurisdiction because plaintiff's state law claim was premised "on a failure by the IRS to give [plaintiff] adequate notice, as defined by federal law") (emphasis added); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 201-02 (1921) (holding that federal jurisdiction was proper because the state law claim, which prohibited investment in illegal securities, depended upon "the constitutional validity of an act of Congress which is directly drawn into question"); but see MHA, 629 F. App'x at 413 (removing party "failed to establish that it is necessary to construe, federal law to determine whether [plaintiff] can establish the elements of its [state law claims]") (emphasis added); Manning v. Merrill Lynch Pierce Fenner & Smith, Inc., 772 F.3d 158, 163 (3d Cir. 2014) (holding that plaintiff's claims could be decided without reference to federal law and, therefore, were not subject to federal jurisdiction) (emphasis added); Old Bridge Twp. Raceway Park, Inc. v. Twp. of Old Bridge Zoning Bd. of Adjustment, No. 13-05219, 2013 WL 5793452, at *2 (Oct. 28, 2013) (stating that even though a related case was in front of the court and "on an intuitive level" it would seem to make sense to have both cases proceed there, the court lacked subject matter jurisdiction over a case involving a state law zoning dispute); New Jersey v. City of Wildwood, 22 F. Supp. 2d 395, 403-04 (D.N J. 1998) (holding that while plaintiff's complaint references federal law, the central issue

"turns on the application and interpretation of purely state laws") (emphasis added).

Plaza's and Barth's complaints raise violations of New Jersey law, while referencing the Court's Order incorporating the Settlement Agreement. (See generally Plaza Compl.; Barth Compl.) Defendants have not demonstrated, however, that reference to an order–which is not a federal law–is sufficient to establish subject matter jurisdiction based on a substantial federal issue. Further, Defendants have not demonstrated that Plaza's and Barth's complaints meet the standards set forth in both Grable and Smith and have not earned their burden of demonstrating that the Complaints raise a substantial federal issue.

iii. Ancillary Jurisdiction

Ancillary jurisdiction gives courts authority to hear matters that lack an independent basis for subject matter jurisdiction but are "incidental to other matters properly before them." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378 (1994); Bryan v. Erie Cty. Office of Children & Youth, 752 F.3d 316, 321 (3d Cir. 2014). Courts generally exercise ancillary jurisdiction over a claim to: "(1) permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Kokkonen, 511 U.S. at 379-80.

*6 Claims involving settlement agreements properly incorporated into a federal court order may be subject to ancillary jurisdiction. Kokkonen, 511 U.S. at 381. In Kokkonen, the Supreme Court reversed the Ninth Circuit's affirmation of a Finding of subject matter jurisdiction in an action stemming from a settlement agreement. Id. at 382. The district court in the original action did not retain its jurisdiction over future claims regarding the settlement and, therefore, no subject matter jurisdiction existed. Id. at 381. The Supreme Court noted:

The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal -- either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. Id.

Nevertheless, "a 'court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims[;]' [a]ncillary jurisdiction alone cannot provide the original jurisdiction that [a party] must show in order to qualify for removal under § 1441." Syngenta Crop Prot., Inc. v. Benson, 537 U.S. 28, 34 (2002) (quoting Peacock v. Thomas, 516 U.S. 349, 355 (1996)). In other words, there must be an anchor claim present in the lawsuit establishing subject matter jurisdiction before a court may allow ancillary claims. See id.; Kokkonen, 511 U.S. at 381; Old Bridge, 2013 WL 5793452, at *2 (granting plaintiff's motion to remand, the court held that "[ancillary] jurisdiction cannot serve as a basis for bootstrapping [p]laintiff's action to the previous [federal] action between [defendant] and [plaintiff]").

Unlike the parties in Kokkonen, this Court retained jurisdiction over claims arising under the Settlement Agreement. (Exhibit B, ECF No. 1-2.) Plaza and Barth, however: (i) are not parties to the Settlement Agreement; (ii) brought separate cases challenging the actions of the Planning Board and ISBR and not, for example, a motion to enforce or a challenge to the Settlement Agreement in the Original Action; (iii) Plaza's and Barth's claims reference the Settlement Agreement, but only allege violations of state law; and (iv) importantly, the matters were filed in state court and then removed to this Court. Accordingly, Defendants have not carried their burden to show that the Court has subject matter jurisdiction.

Moreover, paragraph 10–one of the provisions of the Settlement Agreement that Defendants assert vest the Court with jurisdiction over this case–does use broad language;

For the avoidance of doubt, the Court's retention of jurisdiction over this matter encompasses all matters relating to the Whispering Woods hearing referenced in Paragraph 3, any approvals referenced in Paragraph 5, any legal appeals or challenges referenced in Paragraphs 5 or 9, or any other matters relating to the approval, construction or operation of ISBR's proposed mosque on the Property.

(Settlement Agreement ¶ 10, ECF No. 10-2.) The language speaks in terms of retention of jurisdiction over "this matter", which, as written, includes "any Complaint in Lieu of Prerogative Writ or other Complaint or pleadings filed in any Division or Venue of the Superior Court of New Jersey[, which] shall be promptly removed to the United States District Court for the District of New Jersey and marked as a related matter to this Action." (Id.) The provision further states, however, that "[a]ll Parties consent to such removal and all further proceedings on any such pleadings shall be in this Court before Judge Shipp (or the District Judge then assigned to this Action)." (Id. (emphasis added).) Thus, paragraph 10 speaks in terms of the consent of the parties to the Settlement Agreement itself; however, neither Plaza nor Barth is a party to the Settlement Agreement. Defendants have not carried their burden to demonstrate that this language that purportedly vests the Court with ancillary jurisdiction is a permissible basis for removal.

*7 Further, in Smith v. Township of Bernards, this Court ruled that the Court did not have ancillary jurisdiction over state law claims challenging the Settlement Agreement brought by third parties. 2017 WL 5892202, at *3-4. In Smith, defendants, which included the Planning Board, removed an action alleging a violation of the Open Public Meetings Act ("OPMA"), a New Jersey state law, to federal court. Id. at *1. Similar to the present action, this violation

stemmed from the Settlement Agreement. Id. Plaintiff in Smith contended that defendants failed to provide proper notice of the meeting in which certain parties in the Original Action entered into the Settlement Agreement, which constituted a violation of the OPMA. Id. Defendants argued that this Court's retention of jurisdiction over the Settlement Agreement created ancillary jurisdiction over the OPMA claim. Id. at *3. This Court, however, granted plaintiff's motion to remand, stating that "[a]ncillary jurisdiction, however, is not available here because '[i]n a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring jurisdiction.' " Id. (quoting Peacock, 516 U.S. at 355).

IV. Conclusion

Accordingly, for the reasons set forth above, Barth's Motion for Recusal and Motion to Strike are denied, Plaza's and Barth's Motions to Remand are granted. An order consistent with this Memorandum Opinion shall be entered.

Footnotes

1 All citations are to the Plaza Action docket unless otherwise indicated.

2 Members of the Bernards Township Committee who agreed to the terms of the Settlement Agreement were John Carpenter, John Malay, Thomas Russo, Carolyn Gaziano, and Carol Bianchi (Compl. ¶ 11), while the members of the Planning Board were James Baldassare, Kathleen Piedici, Barbara Kleinert, and Scott Ross. (Id.). Of these members, Gaziano, Piedici, Baldassare, and Ross ("Conflicted Board Members") are parties to the Settlement Agreement and, therefore, beneficiaries of the general release. (Id. ¶ 20.) The Court notes that in the Original Action, Plaza was named as a defendant in his official capacity but was not a party to the Settlement Agreement.

3 Complete preemption may be a basis for removal in certain limited circumstances. The Supreme Court has recognized complete preemption in three situations: § 301 of the Labor Management Relations Act; § 502(a) of the Employee Retirement Income Security Act; and §§ 85 and 86 of the National Bank Act. Defendants do not address in their briefs the topic of complete preemption–which, in any event, is irrelevant–and, therefore, fail to demonstrate that the doctrine applies to the removed action.

SUPREME COURT OF NEW JERSEY
No. 083394

Michael S. Barth Plaintiff-Appellant, v. Bernards Township Planning Board and Islamic Society of Basking Ridge, Inc. Defendants-Respondents.	Petition for Certification To the Supreme Court of NJ Appellate Division Docket No. A-00744-18T3 SAT Below: Hon. Carmen A. Alvarez Hon. Hany A. Mawla Hon. Carmen Messano

REVISED PETITION FOR CERTIFICATION AND APPENDIX

Michael S. Barth, Plaintiff-Appellant
P.O. Box 832
Far Hills, New Jersey 07931
(917) 628-6145

September 26, 2019

RECEIVED SEP 27 2019
SUPREME COURT OF NEW JERSEY

TABLE OF CONTENTS

Table of Contents i
Table of Authorities ii
Short Statement of Matter Involved 1
Questions Presented 6
Errors Complained Of 7
Reasons Certification Should be Granted 20
Comments with Respect to Appellate Division Opinion . . 20
Conclusion 20
Certification Pursuant to 4. 2:12-7 (a) 20

Table of Content to Appendix

Amended Notice of Petition for Certification Apa1
Appellate Division Order issued July 31, 2019 . . . . . Apa2
Appellate Division Order issued June 12, 2019 . . . . . Apa3
Appellate Division Order issued June 12, 2019 . . . . . Apa4
New Jersey Supreme Court Order issued May 24, 2019 Apa5
Appellate Division Order issued February 8, 2019 . . . . Apa6
Appellate Division Order issued November 19, 2018. . Apa7

TABLE OF ATHORITIES

CONSTITUTIONAL AUTHORITIES

United States Constitution Fourteen Amendment 8
New Jersey Constitution Articles 1 8

Case Law Authorities

Cherokee LCP Land, LLC., V. City of Linden Planning Board, 234 N.J. 403 (2018) 7, 18
Dunbar Homes, Inc. v. Zoning Board of Adjustment of Township of Franklin, 233 N.J. 246 (2018) 7, 16
Ghandi v. Caspedez, 390 N.J. 193 (NJAD 2007) 9
In Re Accutane Litigation, 234 N.J. 340 (2018) 7, 17
Montclair St. Univ. v. Cty of Passaic, 234 N.J. 434 (2018) 14
Palisadium MGT Corp. v. Borough of Cliffside Park, 456 N.J. Super. 293 (N.J.A.D. 2018) 17
Piscitelli v. City of Garfield Zoning Board of Adjustment, 237 N.J. 333 (2019) 4, 6, 12-15
U.S. v. Decker, 957 F.2d 773, 777 (CA8 1992) 9
Wawa Inc. v. Tw. of Westhampton, 182 N.J. 626 (2003) . . 8

Whispering Woods at Bamm Hollow, Inc. v. Middletown Tp. Planning Board 223 N.J. Super. 1 (NJAD 1987) cert denied 110 N.J. 175 (1988) 14

Statutes

MLUL, Municipal Land Use Legislation
N.J.S.A. 40:55-d-40.4 et seq. 17

ARTICLES

Bernards Township Official urged to yes vote on Mosque, then voted no, Bernardsville News, October 19, 2017 . . . 12

SHORT STATEMENT OF MATTER INVOLVED (FN1)
FN1: All references are basically verbatim from Appellant's Brief and Appendix submitted to the Appellate Division.

This matter mainly involves the application of recent Supreme Court cases to what originated as an Islamic Society of Basking Ridge (ISBR) filing of a false and misleading sham land use application with the Bernards Township Planning Board ("Board") to construct a community center at 124 Church Street Bernards Township, where ISBR admitted its property was unsuited for the proposed land use, it lacked a legally cognizable interest in a sewer easement that was a fundamental requirement of the application (Board counsel erroneously advised that the "MLUL" did not allow it to undue a completeness review of even a fraudulent application), were ISBR consented to the public participation in board hearings and to object and cross exam its witnesses (knowing for example that this party a tax paying resident lived within one mile of the location and a member of a volunteer organization within 200 feet of the proposed development), where ISBR admitted tier plans would have a negative impact on the local community as even ISBR's traffic expert testified against ISBR of insufficient parking and traffic problems and another ISBR witness testified members always late would race to meetings at the site, but where the Board admitted it failed to (and claimed it could not) consider traffic on the road in front of the site and impact on internal circulation of the proposed development). However, the Board initially denied the application finding it would create public health and safety problems, ISBR's witness testimony unqualified, unreliable (and previous witness coaching).

This matter involves the application of case law to conflicted board members voting at a so called "whispering woods hearing" to approve ISBR's previously denied public health and safety hazarded land use application, when even ISBR counsel cautioned the Board and asked to enter into the record plaintiff's letter objecting to the availability of the

plans in sufficient time before the meeting and potential conflicts of interest of Board members (Board counsel would not allow plaintiff to respond, but plaintiff later objected to the change in the rules for the hearing.) Conflicts of interest of Board members were also raised by Mr. Jeffrey Plaza, the former Board Chairman over the application who resigned over the conflict of interests present, and Mr. Robert Orr, former member of the Board that reviewed the ISBR application. Later in the meeting a voting board member asked for advice if members had a conflict of interest in voting that evening, but instead of adjourning for a local board review, Board counsel indicated the conflict of interest would have to be resolved by a New Jersey Superior Court. The conflicted Planning Board approved the same application it denied, with reference to the same existing unresolved public health and safety hazards as Board Planners stated the plans conformed to a settlement, not the "MLUL".

Matters before the Appellate Division involved plaintiff's complaint to reverse the Board approval, and Mr. Plaza similar complaint. The removal of both complaints were subsequently remanded. At a consolidated case Management Conference Mr. Plaza agreed to provide transcripts of the board proceedings. Mr. Plaza described a quid-pro-quo arrangement that created a conflict of interest of board members and that one board member responded to the presentation of a conflict of interest but was not provided with any advice before a vote was taken. During that same hearing, John Belardo, Esq., who was not counsel of record, testified on the matter how building plans were proceeding, where Judge Miller advised ISBR proceeds at its own risk. Plaza subsequently withdrew his complaint on the basis he would have to testify against his former colleagues.

"ACMS" indicated there would be no oral arguments on the various motion made before Judge Miller. About 455 pm the evening before, Judge Miller's clerk left this party a message of oral arguments the next morning. Judge Miller

indicated at oral arguments he would issue his decision later that day. Based on the memorandum attached to his orders, Judge Miller did not read his opinions. The Superior court sent no copies of the Orders to this self-represented party. Over time it appeared Judge Miller attempted to make changes to the Orders he didn't read before he signed, the most recent Order being completely illegible based on an ACMS download. To my knowledge, the Court made no effort to send those unnoticed changes to plaintiff.

Plaintiff appealed 1. October 12, 2018 Order granting ISBR Motion to dismiss Complaint for Failure to State Claim. 2. October 12, 2018 Order denying Order to Show Cause. 3. October 12, 2018 Order granting Bernards Motion dismiss Complaint for failure to State Claim. 4. October 15, 2018 Amended Order granting Bernards Motion to dismiss Complaint for failure to State Claim. 5. October 15, 2018 Amended Order denying Order to Sow Cause, and 6. October 24, 2018 Amended Order granting Bernards Motion to Dismiss Complaint for failure to State Claim. It is not clear which of any of these were issued with-or-without prejudice, or if still in draft form. (fn2)

Fn2: Judge Miller issued an Order denying Plaintiff's motion for Summary Judgement and Discovery, but remotely addressed those in the statement of reasons he did not read.

On November 19, 2018 the appellate division denied appellant's motion to stay the orders below and a preliminary injunction pursuant. (Apa7.) On February 22, 2019, plaintiff filed a motion of Interlocutory Appeal with the New Jersey Supreme Court to stay the Appellate /division briefing schedule pending a Supreme Court decision in Piscitelli v. City of Garfield Zoning Board of Adjustment. On May 20, 2019, defendants filed a "motion" with the Appellate Division to dismiss plaintiff's appeal for lack of prosecution. On May 24, 2019 the New Jersey Supreme Court denied plaintiff's motion to stay the Appellate Division briefing schedule as moot. (Apa5.) On June 3, 2019 plaintiff filed a motion for reconsideration and to file as within time a motion

for reconsideration. On June 5, 2019 defendants field a SECOND motion to dismiss plaintiff's appeal without prejudice. On June 7, 2019 defendants filed opposition to plaintiff's June 3, 2019 motion providing a response that was plain legal error. On June 12, 2019 the Appellate Division granted respondent's May 20 Motion to dismiss Appeal for Failure to Prosecute. (Apa3.) On June 12, the Appellate Division denied plaintiff's motion for reconsideration and to file as within time a motion for reconsideration. (Apa3.) On June 12, the Appellate Division denied plaintiff's motion for reconsideration and to file as within time a motion for reconsideration. (Apa3.) On June 18, 2019 Plaintiff pointed out the plain legal error that the Appellate Division relined on Defendant misrepresentation of June 7, 2018, that was the defendants' basis for the Appellate Division Order on June 12, 2019. On June 18m, 2019, the /appellate Division directed plaintiff to file a formal motion. On July 31, 2019 Appellate Division without comment denied plaintiff's Motion to : file pleadings of July 2, 2019 as within time, extend Time to File Pleadings of July 2, 2019, reconsideration of the appellate division June 12, 2019 Orders, file June 17, 2019 pleadings as within time, extend the time to file the June 2, 2019, file the June 3, 2019 Brief and Appendix, Reinstate Appeal (Apa2.)

QUESTIONS PRESENTED

1. Did the ACMS "go fish" service of process violate federal and New Jersey constitutional protections?
2. Is "5 minute" notice of oral arguments adequate when parties were previously notified there would be no oral arguments?
3. Is a trial court Judge that signs an Order and not read is own supporting opinion prima facie evidence of judge bias, and null and voids the judge's Order?
4. Did the Appellate Division abuse its discretion to facilitate Defendants' Motion to Dismiss?
5. When the Appellate Division dismissal of plaintiff's appeal was based on plain legal error, and the Division

refused to provide a reason for dismissing plaintiff's appeal, is the Division's refusal to reinstate the appeal an unlawful abuse of discretion under other New Jersey case law?

6. Under Piscitelli v. City of Garfield Zoning Board of Adjustment, 237 N.J. 333 (2019), is the conflicted planning board decision below null and void or warrants additional discovery?
7. Is the Order Granting ISBR Motion to Dismiss for Failure to State a Claim defective?
8. Under Montclair State University v. County of Passaic, 234 N.J. 434 (2018), a local municipal planning board must consider the traffic safety impact of a land use application on an adjoining road, even if that roadway is a "county road", and if not, the MLUL is unconstitutional?
9. Under Piscitelli, Dunbar and In Re Accutane, the current interpretation Whispering Woods at Bamm Hollow, Inc. v. Middletown Tp. Planning Board, 223 N.J. Super. 1, (NJAD 1987) *cert denied* 110 N.J. 175 (1988) needs to be revisited by the New Jersey Supreme Court because it is being unconstitutionally applied, and alternatively, the NJ MLUL is unconstitutional if a "Whispering Woods" hearing can circumvent the principles in the statute?
10. Under Dunbar Homes, Inc. v. Zoning Board of Adjustment of Township of Franklin, 233 N.J. 5456 (2018), is a planning board approval of a sham land use application null and void and if not, is the NJ MLUL unconstitutional?
11. Under In Re Accutane Litigation, 234 N.J. 340 (2018), is a planning board approval of a land use application that was based on incompetent testimony, null and void, and if not, is the MLUL unconstitutional?
12. Under Cherokee LCP Land, LLC v. City of Linden Planning Board, 234 N.J. 403 (2018), is a township resident similarly situated to plaintiff have standing in the instant matter?

ERRORS COMPLAINED OF

1. The ACMS "go fish" service of process violates federal and New Jersey constitutional protections?

It is not clear whether this is an issue of first impression as the ACMS on-line access process appears recently rolled out to self-represented parties, and perhaps until this time the Trial Court had at least some form of courtesy to ensure all parties received the court's order that are subject to appeal in a timely fashion. Other than the Trial court stating on oral arguments that the Court would render decisions that afternoon, to my knowledge, a self-represented does not (or did not have at that time) have electronic delivery of Orders uploaded into eCourts. The system itself seems to indicate one needs a valid "Bar ID" to view the submitted documents. As the Court can take judicial notice of three orders uploaded after the day of oral arguments, copy of Orders only deemed served by the uploading of an Order on eCourts is NOT adequate notice, and are basic procedural violations of the United States Constitution, and New Jersey Constitution Article 1. Accordingly, the ACMS "go fish service" of process violates federal and New Jersey constitutional protections.

2. Is "5 minute" notice of oral arguments adequate when parties were previously notified there would be no oral arguments?

As ACMS shows, the trial court repeatedly listed that no oral arguments would be permitted for the various orders before the court on October 12, 2018. Since there are ramifications for not being present at oral arguments, the court leaving a voice mail message five minutes before the court closes for the evening that oral arguments are required first thing the following am is a clear abuse of discretion, and the New Jersey Court Rules should be so modified. If not, the trail court notification procedure is clearly a violation of the U.S. Constitution Fourteenth Amendment, and N.J. Constitution Article 1.

3. Is a trial court Judge that signs an Order and not read is own supporting opinion prima facie evidence of judge bias, and null and voids the judge's Order?

The Court may recall during oral arguments in Wawa Inc. v. Tw. of Westhampton, 182 N.J. 626 (2005), the Court asked an advocate if he thought the "judge read is opinion before he signed it." Although the subject did not appear further explored in Wawa, the general basis for the question is that a judge who signs an order but does not read the supporting material shows an inappropriate bias on the Judge's part. *See e.g.,* U.S. v Decker, 957 F.2d 773, 777 (CA8 1992). Judge Miller clearly did not read attached statement of reasons before he signed is orders. Accordingly, Judge Millers Orders that he signed when he did not read his own supporting opinion is prima face evidence of judge bias, and null and voids the judge's Order.

4. Did the Appellate Division abuse its discretion to facilitate Defendants' Motion to Dismiss?

In the Court's June 12, 2018, the Appellate Division noted that defendants filed a motion on May 20, 2019 to dismiss plaintiff's appeal for failure to prosecute. However, the record appears clear that defendants did not file a motion on May 20, but filed on or about June 5, when they sent in a Motion without any supporting documentation. There is no basis in fact, law, or rule, to all the Appellate Divisions to abuse its discretion by permitting defendants motion. Accordingly, the appellate division inappropriately dismissed plaintiff's appeal.

5. When the Appellate Division dismissal of plaintiff's appeal was based on plain legal error, and the Division refused to provide a reason for dismissing plaintiff's appeal, is the Division's refusal to reinstate the appeal an unlawful abuse of discretion under other New Jersey case law?

Gandi v. Cespedes, 390 N.J. 193 (NJAD 2007) held the right to reinstate appeals are ordinarily routine and freely granted when a plaintiff cures the problem that led to the

dismissal, and that such motions to restore should be viewed with great liberality. R 1:13-7(a). In other cases, the Court has held it is impermissible to dismiss and appeal and deny a motion to reinstate an appeal without the court providing any basis. As the Court is aware, on February 22, 2019, plaintiff filed a motion for interlocutory appeal to the Supreme Court to stay the briefing schedule pending a decision in Piscitelli, and before the Supreme Court decided that motion, on May 20, 2019, defendants filed a DEFECTIVE motion to dismiss plaintiff's appeal for lack of prosecution (defendants sent in the actual form of notice on June 5, not May 20) but before defendants filed its June 5, motion, plaintiff on June 3 had already a motion to submit pleadings in the matter. Plaintiff's June 3 motion was basically within a few days of the Supreme Court decision on the May 24, 2019 interlocutory appeal. In addition, the Appellate Divisions abused its discretion when it relied on the plain legal error in defendants'' pleadings. More specifically, defendants cited the incorrect rule, and the May 1, 2013 letter of the Clerk of the Appellate Division that in effect showed plaintiff filed the correction motions. Accordingly, the Appellate Division dismissal of plaintiff's appeal was clearly an abuse of discretion.

6. Under Piscitelli v. City of Garfield Zoning Board of Adjustment, 237 N.J. 333 (2019), is the conflicted planning board decision below null and void or warrants additional discovery?

Piscitelli was recently decided by the Supreme Court and identified the principles for reviewing conflict of interest by Municipal Boards. Perhaps the categories from Piscitelli include: standard of review of the courts below, laws and standards, implications, fact sensitive nature of conflict of interest, and if the trial court fails, to allow for discovery.

The general implications are a planning board decision is null and void based on a conflicted vote. The laws and standards are similar to what plaintiff raised in the complaint in the first count, the Local Government Ethics Law,

N.J.S.A. 40A:9-22.2, the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-69, and the common law. As noted in Piscitelli, no deference is given to the courts below. In Piscitelli, the Court also expanded the range of conflicts to ensure board members are free of conflicting interests that have the capacity to compromise their judgments.

Here the facts are more troubling than most other conflict of interest cases. An initial matter, ISBR counsel asked that the Board enter into the record, plaintiff's letter expressing concern about conflict of interest of Board Members. (Transcripts August 8, 2017, Page 38-39.) Mr. Plaza himself made a presentation that evening why certain Board members should disqualify themselves. Id. 65-69. A former member also addressed the Board about potential conflicts. Id. 70-74. As Mr. Plaza noted in the Case Management Conference, a board member asked for advice on conflict of interest, whereupon Board Counsel stated he could not give advice but that the matter needed to be resolved by a Superior Court. Id. 95-96. A major risk on the quid pro quo was if the settlement was not approved, the individual emails of the Board members could be discoverable, because of the use of their individual emails for government use. As to discovery, defendants' main contention was that such discovery was protected by the attorney client privilege. However, it clear that town counsel does not control the privilege, rather the individual, and as the record reflects, some former members were willing to discuss the pressures they received in being forced to sign off on the settlement, and why they resigned instead of having to approve a land use application that was admittedly a public health and safety hazard. *See e.g., Bernards Township Official urged yes vote on Mosque, then voted no."* Bernardsville News, October 19, 2017. (Mayor acknowledged he called other members to influence their vote, a discussion that waives and is not protected by the attorney client privilege, and is subject to discovery.)

A worsening difference between this case and Piscitelli is in Piscitelli, the parties recognized the need for an "opinion" before a conflicted vote is case, where here unconstitutional defective Whispering Woods principles worsened the conflict of interest. Accordingly, under Piscitelli, the trial court erred in not finding a conflict of interest and alternatively erred in not allowing the discovery.

7. Is the Order Granting ISBR Motion to Dismiss for Failure to State a Claim defective?

It appears there is only one Order entered in connection with ISBR Motion to Dismiss for Failure to state a claim. The Court basis was irrationally flawed. The Court seems to indicate that conflict of interests, whispering wood procedural flaws, and planning boards that approve an application that is admittedly a public safety hazard is no longer arbitrary, capricious, and ultra vires. Perhaps the court also needs to address the role of an applicant in a complaint in lieu of a prerogative writ action, because as Judge Miller stated at the Case Management Conference (P 23), a land use applicant generally has an interest in a prerogative writ action, but if the Court deems a party can sue the municipal agency only, and not have to serve the applicant, the result can be a null and void determination resulting in an injunction. The court should so announce and save parties the expense of attempting to serve the complaint on an organization whose registered agent is evasive to service, as occurred here. Since it appears Judge Miller did not read his statement of reasons, it is not clear if he appreciated the ramifications of another party having access to your personal email, and while a Human Resources department may not be able to arbitrarily have access to your personal emails, when they are disclosed a s result of discovery, as was sought here if the case was not settled, settling a case to avoid having to disclose and litigate your personal email should be sufficient interest to realize there is a problem. It also seems the Trial Court is out of touch with conflict of interest case law, as to the extent Piscitelli holds a board approval of a land use

application is null and void, for the court to suggest that is irrelevant is bizarre at best. Accordingly, the trial court granting of ISBR's motion to dismiss should be reversed.

8. Under Montclair State University v. County of Passaic, 234 N.J. 434 (2018), a local municipal planning board must consider the traffic safety impact of a land use application on an adjoining road, even if that roadway is a "county road", and if not, the MLUL is unconstitutional?

In the instant matter, defendants repeatedly argued that the planning board could not consider the impact of the development on the local roads, because the road that adjoined the construction is a county road. Conversely, in Montclair State University v. County of Passaic, 234 N.J. 434 (2018), a local municipal planning board must consider the traffic safety impact of a land use application on an adjoining road, even if that roadway is a "county road", and if not, the MLUL is unconstitutional. Defendants claim the holding only applies to certain parties, but the same basic principles should hold true to all planning board applications.

9. Under Piscitelli, Dunbar and In Re Accutane, the current interpretation Whispering Woods at Bamm Hollow, Inc. v. Middletown Tp. Planning Board, 223 N.J. Super. 1, (NJAD 1987) *cert denied* 110 N.J. 175 (1988) needs to be revisited by the New Jersey Supreme Court because it is being unconstitutionally applied, and alternatively, the NJ MLUL is unconstitutional if a "Whispering Woods" hearing can circumvent the principles in the statute?

What a Whispering Woods hearing stands for is a good question, because form the surface, it is an unconstitutional vague concept. A common practice for planning boards is to just publish a notice "whispering woods hearing to be held"... Then as here, like a football game, the board attorney can call an "audible" as the line of scrimmage, and change the playbook. Here, the Planning Board attorney changed the "play" at the time of scrimmage, and read off whatever was convenient to him. August 8, 2017 Transcripts

P 4-7. Plaintiff objected to the vague read out. Id. at 83. In addition, whispering woods is defective or unconstitutionally applied as here when a board member raises a conflict interest. Id. at 95, and whispering woods does not allow an adjournment to resolve the conflict of interest. (Here Board attorney stated the conflict of interest has to be resolved by a court of law.) Furthermore, as here the Board professional state the plans conform with a settlement, and not MLUL land use principles, that are echoed by the Board members finding the appreciation problematic, and even the Township Press release also finding the approve plans are not consistent with the MLUL. the reality of a decision from a so-called Whispering Woods Hearings, based on conflicted Board members needs to be revisited by the Supreme court. Conflicted Board members negates the concept that if "takes at least to negotiate" when here, because of the conflicted members, an acknowledged defective land use application was approved.

10. Under Dunbar Homes, Inc. v. Zoning Board of Adjustment of Township of Franklin, 233 N.J. 5456 (2018), is a planning board approval of a sham land use application null and void and if not, is the NJ MLUL unconstitutional?

This Court has repeatedly stated that local citizens have due process rights to amend planning board meetings. (Citation omitted.) Ironically even Bernards Township in a November 18, 2016 press release expressed concerns on its citizen's due process rights as a result of ISBR's sham application. What is more fundamental to due process is efficiency, and in land use application under Dunbar, it is to dispose of sham and deceptive land use applications. In the instant matter, ISBR deceived the Board on its land use application related to an easement that was necessary to provide sewer. There is a list of all the admissions by ISBR and its counsel that it lacked a legally cognizable interest in a sewer easement that was a fundamental aspect of its land use application that was a similar application requirement in

Dunbar. The Board counsel went as far to state that a Superior Court must determine whether ISBR had a legal interest in a sewer. Then counsel indicated that the MLUL, prohibited the Board from undoing or reversing a mistaken completeness review. Judge Miller and opposing counsel somewhat complained, where is the reference to the completeness review in the MLUL? (Citation omitted.) However, it appears clear from the Court's oral argument in Dunbar that the phrase itself does not exist in the MLUL, protection, and according the Court should find the planning board approval of ISBR's sham land use application is null and void or alternatively, the New Jersey MLUL is unconstitutional that such a defective land use application could span the number of meetings that this application consumed. (At the same time the court needs to give guidance when community centers are community centers, as here.)

11. Under In Re Accutane Litigation, 234 N.J. 340 (2018), is a planning board approval of a land use application that was based on incompetent testimony, null and void, and if not, is the MLUL unconstitutional?

The standards for expert testimony was tightened in In Re Accutane and has since been applied to a number of subject areas including the Solberg Airport and that net opinions should be excluded in a Tax Court. Palisadium Management Corp. v. Borough of Cliffside Park, 456 N.J. Super 293 (N.J.A.D. 2018). As stated in the complaint Paragraphs 63 and 64, ISBR witness testimony was unreliable as it included coaching of witnesses, and ISBR testimony lacked qualified expert witnesses as its traffic expert testified against his client, and ISBR never submitted a qualified traffic expert witness. Even the planning Board memorialized that ISBR substitute was not qualified to testify on so many aspects of the land use application. (*See e.g.*, Page 19 January 19, 2016 Resolution Memorializing Denial of Preliminary and Final Site Plan approval, Pa 163, Appendix 4 of 4, Motion and Appendix in support of a stay of the Orders below and a

Temporary Injunction.) Accordingly, the Court should find approval of the applicable land use null and void, and if not, the MLUL, is unconstitutional under individuals to participate in planning board hearings, allowing a circus of unqualified experts infringes on those due process rights.

12. Under Cherokee LCP Land, LLC v. City of Linden Planning Board, 234 N.J. 403 (2018), is a township resident similarly situated to plaintiff have standing in the instant matter?

In Cherokee, the Court acknowledged New Jersey has perhaps the most liberal approach to standing of any jurisdiction. In Cherokee, the Court ruled that standing extends to those why do not receive "statutory notice" under the Municipal Land Use Laws (MLUL). Based on the record, it is clear that plaintiff would be equally harmed by the public health and safety hazards acknowledged in the Board's approval of the ISBRE land use application. Here the record shows that plaintiff has a sufficient interest for plaintiff to have standing. This included fact plaintiff lived within one mile of the subject property, defendants consented to this party's right cross examine witnesses during the hearing, present evidence, and raise objections (references omitted, and that the plaintiff is a member in a volunteer organizations within 200' of the subject property (Pa 1-2, Mary 23, 2019 Plaintiff Letter Memorandum and Appendix, 7 of 13 Appellate Division Brief and Appendix.) This included as noted above ISBR's counsel asking that the board enter into the record, Barth's objection to the opportunity to review the site application within the time requirements, and Barth's noted concerns of conflict of interest among voting Board members that participated in the Whispering Woods hearing. Accordingly, under Cherokee and New Jersey liberal approach to standing, plaintiff has standing in this instant matter. Alternatively, the MLUL, rules are unconstitutional under the Fourteenth Amendment to the United States Constitution.

REASONS CERTIFICATION SHOULD BE GRANTED

Certification should be granted based on existing case law and statutes, and if any area is currently silent, new case law should be established as precedent.

COMMENTS WITH RESPECT TO THE APPELALTE DIVISION OPININO

Respectfully, there is no appellate division opinion to comment. The silent appears a basis to grant certification.

CONCLUSION

For the foregoing reasons, Appellant respectfully request that this court grant certification.

Respectfully submitted

Dated: September 26, 2019

Michael S. Barth
P.O. Box 832
Far Hills, New Jersey, 07931

CERTIFICATION PURSUANT TO R. 2:12-7 (a)

Tis Revised Petition for Certification presents a substantial question and is filed in good faith and not for the purposes of delay. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to punishment.

Dated: September 26, 2019 Michael S. Barth

SUPREME COURT OF NEW JERSEY
NO-083394

MICHAEL S BARTH	Petition For Certification To The Supreme Court of NJ
Plaintiff-Appellant,	Appellate Division Docket No. A-00744-18T3
v.	SAT Below: Hon. Carmen A. Alvarez
BERNARDS TOWNSHIP PLANNING BOARD AND ISLAMIC SOCIETY OF BASKING RIDGE, INC. Defendants-Respondents.	Hon. Hany A. Mawla Hon. Carmen Messano

BRIEF AND APPENDIX FOR PETITION AND CERTIFICATION AND MOTION FOR A PRELIMINARY INJUNCITON

Michael S. Barth, Plaintiff-Appellant
P.O. Box 832
Far Hills, New Jersey 07931
(917) 628-6145

August 26, 2019

TABLE OF CONTENTS

Table of Authorities iii
Table of Content to Appendix iii
Table of Contents in Briefs' and Appendixes iii
Questions Presented

QUESTIONS PRESENTED

1. Did the ACMS "go fish" service of process violate federal and New Jersey constitutional protections?
2. Is "5 minute" notice of oral arguments adequate when parties were previously notified there would be no oral arguments?
3. Is a trial court Judge that signs an Order and does not read his own supporting opinion prima facie evidence of judge bias, and null and voids the judge's Order?
4. Did the Appellate Division and abuse its discretion to facilitate Defendants' Motion to Dismiss?
5. When the Appellate Division dismissal of plaintiff's appeal was based on plain legal error, and the Division refused to provide a reason for dismissing plaintiff's appeal, is the Division's refusal to reinstate the appeal an unlawful abuse of discretion under other New Jersey case law?
6. Under Piscitelli v. City of Garfield Zoning Board of Adjustment 237 N.J. 333 (2019), is the conflicted planning board decision before null and void or warrants additional discovery?
7. Is the Order Granting ISBR Motion to Dismiss for Failure to State a Claim defective?
8. Under Montclair State University v. County of Passaic, 734 N.J. 434 (2018), a local municipal planning must consider the traffic safety impact of land use application on an adjoining road, even if that roadway is a "county road", and if not, the MLUL unconstitutional?
9. Under Piscitelli, Dunbar, and In Re Accutane, the current interpretation Whispering Woods at Bamm Hollow, Inc. v. Middletown Tp. Planning Board, 223 N.J. Super. 1, (NJAD 1987), *cert denied* 110 N.J. 173 (1988) New

Jersey Supreme Court because it is being unconstitutionally applied, and alternatively, the NJ MLUL is unconstitutional if a "Whispering Woods" hearings can circumvent the principles in the statute?
10. Defendant will not suffer any irreparable harm from a temporary injunction.
11. Under Dunbar Homes, Inc. v. Zoning Board of Adjustment of Township of Franklin, 223 N.J. 546 (2018), is a planning board approval of a sham land use application null and void and if not, is the NJ MLUL unconstitutional?
12. Under In re Accurate Litigation, 234 N.J. 340 (2018), is a planning board approval of a land use application that was based on incompetent testimony, null and void, and if not, is the MLUL is unconstitutional?
13. Under Cherokee LCP Land, LLC v. City of Linden Planning Board, 234 N.J. 403 (2018), is a township resident similarly situated to plaintiff have standing in the instant matter?
14. A Preliminary Injunction is consistent with Piscitelli, Dunbar, In re Accutane, among others.
15. Stay Pending Appeal to the United States Supreme Court.

Reasons Why Certification Should be Granted 11
Conclusion 27

Table of Authorities

Constitutional Authorities

United States Constitution Fourteen Amendment 13
New Jersey Constitution Articles 1, 13

Case Law Authorities

Cherokee LCP Land, LLC., V. City of Linden Planning Board, 234 N.J. 403 (2018) 25
Dunbar Homes, Inc. v. Zoning Board of Adjustment of Township of Franklin, 233 N.J. 246 (2018) 21-23, 26
Ghandi v. Caspedez, 390 N.J. 193 (NJAD 2007) 14
In Re Accutane Litigation, 234 N.J. 340 (2018) 24, 26
ISBR v. Township of Bernards, 226 F. Supp. 3d 320 (2016).4

Montclair State University v. County of Passaic, 234 N.J. 434 (2018) 19
Palisadium Management Corp. v. Borough of Cliffside Park, 456 N.J. Super. 293 (N.J.A.D. 2018) 24, 26
Piscitelli v. City of Garfield Zoning Board of Adjustment, 237 N.J. 333 (2019) 8-9, 15-17, 21
Plaza v. Bernards Township Planning Board, 2018 WL 3637515 (D.N.J. 2018) 5
Smith v. Twp of Bernards, 2017 WL 5892202 (DNJ 2017). 5
U.S. v. Decker, 957 F.2d 773, 777 (CA8 1992) 13
Waste Management of New Jersey v. The Union City Utilities Authority 399 N.J. Super. 508 (N.J.A.D. 2008) . . 20
Wawa Inc. v. Tw. of Westhampton, 182 N.J. 626 (2003) . 13
Whispering Woods at Bamm Hollow, Inc. v. Middletown \Tp. Planning Board223 N.J. Super. 1 (NJAD 1987) cert denied 110 N.J. 1U75 (1988) 21

Statutes

MLUL, Municipal Land Use Legislation N.J.S.A. 40:55-d-40.4 et seq. 2, 22-23
RLUIPA, Religious Land Use and Institutionalized Persons Act, 42 USC 2000cc et seq.. 1

ARTICLES

Bernards Township Official urged to yes vote on Mosque, then voted no, Bernardsville News, October 19, 2017 17

Table of Content to Appendix

1. August 19, 2019 [AMENDED] Notice of Appeal and Petition for Certification
2. May 24, 2019 New Jersey Supreme Court Order May 24, 2019 denying motion to stay the Appellate Division's briefing schedule as moot.
3. July 31, 2019 Appellate Divisions' July 30, 2019 ORDER denying Motions: to file pleadings of July 2, 2019 as within time, extend Time to File Pleadings of July 2, 2019 reconsideration of the appellate divisions June 12, 2019 Orders, file June 17 2019 pleadings as within time, extend the time to file the June 3, 2019 file the June 3, 2019 Brief and Appendix, Reinstate Appeal.

4. June 12, 2019 Order Granting [Joint] Motion to Dismiss appeal [WITHOUT PREJUDICE] for Failure to Prosecute.
5. June 12, 2019 ORDER Denying Motion for Reconsideration; Denying Motion to File as Within time a Motion for Reconsideration.
6. February 8, 2019 NJAD Order denying Appellant Motion Staying Briefing Schedule
7. November 19, 2018 DENY Motion stay and a preliminary injunction pursuant to R 2:8-1.
8. October 27, 2018 Amended Notice of Appeal
10. Civil Case Information Statement
11. Jun 7, 2019 Defendant opposition based plain legal error
12. May 1, 2013 Appellate Division Letter Motion for reconsideration after 10-day period.
15. ACMS Case Summary – SOM L – 00123-17
18. October 12, 2018 Order granting ISBR dismiss Complaint fail to state claim
19. October 12, 2018 Order denying Barth Order to Show Cause
20. October 12, 2018 Order granting Bernards' Motion for Summary Judgment
22. October 15, 2018 Amended Order granting Bernards Motion for Summary Judgement.
24. October 15, 2018 Amended Order denying Barth Order to Show Cause
25. October 24, 2018 [SECOND] Amended Order granting Bernards Motion for Summary Judgement
27. September 11, 2018 Plaza letter to Bernards Township Planning Board
29. June 5, 2019 **DEFENDANTS'** motion to dismiss appeal **WITHOUT PREJUDICE** for lack of prosecution.
37. Bernards Township Construction Permits for 124 Church street as of August 22, 2019
39. May 30, 2017 Bernards Township Press Release
42. November 18, 2016 Bernards Press Release