
Judge Dismisses Tabor Countersuit

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Superior Court Judge Linda A. Lager has dismissed a countersuit against the town of Branford filed by the Marcus Law Firm, saying the law firm jumped the gun.

She also said the subject of the firm's claim—a breach of fiduciary duty charge the town leveled against the firm—might well be restored on appeal.

The town sued the law firm for malpractice in August 2008 for allegedly doing a negligent job of representing it in the Tabor eminent domain case. The town filed three claims against the law firm: malpractice, negligence, and then added a breach of fiduciary duty in an amended complaint.

The judge's ruling was the latest development in what has become an ongoing legal feud between the town and its former legal counsel. The law firm, led by Ed Marcus, former chair of the Democratic State Committee, represented the town from 2005 to 2007 when Cheryl Morris served as first selectwoman. The firm moved from New Haven to North Branford in 2007.

The whole matter dates back to the Tabor case. The Tabor case began in 2003 when First Selectman Unk DaRos moved to take by eminent domain 77 acres of open space on Tabor Drive because of its proximity to the town's contaminated town dump. New England Estates, (NEE) a developer hoping to build condos there, sued the town after the town seized the land. It won a \$12.4 million judgment at the trial level. This judgment was later overturned by the State Supreme Court in what was a major victory for the town.

The subsequent malpractice and negligence charges remain intact, and they have been reviewed by an outside expert. But last December Judge Richard E. Burke, one of many judges who have ruled on this case since it was first filed in 2008, decided to throw out the breach of fiduciary duty charge. He said, in effect, that the town's complaint lacked requisite specificity. After Judge Burke ruled, attorneys representing the Marcus Law Firm quickly filed a countersuit against the town, asserting vexatious litigation and seeking monetary damages.

However, Judge Lager, in a 9-page written decision filed May 6, said the Marcus Law Firm acted prematurely. She dismissed the countersuit against the town saying it was not ripe for review. In doing so, she agreed with Attorney Kevin Shea, who argued on behalf of the town at the March hearing. Shea said the town was caught between a rock and a hard place because it was not permitted under law to appeal Judge Burke's ruling in order to try to restore the breach of fiduciary duty count until the case is over.

Judge Lager said that "in this case, permitting the defendants (the Marcus Law Firm) counterclaim for vexatious litigation exposes the town to a liability finding based on a judgment that may be reversed as well as to potential prejudice. On the other hand, the defendants will suffer no ascertainable harm in awaiting the termination of this action to pursue their claim if appropriate."

After her court hearing, the judge said the issue before her was to determine whether the allegations of the Marcus Law Firm's counterclaim "are legally sufficient" for a vexatious litigation counterclaim. Then she needed to decide if the claim "is presently ripe for adjudication."

As part of her legal research, Judge Lager also analyzed Judge Burke's decision to throw out the breach of fiduciary duty count. She indicated she disagreed with his conclusion. She said that "this court must conclude that at this point in time there is a chance that the trial court's decision on the claim of breach of

fiduciary duty could be overturned.”

At the March hearing Shea said the town planned to appeal Judge Burke’s decision but could not do so by law until the case was terminated. During the hearing, the judge told Fred Murolo, who represents the Marcus Law Firm, “You moved too quickly to give yourself a bit of a boost.” She observed that dismissing one count in a complaint is not unusual.

In her written decision, Judge Lager agreed with Shea’s position. She said the Marcus Law Firm’s “claim for vexatious litigation is premature. Accordingly, the court concludes that it lacks jurisdiction over the counterclaim on the ground that the cause of action for vexatious litigation is not ripe.”

A vexatious litigation lawsuit permits a party that has been wrongfully sued to subsequently recover damages for harm to his reputation and to reimburse him for the expense of defending against the unwarranted action.

The judge wrote there was a “narrow exception” to the “final judgment” rule. The exception centered on there being an issue of “such significance” in the case that the chief justice or the chief judge of the court having appellate jurisdiction, would have to review it.

Judge Lager observed that Judge Burke’s decision to dismiss the fiduciary duty count “does not meet the requirements of this exception. Thus, it is clear that the town is presently unable to appeal the court’s decision to strike the third count of the complaint.”

The town alleges that prior to the Tabor trial, the law firm and David Doyle, the firm’s litigator, failed to consult with experts; failed to disclose experts pursuant to court orders; failed to notify the plaintiffs or the plaintiffs replacement trial attorneys of the court-ordered deadlines regarding disclosure of experts; failed to timely obtain expert reports and failed to address legal issues and organize factual issues necessary to represent the town.

As a result, the judge overseeing the Tabor case, William T, Cremins, Jr., barred the town from presenting any environmental or financial expert testimony despite efforts by the town’s attorneys to get their evidence before the jury.

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