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PLEASE REPLY TO
ATLANTIC COUNTY OFFICE

May 12, 2014

Mayor Michael Becker
Municipal Building
9001 Winchester Avenue
Margate, New Jersey 08402

Re: The City of Margate Advertising
Our File Number: 60258-01

Dear Mayor Becker:

In accord with Resolution No. 74 of 2014, our law firm has been retained to represent, acting as the Solicitor, the interests of the City of Margate pertaining to potential litigation stemming from leased advertising space on multiple lifeguard/beach shacks. After receiving documentation from the City of Margate and speaking with Mayor Michael Becker, Clerk Tom Hiltner, Deputy Clerk Rosie

Freed, Commissioner Brenda Taube, Chief David Wolfson, CFO Lisa McLaughlin, and Dan Gallagher, Esq. representing Gigi Rosenberger/Marketplace Realty (hereinafter referred to jointly, severally, and in the alternative as Rosenberger), we present a brief introduction as to how the matter arose, followed by issues presented, a detailed statement of facts, conclusions and recommendations.

Introduction

At several work session meetings in the beginning in October of 2013, Commissioner Brenda Taube raised concerns about resolutions passed in 2011 granting advertising space on multiple beach shacks/tents to three local businesses. The concerns focused on deposits made on the day of the public auction, with no record that all remaining balances were paid, nor any record of any fully executed lease agreement pertaining to the advertising space.

One of the businesses involved is Marketplace Realty (hereinafter sometimes referred to as MPR), owned by Gigi Rosenberger. Rosenberger is well known in the City of Margate and

has been charitable to the City over the years. Among other things, Rosenberger has donated lifeguard boats and lifeguard umbrellas to the City of Margate. Rosenberger became aware of and took umbrage with Commissioner Taube's remarks publicly made at City of Margate meetings. An attorney for Rosenberger, Dan Gallagher, Esq., sent a letter dated February 6, 2014, to Richard Deaney, the Business Administrator of Margate, addressing Commissioner Taube's remarks. Attorney Gallagher maintained that Commissioner Taube's spoken remarks, also published in the Press of Atlantic City, were negative, false, and defamatory. The letter from Attorney Gallagher requested a public apology to Rosenberger and a written retraction in the Press of Atlantic City. Mr. Gallagher also appeared on behalf of Rosenberger at a City of Margate meeting on February 6, 2014, to reiterate the same concerns put forth in his letter. In a second letter dated February 20, 2014, Mr. Gallagher made the following demands of the City: A public apology for the insinuation of an outstanding debt, a written apology in the Press of Atlantic City and the Current, the right to continue supplying the

City with lifeguard boats and umbrellas, and reimbursement for attorney fees expended.

As evidenced by several e-mails, statements made in the Press of Atlantic City, and remarks made at public meetings, Commissioner Taube did not state that Rosenberger had any outstanding debts. Apparently, Commissioner Taube meant to focus concern on proper management of City contracts.

Issues Presented

(1) Was there a valid, enforceable contract entered into between the City of Margate and Rosenberger in 2011 for leased advertising space, and did Rosenberger breach the contract?

(2) Does Rosenberger have a viable defamation claim against the City of Margate?

(3) Does Rosenberger have a viable false light claim against the City of Margate?

(4) What is the appropriate resolution for the issues presented?

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Statement of Facts

On March 28, 2008, the City of Margate passed Resolution No. 55 of 2008 approving a public auction to take place on April 9, 2008 for advertising space on several beach shacks. The resolution called for a minimum bid of \$3,500.00 and that every bid be accompanied by 20% deposit.¹ A public notice of this auction was published on March 22 and March 29 of 2008. The notice specified a \$3,500.00 minimum bid and that each bid must be accompanied by a deposit of \$700.00.² Apparently, there is no record of any resolution awarding any contracts to the winning bidders of the April 9, 2008 auction. However, a lease agreement, signed by Rosenberger (not dated), Clerk Tom Hiltner, Commissioner Daniel Campbell, and Solicitor Mary Siracusa (dated July 17, 2008), granted MPR advertising space on four different beach shacks for 29 months, from May 1, 2008 to October 30, 2010. The total amount due before June 15, 2008 was \$4,666.66. Identical lease agreements were also awarded to Dino's Sub Shop and JEMM

¹ Resolution No. 55 of 2011 - Document marked "13"

² Public Notice of Auction - Documents marked "11" - "12"

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Hospitality/Gold Transportation.³ The records reflect a check from Dino's in the amount of \$4,666.66 dated August 16, 2008.⁴ At this time, we do not possess a record of payment made by MPR or JEMM for the 2008 lease; however, in an email from CFO Lisa McLaughlin to Commissioner Taube dated October 2, 2013, CFO McLaughlin stated that a total of \$14,000.00 in beach advertising revenue was received in 2008,⁵ which reflects the full payment from all three of the businesses.

At a Commission Work Session on November 4, 2010, CFO McLaughlin remarked that the beach advertising contracts ended in October, and that if the advertising program was to continue, the fees should be raised and Solicitor Siracusa should draft the resolution.⁶ On January 20, 2011, Resolution No. 24 of 2011 was passed authorizing a public auction to be held on February 16, 2011, to bid on beach advertising. The resolution called for a

³ Lease Agreements – Documents marked "1" – "9"

⁴ Check from Dino's – Document marked "5"

⁵ Email from CFO McLaughlin to Commissioner Taube – Document marked "P.40"

⁶ Work Session Minutes – Document marked "-31-"

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minimum bid of \$3,500, to be accompanied by a 20% deposit.⁷ Notice of the auction was published on February 2 and February 9 of 2011. The notice reiterated a \$3,500.00 minimum bid and that the bid be accompanied by a \$700.00 deposit.⁸ The City of Margate received a cashier's check in the amount of \$2,000.00 from MPR to the City of Margate, dated February 16, 2011, the same date of the public auction. A handwritten note on the check indicated that \$1,000.00 was for MPR and \$1,000.00 was for Dino's Sub Shop.⁹ The City of Margate records reflect one receipt to MPR for \$1,000.00 by check acknowledged by "MCS," one receipt to Dino's for \$1,000.00 by check acknowledged by "MCS," and one receipt to Gold Transportation for \$700.00 in cash acknowledged by Mary Siracusa.¹⁰ The City of Margate accounting software notes that these payments were for beach advertising.¹¹

⁷ Resolution No. 24 of 2011 – Documents marked "P.31" – "P.32"

⁸ Notice of Public Auction – Documents marked "P.33" & "P.68"

⁹ Copy of Check – Document marked "P.11"

¹⁰ Copy of Receipt – Document marked "P.11"

¹¹ Accounting Software – Document marked "McLaughlin 00005"

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On February 17, 2011, Resolution No. 44 of 2011 was passed authorizing the Commissioner of Public Works to execute leases with the winning bidders, naming MPR, Dino's Sub Shop, and JEMM Hospitality/Gold Transportation.¹² Letters dated March 18, 2011, were sent to the three winning bidders enclosing two copies of the leases, asking for signatures on both leases, return one, and keep the other. The lease provisions were for advertising space on one side of four beach shacks for a period of 36 months, from February 17, 2011 to February 16, 2014. The total amount due was \$4,666.66 to be paid in full before June 15, 2011.¹³

Sometime between mid-March of 2011 and the end of June of 2011, Solicitor Siracusa informed the Clerk's office that the leases needed to be revised to reflect a credit due to the businesses (lessees) complaining that their earlier advertisements had been vandalized and some went missing during the previous summer of 2010. Solicitor Siracusa informed the Clerk's office that she would make the revisions and send them out to provide some help for the

¹² Resolution No. 44 of 2011 – Document marked "P.30"

¹³ Letters and Leases – Documents marked "P.12" – "P.20"

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Clerk's office due to the impending May elections. Apparently, Solicitor Siracusa never made these revisions before she resigned sometime in June 2011.¹⁴

Throughout the fall of 2011, Clerk Hiltner was out of work on medical leave "off and on", starting sometime in September of 2011. Clerk Hiltner returned to work sometime in late November of 2011.¹⁵ Letters dated November 29, 2011 from Clerk Hiltner to MPR and the other two businesses were sent enclosing two copies of revised leases reflecting a \$200.00 credit and the \$1,000.00 deposit leaving a total balance due of \$3,466.66 due by December 31, 2011. The revisions on the leases were handwritten. The letter requested that two copies of the leases be signed and returned to be executed, and one executed copy would be mailed back.¹⁶ The City of Margate records reflect that JEMM Hospitality made the final payment in full by January 23, 2012.¹⁷ No further payment beyond the

¹⁴ 2/14/14 email from Clerk's office to Mayor Becker – Document marked "Wolfson/000005"

¹⁵ Interview with Tom Hiltner and 2/14/14 email from Clerk's Office to Mayor Becker – Document marked "Wolfson/000005"

¹⁶ Letters and Leases – Documents marked "P.21" – "P.29"

¹⁷ Check stub – Document marked "P.35"

2/14/14 email – Document marked "Wolfson/000005"

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February 16, 2011 deposit was made by either MPR or Dino's. There is also no record of any signed original lease agreement or signed revised lease agreement from any of the three businesses.

Based on an email from Commissioner Taube dated September 20, 2013, it appears that something was mentioned about the beach advertising at the September 19, 2013 City of Margate meeting within the context of the "Adopt-A-Beach" program.¹⁸ After the September 19, 2013 meeting, CFO Lisa McLaughlin was asked to look into the beach advertising program. (CFO McLaughlin does not recall who it was that came to her, but believes that it was either Richard Deaney or Commissioner Taube). In an email from CFO McLaughlin to Commissioner Taube dated October 2, 2013, CFO McLaughlin stated that the City received revenue from beach advertising in 2008 in the amount of \$14,000.00, in 2011 in the amount of \$2,700.00, and in 2012 in the amount of \$2,766.00.¹⁹ According to CFO McLaughlin in an email to Mr. Deaney dated December 11, 2013, MPR and Dino's

¹⁸ 9/20/13 email from Commission Taube to Tom Hillner – Document marked "P.43"

¹⁹ 10/2/13 email from CFO McLaughlin to Commission Taube – Document marked "P.40"

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Sub Shop each owe a total of \$3,639.00 including interest.²⁰ Since the time of the discoveries pertaining to the unsigned leases and alleged unpaid balances, Commissioner Taube has been seeking answers. In an interview with CFO Lisa McLaughlin, Ms. McLaughlin stated that it is not uncommon for the City of Margate to operate on unsigned contracts.

Comments were made at multiple public meetings, including October 3, 2013,²¹ December 19, 2013,²² and January 16, 2014,²³ alleging that money is missing. At the January 16, 2014 meeting, Mr. Deaney stated that no money is missing, rather payments were not made by advertisers, per contract.²⁴ Based on these comments and questions raised by Commissioner Taube, Mr. Deaney, and others, Rosenberger reportedly felt as though there were insinuations that she has an unpaid debt.²⁵ In Mr. Gallagher's

²⁰ 12/11/13 email from CFO McLaughlin to Richard Deaney – Document marked "P.2"

²¹ Work Session Minutes – Document marked "P.3"

²² Work Session Minutes – Document marked "P.4"

²³ Work Session Minutes – Document marked "P.5"

²⁴ Work Session Minutes – Document marked "P.5"

²⁵ 12/11/13 email from CFO McLaughlin to Mr. Deaney – Document marked "P.2"

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February 6, 2014 letter to the City, he stated that the comments were false and defamatory. He also stated that:

In 2008, my client [Rosenberger] and the owner of Dino's in Margate were approached about advertising on the back of lifeguard tents. She continued with this practice until she was told in 2011 that the advertisement would go out to bid. After making a deposit for Marketplace and Dino's, my client decided she would not bid in 2011. She never attended a bid auction in 2011 and there is no signed contract.²⁶

Thereafter, in a letter dated February 20, 2014, Mr. Gallagher, on behalf of Rosenberger, made the following demands on the City of Margate:²⁷

- (1) A public apology for the insinuation of an outstanding debt;
- (2) a written apology in the Press of Atlantic City and the Local Current;
- (3) the right to continue supplying the City with lifeguard boats and umbrellas;
- (4) and reimbursement for attorney fees.

²⁶ Letter from Dan Gallagher to City of Margate – Documents marked "P1" – "P2"

²⁷ Document marked "P1" – P2"

Conclusions and Recommendations

(1) Was there a valid, enforceable contract entered into between the City of Margate and Rosenberger in 2011 for leased advertising space, and did Rosenberger breach the contract?

There was a valid contract and Rosenberger is in breach of the contract. Since the Statute of Frauds applies to leases “for more than three years,” arguably the Statute of Frauds should not apply to the instant lease agreement which, is for a period of exactly 36 months. Even if the Statute of Frauds is considered applicable, the Statute of Frauds allows for an unsigned contract to be enforceable as long as “the real estate, the term of the lease and the identity of the lessor and the lessee are proved by clear and convincing evidence.”²⁸ In the instant case, there is “clear and convincing” evidence that such a contract existed and there was partial performance from both parties.

In Mr. Gallagher’s initial letter dated February 6, 2014, he stated that Rosenberger initially started the beach advertising in

²⁸ N.J. Stat. §25:1-12(b)

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2008 when the City approached her, but was not interested in 2011 when she was told it would go out to bid; however, Mr. Gallagher acknowledged Rosenberger placed a deposit in 2011. Mr.

Gallagher's argument may be that Rosenberger did not have to bid in 2008, so she should not have needed to bid in 2011. The records indicate, however, that a bid was required in 2008, so it should not have been a surprise that a bid would be required in 2011. Also, a cashier's check in the amount of \$2,000 (\$1,000 for MPR and \$1,000 for Dino's) was made out to the City of Margate on February 16, 2011, the same day that the auction was held. If Rosenberger did not intend on bidding for the advertising space, what was this check intended for?

If it can be shown that the check was specifically for a deposit, it should suffice as partial performance on the part of Rosenberger; and, the fact that the City provided the advertising space for MPR, and did so for the entire 3 year period, the City also performed, at least in part if not in full. If a deposit alone does not suffice as partial performance, certainly, taking all of the evidence together

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should suffice as a contract in-fact. The deposit of \$1,000.00, along with the receipt and no objection to an original and revised contract detailing the provisions mailed to Rosenberger, the placement of the advertising signs for the three year period, collectively, is evidence of assent to the terms by Rosenberger.

Finally, should it be found that no valid, enforceable contract existed, the City would probably still succeed in collecting under the theory of quantum meruit. "Quantum meruit is a form of quasi-contractual recovery and 'rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.'"²⁹ Rosenberger benefited by being able to advertise for three years without full payment, constituting an unjust enrichment. The City of Margate should be able to collect for the value of the advertising space for all the time the advertisements were up.

²⁹ Weichert Co. Realtors v. Ryan, 128 N.J. 427, 437 (1992) (quoting Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108 (App. Div. 1966)).

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(2) Does Rosenberger have a viable Defamation claim against the City of Margate?

Rosenberger does not have a viable defamation claim against the City of Margate.

(1) Under the New Jersey Tort Claims Act, a plaintiff has 90 days to file a notice of potential tort claims against a municipality and public officials unless there is some extraordinary circumstance preventing a plaintiff from filing such a notice. Rosenberger has failed to file such notice in a timely manner, and therefore should be barred from filing a tort claim against the City of Margate arising from any comments made publicly at City of Margate meetings.³⁰

(2) Under the Tort Claims Act, the City of Margate should be awarded absolute immunity against any remarks made by Commissioner Taube.

³⁰ It is arguable that the letters dated 2/6/14 and 2/20/14 from Dan Gallagher could suffice as a Notice of Tort Claim based on the "substantial compliance" doctrine. (See, Vargas v. Camden City Bd. of Educ., 2006 U.S. Dist. LEXIS 13357, 13-15 (D.N.J. Mar. 28, 2006).

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(3) In regards to any civil rights claim, Commissioner Taube is an elected official, and as such, should be afforded qualified immunity. "Qualified immunity shields government officials from personal liability for civil damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"³¹

(4) For civil rights claims, there is no basis for municipal liability under Monell principles, and there is no respondeat superior liability for civil rights violations.

(5) Commissioner Taube's remarks were not defamatory as they were not false. "As a general rule, a statement is defamatory if it is false, communicated to a third person, and tends to lower the subject's reputation in the estimation of the community or to deter third persons from associating with him."³² There was a resolution in which MPR was awarded the lease, there were copies of an unsigned lease agreement pertaining to the advertising space naming MPR, and the records indicated that some remaining

³¹ George v. Reibel, 738 F.3d 562, 571-72 (3d Cir. 2013), (quoting, Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

³² Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 164-65 (1999) (citing Restatement §§ 558, 559).

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balances had not been paid. These facts are all true and verifiable. Commissioner Taube never accused MPR of being in breach of contract, but was merely questioning the existence of the resolution, the contracts, and some payments not recorded. In fact, arguably, Commissioner Taube never made any statements, rather, she was only trying to elicit the facts of the situation.

Even if Commissioner Taube's remarks are considered to be defamatory statements, the statements made by Commissioner Taube were of public concern. A city commissioner asking questions about accounting and contract management measures may be what taxpayers expect out of their elected officials. In order to succeed in a defamation claim against an elected government official with qualified immunity, Rosenberger would need to prove, by clear and convincing evidence, that the elected official, Commissioner Taube, knew the statements were false or acted in reckless disregard of the truth. The record indicates it is more accurate to characterize Commissioner Taube as asking questions to seek the full truth, and her questions and remarks were based on available documentation.

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Evaluating Commissioner Taube's remarks within the entire context, it is highly unlikely a trier of fact would find she acted with reckless disregard of the truth.

(3) Does Rosenberger have a viable False Light claim against the City of Margate?

It appears the City of Margate should be afforded absolute immunity and Commissioner Taube should be afforded qualified immunity. Even if the City is not afforded absolute immunity, it is nevertheless clear, as with the defamation claim, Commissioner Taube did not recklessly make any false statements. Moreover, based on an objective standard, Commissioner Taube's remarks were not highly offensive to Rosenberger.

(4) What is the appropriate resolution for the issues presented?

The City of Margate has a strong defense against any possible defamation or false light claim. As for the contract issue, although the City of Margate has some strong arguments, without a signed contract, there are difficulties to overcome. Based upon the relatively small amount owed, the counterbalancing costs of

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litigation, and the appropriate consideration for generous donations from Rosenberger to the City of Margate over the years, it is recommended the City of Margate should waive the balance due on the beach advertising and not pursue related claims if Rosenberger also agrees to waive any and all claims arising out of or related to the MPR advertising under City of Margate Resolution Numbers 24 and 44 of 2011. With the authorization of the City of Margate, it is recommended that a mutual release be extended to Rosenberger including the following terms for both parties:

- (1) City of Margate waives all claims against Rosenberger arising out of or related to the beach advertising and Resolution Numbers 24 and 44 of 2011, including any claim for fees or costs;
- (2) Rosenberger waives all claims against City of Margate arising out of or related to Resolution Numbers 24 and 44 of 2011, including, but not limited to, defamation and false light.
- (3) No admission of fault, blame, or damage

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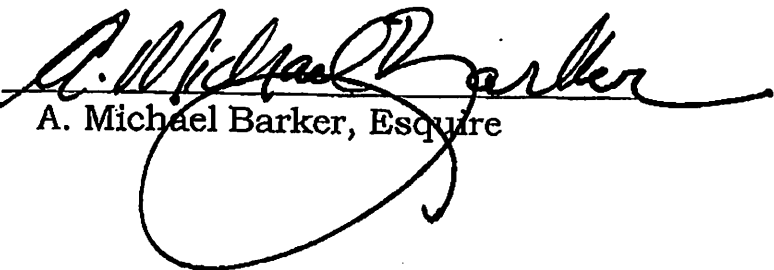
(4) No curtailment of Rosenberger continuing to provide lifeguard umbrellas or boats in accord with earlier donations, should Rosenberger elect to so continue.

Please contact me with any questions and to advise on how you wish to proceed.

Respectfully submitted,

BARKER, GELFAND & JAMES
A Professional Corporation

AMB/gd

By: 
A. Michael Barker, Esquire