

STATE OF INDIANA)
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COUNTY OF PORTER)

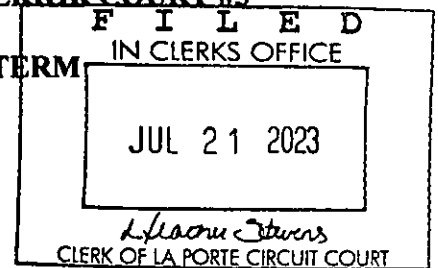
FRIEDMAN & ASSOCIATES,
P.C., an Indiana professional
corporation,
Plaintiff,

VS.

TIMOTHY J. STABOSZ,
Defendant.

THE LAPORTE SUPERIOR COURT #3

2023 CONTINUOUS TERM



CAUSE NO. 46D03-2205-PL-000651
Special Judge Mary A. DeBoer

ORDER FROM HEARING ON JULY 19, 2020

Plaintiff, Friedman & Associates, P.C. (hereinafter, Friedman) appeared in person by Shaw Friedman and by Counsel, Clay M. Patton. Defendant, Timothy J. Stabosz (hereinafter, Stabosz) appears by Counsel, J. Thomas Vetne. Cause set for hearing on Stabosz's Motion to Dismiss which the Court converted to a Motion for Summary Judgment and Friedman's Motion for Partial Summary Judgment on Counts I and III. Hearing held. The Court, having taken this matter under advisement and being duly advised, now finds and ORDERS:

Brief Summary of Relevant Facts

1. On May 4, 2022, Friedman filed a Complaint that landing in the LaPorte Superior Court #3. In its Complaint, Friedman alleges that Stabosz is the "duly elected auditor" and that despite Friedman submitting invoices for its legal representation of LaPorte County, Stabosz refused to pay the amounts due. Friedman's claims sound in negligence, conversion/theft, and official misconduct against Stabosz in his individual and personal capacity.
2. Because of long-standing contentious issues between Attorney Friedman and Auditor Stabosz, this Cause was venued out of LaPorte County and landed in Porter Superior Court 5.

3. On June 28, 2022, Stabosz filed Defendant's Motion to Dismiss. In his motion, Stabosz claims that Friedman sued the incorrect party by filing the lawsuit against Stabosz individually instead of Stabosz as the LaPorte County Auditor. Further, Stabosz argues that since the claims alleged are exclusively related to Stabosz's responsibilities and duties as Auditor, Friedman was required to comply with the Indiana Tort Claims Act (hereinafter, ITCA) by filing notice of the claim within 180 days of the loss.
4. On July 12, 2022, Friedman filed Plaintiff's Response to Defendant's Motion to Dismiss. Friedman's argument focused on the idea that Stabosz acted outside the scope of his duties by wrongfully denying Friedman's claims because Stabosz had no discretion to refuse to pay approved claims. Therefore, argues Friedman, the ITCA did not apply and Friedman is able to pursue damages from Stabosz individually. Finally, if the ITCA is in play, Friedman substantially complied with the notice requirement. Attached to its response, Friedman attached Exhibit A: three letters dated March 15, 2022, October 29, 2021, and September 16, 2021 from State Board of Accounts State Examiner Paul D. Joyce, CPA to LaPorte County Auditor Stabosz and the LaPorte County Board of Commissioners, and Exhibit B: the State Board of Accounts' Prescribed Forms, Taxes, General Information, Local Policies, and Deposits and Investments 2017 publication.
5. On August 15, 2022, the Court entered a Notice of Summary Judgment in which the Court informed the parties that it would consider Stabosz's Motion to Dismiss to be a Motion for Summary Judgment due to the extraneous materials attached to Friedman's response.
6. On November 18, 2022, Friedman filed Plaintiff's Partial Motion for Summary Judgment on Count I and Count III of Plaintiff's Complaint. In its motion, Friedman asked the Court to grant it summary judgment related to its claims of negligence per se and official misconduct. With its motion, Friedman also filed its Memorandum in Support of [its motion] and its Designation of Evidence. Friedman's designated evidence included an Affidavit of Carol Heinold, Friedman's Senior Legal Assistant; "LaPorte County Board of Commissioners Owes Friedman & Associates" summary; the three letters previously referenced

from the State Board of Accounts to Stabosz, the same State Board of Accounts' Prescribed Forms, Taxes, General Information, Local Policies, and Deposits and Investments 2017 publication attached to its response to Stabosz's Motion to Dismiss; and a February 16, 2022 through March 15, 2022 Invoice submitted to LaPorte County Board of Commissioners. On January 4, 2023, Friedman filed Plaintiff's Designation of Additional Evidence containing the Affidavit of Diane Gonzales, Executive Assistant to the LaPorte County Board of Commissioners with a summary of what LaPorte County owed Friedman.

7. On February 22, 2023, Stabosz filed Response to Plaintiff's Motion for Partial Summary Judgment Under Ind. T.R. 56. Stabosz also filed Timothy J. Stabosz's Designation of Evidence designating the Complaint.
8. On March 2, 2023, Friedman filed Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment on Count I and Count III of Plaintiff's Complaint.

Law Related to Summary Judgments

1. In *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009), the Indiana Supreme Court held that summary judgment is appropriate if the designated evidentiary matters show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The trial court must draw all reasonable inferences in favor of the non-moving party. Here, the non-moving party is Joseph.
2. The moving party must overcome its initial burden of making a *prima facie* showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. If the moving party is unable to carry this burden, summary judgment is inappropriate. However, if the moving party is able to carry this burden, then the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013).

3. It is incumbent upon the trial court to construe all factual inferences in favor of the non-moving party and resolve all doubt as to the existence of a material issue against the moving party.
4. In *City of Lawrence Utilities Service Board v. Curry*, the Court of Appeals held that a fact is material if its resolution would affect the outcome of the case and an issue is genuine if a trier of fact is needed to resolve the parties' differing accounts of the truth or if the undisputed material facts support conflicting reasonable inferences. 55 N.E.3d 895, 899 (Ind. Ct. App. 2016).
5. Where material facts conflict or where conflicting inferences are possible, summary judgment is inappropriate. Summary judgment should not be used as an abbreviated trial. *Golba v. Kohl's Dept. Store Inc.*, 585 N.E.2d 14, 15 (Ind. Ct. App. 1992).
6. "When summary judgment is granted based on the construction of a written contract, the trial court has either determined that the contract is not ambiguous or uncertain, or that any contract ambiguity can be resolved without the aid of a factual determination." *Franciscan Alliance Inc. v. Metzman*, 192 N.E.3d 957, 963 (Ind. Ct. App. 2022).
7. Summary judgment is a lethal weapon. Courts must be mindful of its aims and targets and beware of over-kill in its use. *Mundia v. Drendall Law Office PC*, 77 N.E.3d 846, 853 (Ind. Ct. App. 2017).

Stabosz's Motion to Dismiss Converted to Motion for Summary Judgment

8. Each count of Friedman's Complaint makes allegations that Stabosz improperly used his office by violating his duty to pay authorized invoices, by withholding county funds from Friedman for the payment of its invoices committed theft/conversion, and by engaging in misconduct as Auditor.
9. When reviewing relevant statutes and case law pertaining to Friedman's suing a government employee personally, to say that the law is a briar patch would be an understatement. Here, clearly Stabosz was acting as the Auditor of LaPorte County when he made the decisions he did not to pay the invoice claims submitted by Friedman for the work Friedman did. Every claim Friedman makes

in his complaint against Stabosz flows from Stabosz's authority, or abuse of his authority, as the Auditor. On the surface, it would appear logical that because of this fact, Friedman would have to comply with the ITCA and provide the requisite notice. On the other hand, there are far too many questions looming regarding Stabosz's alleged blatant abuse of his powers as the Auditor which would place his actions outside the scope of his employment. If Stabosz's actions fall outside of the scope of employment and Friedman complied with I.C. 34-13-3-5(c), then the ITCA rules do not apply.

10. A jury could reasonably find that Stabosz used his position as Auditor to needle and harass Friedman by not paying claims that had been authorized/approved by the LaPorte County Board of Commissioners. Given the parties' notorious animosity toward each other, a jury could reasonable determine that Stabosz acted outside the scope of his employment to further his own personal agenda against Friedman.
11. The Court finds that there are genuine issues of material fact precluding granting summary judgment for Stabosz. The Court denies Stabosz's motion for summary judgment.

Friedman's Motion for Partial Summary Judgment as to Counts I and III

12. Count I of Friedman's Complaint alleges negligence per se. Count III alleges a claim of Official Misconduct.
13. The Court also finds that there are genuine issues of material fact precluding the Court from granting summary judgment as to these two claims. The Court denies Friedman's motion for partial summary judgment as to these two counts.
14. All prior and non-conflicting orders remain in full force and effect.

SO ORDERED THIS 21st DAY OF JULY, 2023.



**Mary A. DeBoer, Special Judge
LAPORTE SUPERIOR COURT #3**

Distribution:

Attorney Clay Patton (Friedman)

Attorney J. Thomas Vetne (Stabosz)