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SUPREME COURT OF NEW JERSEY
Docket No.
App. Div. Docket A-4973-14T4

BRIAN D. ASARNOW,

Plaintiff-Appellant-Petitioner,

v.

CITY OF LONG BRANCH, a municipal corporation of NJ; ADAM SCHNEIDER, Mayor; MARY JANE CELLI, Councilwoman; HOWARD WOOLLEY, Administrator; KEVIN HAYES, Director of Building & Development; MICHELLE BERNICH, Zoning Officer; TERRY JANECZEK, Chairperson, Zoning Board; MICHAEL IRENE, Zoning Board Attorney; ZONING BOARD; EDWARD BRUNO and E&L PAVING, INC.; RAYMOND GRIECO and ATLANTIC PAVING (& COATING), LLC; JOE ROSARIO & ROSARIO CONTRACTING CORP., d/b/a ROSARIO MAZZA DEMOLITION AND RECYCLING CO.; CUSTOM LAWN SPRINKLER CO., LLC; R. BROTHERS CONCRETE, LLC,

Defendants-Respondents.

PETITION FOR CERTIFICATION

Sat below: Sabatino, J.A.D.
Nugent, J.A.D.
Currier, J.A.D.

Honorable Justices:

Petitioner, Brian D. Asarnow, submits this Petition for Certification seeking review of the attached decision of the Superior Court of New Jersey, Appellate Division, Docket No. A-4973-14T4. (PA1-8).

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Questions Presented

1) In a nuisance trial, are prior municipal findings that the defendant expanded use on its property without prior approval, had prior citations for zoning violations, had similar ongoing citations, and committed other trespasses onto the plaintiff's land, admissible to prove the plaintiff's claim?

2) Are a municipality and its officials liable in tort to a citizen for their willful and wanton refusal to enforce the municipality's zoning and use laws?

Matter Presented

This case arises from the defendants' willful and continuous violations of zoning laws in the City of Long Branch that have caused grave damage to adjoining property owner, plaintiff Brian Asarnow. In the Law Division below, plaintiff sued the private defendants who owned and originally operated on the adjoining properties -- E&L Paving and its owner Edward Bruno, as well as the tenants leasing and currently operating on the properties -- Ray Greico and Atlantic Paving and Coating LLC, Joe Rosario and Rosario Contracting Corp., d/b/a/ Rosario Mazza Demolition and Recycling Co., and Custom Lawn Sprinkler Company, LLC. and R. Brothers Concrete, LLC. Plaintiff sought declaratory, injunctive, and monetary relief primarily on grounds of continuing nuisance. (App. Div. Appendix ("A"), A1). Plaintiff charged that Bruno and his company, E&L Paving, and

then its tenants, Ray Greico and Atlantic Paving and Coating LLC, and Joe Rosario and Rosario Contracting (a demolition company) and Custom Lawn and Sprinkler Company, and R. Brothers Concrete, have used their adjacent lots to operate heavy equipment, stockpile equipment and materials, and conduct other activities that are improper per the zoning laws as lacking site plan approvals during various times in question and are unreasonable uses of the land that have interfered with plaintiff's use and enjoyment of his neighboring land. (A2,9).

When trial commenced before a jury on plaintiff's nuisance claim, however, the trial court limited the evidence that plaintiff could introduce to prove his claim. The court precluded evidence that the defendants had prior and ongoing zoning and use violations on the properties in question. Plaintiff wanted to describe for the jury how the defendants' uses of their adjoining properties exceed those permitted and authorized under the governing zoning laws. Defendant Rosario, for instance, operated "Rosario Mazza Demolition," which involved demolition jobs. This far exceeded the limited zoning permit that had been issued to Atlantic Paving in August 2009. (6T72:1-25; A480). Rosario's other business, Custom Lawn and Sprinkler, likewise exceeded the limited use permitted even as of 2009. (6T73:1-25). Neither was R. Brothers Concrete mentioned on the zoning permit. Plaintiff also wanted the jury

to know about defendants' prior guilty pleas for expanding the uses on their property without prior approval. But the trial court precluded plaintiff from introducing this evidence. The jury thus never heard the evidence and, without it, defendants could tell the jury that their uses on the property were perfectly "lawful" and "reasonable." The jury then predictably returned a verdict for the defendants and against plaintiff on his nuisance claim. (11T105:1-108:25; A1681, 1683; A159).

Plaintiff also sued the City of Long Branch and its employees in his Complaint, charging that the City employees knowingly permitted uses and other activities on the defendants' properties that, the employees knew, exceeded the uses permitted on the properties under zoning and related regulations – enabling the private defendants to continue and, in fact, escalate their nuisance, harming plaintiff on his adjoining lot. Plaintiff charged that the City's employees both abetted and failed to abate the private defendants' zoning and related occupancy violations, and then issued an August 2009 zoning permit to attempt to grandfather and expand the already existing but, in fact, non-permitted use that had been ongoing on the defendants' property without needed, prior site plan approval, for which defendants Bruno/E&L were found guilty three times prior. Plaintiff sought damages against the City employees for willful and knowing torts asserting claims for nuisance,

tortious interference with economic advantage and contractual relations, intentional infliction of emotional distress, breach of fiduciary duty, civil conspiracy, and violation of his civil rights, (A1), and against the City for *respondeat superior* liability. The trial court dismissed plaintiff's claims against the public entities on summary judgment, however. (PA1-8).

Plaintiff appealed to the Appellate Division and contended (among other things) that the trial court's rulings improperly handcuffed his presentation of his nuisance claim, and that his claims against the municipal defendants were improperly dismissed. But the appeals panel affirmed, stating that the trial court's evidentiary rulings did not create a "manifest denial of justice" for plaintiff at trial, and rejecting plaintiff's claim that summary judgment for the Long Branch public defendants was improper. (PA1-8).

ARGUMENT

POINT I

THE COURT SHOULD GRANT CERTIFICATION TO CLARIFY THAT UNDER NEW JERSEY LAW, EVIDENCE THAT DEFENDANTS HAVE EXPANDED A USE WITHOUT PRIOR APPROVAL INCLUDING PRIOR CITATIONS AND FINDINGS OF GUILT FOR SAME IS ADMISSIBLE EVIDENCE AT TRIAL TO SUPPORT THE PLAINTIFF'S NUISANCE CLAIM.

Nuisance is established when a plaintiff has presented evidence of "unreasonable interference with the use and enjoyment of land." Sans v. Ramsey Golf & Country Club, Inc.,

29 N.J. 438, 448 (1959). The Model Charge confirms, "The word 'nuisance,' as used here, means an unreasonable interference with the use and enjoyment of one's land which results in material interference with the ordinary comfort of human existence, *i.e.*, annoyance, inconvenience, discomfort or harm to the person or property of another. An owner of property has the right to the reasonable use of his/her land. In determining what is reasonable, you must weigh the utility of defendant's conduct against the extent of the harm suffered by plaintiff. The question is not simply whether a person, here plaintiff, is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of defendant's land."

This Court should grant Certification to clarify that evidence of prior and ongoing zoning violations by defendants is relevant and admissible to prove whether defendants have committed an "unreasonable interference with the use and enjoyment of" plaintiff's land. Evidence that defendants' activities on and off their adjoining properties -- operating heavy equipment, stockpiling of equipment and materials, restricting plaintiff's access to his property, -- were activities that were not permitted due to lack of prior site plan approval, thus exceeded those permitted by the zoning regulations, and is relevant to plaintiff's nuisance claim.

Whether defendants' use of their lots was in accordance with the use permitted on the property by the zoning and other laws and regulations in effect was relevant to the jury's assessment, per the Model Charge, of whether defendants' activities were both "an unreasonable use of defendant's land" and "an unreasonable interference" with plaintiff's own use and enjoyment of his land, and was relevant to whether defendants, as owner and lessees of the neighboring lots, were within their "right to the reasonable use of" their land. The propriety of defendants' activities vis-à-vis the applicable zoning laws and site plan and other regulations was relevant to the jury's determination of "what is reasonable" -- of the jury's charge to "weigh the utility of defendant's conduct against the extent of the harm suffered by plaintiff. The question is not simply whether a person, here plaintiff, is annoyed or disturbed, but whether the "annoyance or disturbance arises from an unreasonable use of defendant's land."

The trial court thus erred in precluding plaintiff and his expert appraiser from testifying or submitting photos mentioning "legal or illegal" or nonconforming uses on defendants' property. (8T17:1-18:20, A1701, A1729). When plaintiff attempted to introduce into evidence deposition testimony from a zoning officer (Michelle Bernich), noting that Bernich had discussed with her boss, Carl Turner, "that there should be no

stockpiling or expansion of use" on defendants' properties, the court said, "this is a nuisance case, this isn't a zoning case." Defendant's counsel said it was already determined that the Long Branch zoning officer was entitled to issue the 2009 zoning permit to defendants. (10T35:1-37:25). The court said, "the zoning case has already been adjudicated." (10T38:1-10). Plaintiff's counsel argued that the stockpiling and expansion of use on defendants' lots noted by the zoning officials showed that defendants had expanded the use beyond the zoning permit conditions without site plan approval. (10T39:1-25). But the court precluded such evidence and argument, stating that Judge Perri had adjudicated the legality of the 2009 zoning permit. (10T42:1-44:25). This Court should clarify that evidence of the zoning violations exceeding the permit was directly relevant and admissible to prove plaintiff's nuisance claim at trial.

The trial court made the same error in precluding deposition testimony of municipal zoning official Carl Turner. (10T46:1-52:25). The court said, "there has been nothing … presented that would establish a *per se* violation of the nuisance statute by virtue of [an] … inappropriate use, zoning use … of the property." (10T51:1-25). The court said that it would not charge the jury about any "zoning issues," only about the "tort of nuisance." (10T52:1-10). The court also precluded evidence, via deposition testimony of Assistant Planning

Director Turner, that E&L Paving's use of the property "was restricted to inside of [the] original garage" on defendants' property. (A561-562,572,575). "That's a zoning determination," the court said in precluding the jury from hearing this evidence. (10T55:1-25). These issues arose again during the final charge conference below, before summations. Defendants' counsel objected to any evidence or argument by plaintiff of lack of site plan approvals on defendants' lots, arguing, "the existence or lack thereof [of] a site plan is a zoning issue" that is not relevant to plaintiff's nuisance claim. (11T20:1-10). The trial court agreed, ruling that the failure to obtain site plan, occupancy, or zoning approvals by the defendants was not relevant to any element of plaintiff's claims and would not be admitted before the jury. (11T20:1-21:5).

This Court should clarify that all this evidence was relevant to whether defendants' use of their lots was in accordance with the use permitted on the property by the zoning and other laws and regulations in effect, which in turn was relevant to the jury's assessment of whether defendants' activities were "an unreasonable use of defendant's land" and "an unreasonable interference" with plaintiff's use and enjoyment of his land; and whether defendants were within their "right to the reasonable use of" their land.

Precluding this evidence completely handcuffed plaintiff's presentation of his nuisance claim before the jury. Because of the trial court's rulings, the jury was not apprised that the uses of and activities conducted on defendants' lots were not, in fact, all in accordance with applicable zoning and sub-division regulations in effect during various time periods in question. Defendants' counsel could thus argue to the jury, during summation, that defendants' actions on and uses of their lots was proper and part of the "industrial zone" -- "clearly an area that is devoted to business."

> So you understand and have been told that the property is located in Long Branch off of the area of Broadway, 7th Avenue, Morris Avenue. It's in a zone which is characterized as a commercial zone, industrial zone, and -- and one part is by a residential zone.
>
> And you can see the context as indicated by D-l as to where the property is.
>
> The significant item that I think that you should consider is the Community Place area where it impacts on Mr. Asarnow's property, the property occupied by -- by the defendants, and then the context of the -- the Long Branch -- the -- the railroad line, the Town Hall, the police department, Seashore Day Camp, and all those other businesses around there.
>
> My point in saying that to you and in mentioning it to you again is that this is clearly an area that is devoted to business. And with all the different things that one would expect that would be associated with business, business is being done down there. It's being done by the defendants, and it's done by -- by Mr. Asarnow, you know, after a fashion, and everybody is down there working.

> You've heard testimony in regard to the work that's being done on the property that's really the subject matter of this 63 Community Place, and you understand what type of work is being done there.
>
> That's been made very clear.
>
> The reason why that is -- that is important in the context of this case is that it is all something that one might expect to be done down there. It's nothing that's -- that is unusual or unreasonable in any context or is -- may be otherwise, you know, according to the common usage of that word. [11T25:1-26:25]

Defendants' counsel could tell the jury that the operations on defendants' lots were "noisy" but were "industrial activities" permitted on defendants' lots:

> Okay. And I will grant you that industrial activities probably could be noisy.
>
> But then so could -- so could my lawnmower. But the fact is that, yes, it can be noisy, and, in fact, it would be noisy. Cars, trucks, lifts, things like that, they operate on engines, gas engines, and they make noise.
>
> Insofar as the particular other activities going on over there, Mr. Asarnow says well, you know, there -- there -- well, we -- we can't -- that's not something that can be done. When you -- when you work sometimes you create -- you might create dirty conditions, and sometimes it may not be something that a neighbor would want to see. But the fact of the matter is that Mr. Asarnow is not living down there.
>
> He is operating a business down there devoted to industrial uses in the same zone that the defendants are -- are located in. So that is not a valid area for him to complain about.
>
> So noise, his characterization as to what may be unsightly, again those are not something that a reasonable person should say the context of the

property is a -- something that he should reasonably object to. [11T28:1-25]

Counsel could portray the history of uses on defendants' lots as fully compliant with all zoning and use regulations:

> Now, at the time he purchased this property, Mr. Bruno had been in that property for almost 30 years. So there's no secret stuff about what -- what was occurring on the property here at 63 Community. Mr. Asarnow, when he was here, was well aware that there was paving activities going on there, there were trucks going down there, there were machinery that Mr. Bruno indicated, there were pavers that would go there, and that's the main entrance into that property.
>
> Mr. Bruno indicated that there were other individuals who -- who used, associated contractors that used that property to -- to put machinery back there. You know, they were going in and out. And nothing's changed on this street since he -- he purchased it. [11T34-35]
>
> ***
>
> Mr. Asarnow's main objection is that he doesn't like the way the property is being used. And that's -- that's unfortunate. We can't help that. And reasonably we can't be expected to change that because he doesn't like the way things are going on down there. **There is nothing in the law that says that we have to.**
>
> Mr. Bruno operated that property since 19 -since the 1960s and up through to 2007. Mr. Rosario and Mr. Grieco then took over in 2000 -- 2009. And you can see -- you can see the photographs what -- you know, what they're doing on the property. You've seen the -- some of the paperwork that they have indicating that they're entitled to use the property that way and that there are documents there with their name on it. There's Mr. Rosario's name on it, there's Mr. Grieco's name on it.
>
> The -- this they're entitled to use the property in the way that they're using it. **There's nothing in**

any of the evidence to indicate that they're not entitled to do so. There's not a shred of evidence.

[11T47-48 (emphasis added)]

Because of the trial court's rulings, the jury never heard the long history of ongoing zoning violations and numerous evasions of site plans and findings of guilt at defendants' properties (see 9T66:1-10, plaintiff's counsel noting to judge that because of rulings counsel "was skipping massive points" that would have been elicited from plaintiff on direct examination). The jury never heard that in January 1984, the zoning officer issued a letter to the City Attorney concerning E&L's improper storage of vehicles and equipment, and moving of soil, on Lots 19, 20, 21 and 40 and stated Bruno had been found guilty of same and that site plan approval was required. (A1848). The jury never heard that in January 1986, the City as plaintiff, and E&L, Bruno, and Long Branch Asphalt Company, terminated litigation by entering a permanent restraining order prohibiting E&L from stockpiling dirt on Lot 40 due to E&L's first site plan being evaded. (A1849).

The jury never heard that in September 1998, the City zoning officer sent a letter concerning multiple violations by defendants Bruno and E&L on Lots 32.01, 37.01, 38.02, 40 and 52 for violations of the permanent restraining order, parking tractor trailers (containing municipal waste) on certain of the

lots, and various other violations, including “expansion of a non-conforming use.” (A1852, 1853).

The jury never heard that in October 1998, the Long Branch zoning officer issued to Bruno and E&L a complaint-summons for expansion of a non-conforming use, and for using certain of the lots for storage without prior approval from the City for which he was found guilty January 27, 2000 (A1854, 1856).

The jury never heard that another summons issued on November 10, 1999 for failing to obtain prior approval to expand the use after demolition of the house on lot 32.01 across from plaintiff for which he was found guilty on January 30, 2000. (A1857-58). However, no ejection/ termination from the lot ensued then or since pending site plan approval (as per A470).

The jury never heard that on November 27, 2000, the Zoning Board of Adjustment dismissed a second application by E&L for a "[u]se variance and/or approval for expansion of a non-conforming use, along with related bulk variance relief and site plan approval and/or waiver of same" relating to Lots 32.01 and 37.01. (A484). The jury never heard that another notice of violation issued March 15, 2002 for expansion of use/stockpiling on residential lots 19, 20, 21 on Morris Avenue. (A1860)

The jury never heard that a third site plan for multiple lots seeking use and other variances was filed in 2002, (A494), but was withdrawn on August 27, 2007 (A1109). The jury never

heard that in the interim, Bruno/E&L was permitted to use the lots while stealthily seeking variances via a neighbor's application which were improperly granted January 24, 2004. (A1119-1163).

The jury never heard that a Certificate of Occupancy was required when E&L Paving began using lots 13B and 39, purchased in or around 1965 on Community Place. (A173,1522). This was pursuant to Section 12.1 and 12.2 of Long Branch Zoning Ordinance 235 (eff. 5/31/55). (Trial exhibit 11, A1773, also not permitted into evidence via trial court rulings). Defendant Bruno admitted that he had no C.O. (10T:26-28) before the line of questioning was cut short, and none was found thru OPRA. (A1883). A zoning permit was required beginning in 1970 pursuant to section 20-11.2 of Long Branch Ordinance 284. (Trial exhibit 13, A1815). None was found through plaintiff's Document Demand (A169) or OPRA Requests (A503, 1883) to construct the garage, though NJDARM (Division of Archives & Records Management) requires retention for the lifetime of the structure (Disallowed Exhibit 15, A1826). Furthermore, no certificate of non-conforming use exists (Exhibits 16, A1829), though permanent retention is required (Exhibit 17, A1835). Bruno purchased lots 19-21 in 1971 (the Morris Ave. garage), which had been Defazio dry cleaners which was a non-conforming use in the residential zone, and put it to use for his paving

business instead of it reverting to the residential use. No approvals were obtained. (A181).

This Court should clarify that the trial court erred in ruling that evidence and argument about defendants' improper uses of the lots was not admissible because the trial below was not a "zoning case." Operating activities on and off a property in knowing and continuous violation of zoning, occupancy, and use laws is unreasonable, the jury could have found. Also relevant were summonses and guilty pleas to prove expansion of use and unreasonable use on the defendants' properties. A showing of expansion of use without required permits and approvals, with tax board judgments affirming depreciation due to these external factors, was relevant to proving plaintiff's nuisance claim. Cf. MLUL (providing for statutory injunctive relief on showing of special interest for violations).

Point 2

THE COURT SHOULD GRANT CERTIFICATION TO CLARIFY THE LIABILITY OF A MUNICIPALITY AND ITS OFFICIALS FOR WANTON AND WILLFUL REFUSAL TO ENFORCE THE MUNICIPALITY'S LAWS.

Plaintiff charged that the City and its officials conspired to continue to allow defendants to operate in violation of the zoning and use laws and outside of the original garage and permit conditions. This Court should grant Certification to

stress, again, that local officials cannot simply do as they please in enforcing the municipality's laws.

The trial court dismissed plaintiff's claim against Long Branch and its officials on summary judgment despite that none of the defendants could explain why they had been unable to abate the ongoing zoning violations committed by plaintiff's adjoining neighbor. The trial court believed that the municipal court would be able to adjudicate the issue and even "incarcerate" defendants if necessary. (2T69;16-70:16, 71:9-72:20). Yet even as late as two weeks ago, the municipal court said that none of the numerous summonses issued to defendants and outstanding since February 25, 2013 have been adjudicated, despite Defendants' site plan to expand the use being denied months ago. This makes a mockery of the rule of law. Per N.J.S.A. 40:44D-18, "the governing body of a municipality shall enforce this act and any ordinance or regulation made and adopted hereunder" and "provisions of the municipal land use law are mandatory." Pop Realty Corp. v. Springfield Bd. of Adjustment of Springfield Twp., 176 N.J. Super. 441, 423 (Law Div. 1980). A "substantial public interest exists in the preservation of the integrity of a zoning ordinance." Sod Farm Associates v. Twp. of Springfield, 366 N.J. Super. 116 (App. Div. 2004). The Tort Claims Act provides that acts of the City's employees cannot be palpably unreasonable. N.J.S.A.

59:3-2d. Yet Long Branch and its officials have refused to enforce the laws that are supposed to protect plaintiff from the continuing nuisance and harassment defendants have forced upon him. Long Branch's officials have ignored plaintiff's requests for injunctive relief to stop the nuisance despite their duty to do so (see Long Branch Ordinance 345-75: Zoning Officer; powers and duties, E. Enforcement procedure, subsection (3) "Termination of violation. All violations shall be terminated within 30 days or shall be deemed a separate violation for each day following and subject to fines as set forth within").

These facts merited a trial, not dismissal as a matter of law, on whether the City and its officials have willfully and wantonly refused to enforce the zoning laws, and whether the defendants are liable to plaintiff, per the Tort Claims Act, for civil conspiracy to enable the nuisance, violation of plaintiff's civil rights, tortious interference with plaintiff's economic and contractual relations, and the other causes of action lodged in plaintiff's Complaint. Plaintiff's submissions on summary judgment permit a reasonable jury to find that plaintiff has been retaliated against by the municipal defendants numerous times since 1998 for plaintiff having sought to vindicate his property rights (including plaintiff having been hunted down on the beach by a police officer and threatened with arrest a week after plaintiff filed his complaint).

42 U.S.C.A. § 1983, too, requires a public defendant to refrain from interfering with the plaintiff’s federal rights and provides money damages and injunctive relief for such violation. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 723 (1999) (Scalia, J., concurring); W. v. Atkins, 487 U.S. 42, 48-49 (1988). 42 U.S.C.A. § 1983 is designed to protect citizens from abuse of power by officials cloaked with governmental authority. Montgomery v. De Simone, 159 F.3d 120, 125 (3d Cir. 1998). Peaceful possession and enjoyment of one’s property and equal protection of the laws are among these rights. The evidence submitted on summary judgment in this case permits a reasonable jury to find a palpable abuse of discretion by the municipal defendants that has deprived plaintiff of his rights under the United States and New Jersey Constitutions to peaceful possession and enjoyment of his property and to due process of law in enforcement of Long Branch’s zoning and land use laws (plaintiff incorporates by reference here his argument set forth in his Appellant’s Brief at pages 43-61).

Reasons for Granting Certification

Certification should be granted where (1) the appeal presents a question of general public importance that has not been but should be settled by the Court, (2) the Appellate Division's decision is in conflict with another decision of the same or a higher court, or (3) the interest of justice requires that the Court review the matter. R. 2:12-4. Certification is warranted under all these grounds. Plaintiff was entitled to have the jury consider evidence about whether defendants' activities on and uses of their adjoining and adjacent lots were in accordance with the zoning, site plan, use, occupancy, and other regulations in effect during the time in question. Precluding this evidence and argument deprived plaintiff of a fair trial on his nuisance claim. Plaintiff was entitled, also, to have a jury assess his claims against the municipal defendants, because the summary judgment evidence permits a reasonable jury to find that the municipal defendants violated plaintiff's federal and state constitutional rights to (among other things) due process, by willfully and wantonly refusing to enforce against the private defendants plainly-applicable zoning and land use laws. The Court should grant Certification to correct these improper rulings by the trial court in this case and to clarify these issues for future nuisance cases heard in our courts.

Conclusion and Certification

The undersigned certifies that this application is made in good faith, presents substantial questions, and is not brought for purposes of delay. If the Petition is granted, petitioner reserves the right to seek leave to file a brief pursuant to R.2:12-11.

Respectfully submitted,

Michael Confusione
Michael Confusione
Counsel for Petitioner, Brian D. Asarnow

Dated: October 18, 2017

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4973-14T4

BRIAN D. ASARNOW,

Plaintiff-Appellant,

v.

CITY OF LONG BRANCH, a municipal corporation of NJ; ADAM SCHNEIDER, Mayor; MARY JANE CELLI, Councilwoman; HOWARD WOOLLEY, Administrator; KEVIN HAYES, Director of Building & Development; MICHELLE BERNICH, Zoning Officer; TERRY JANECZEK, Chairperson, Zoning Board; MICHAEL IRENE, Zoning Board Attorney; ZONING BOARD; EDWARD BRUNO and E&L PAVING, INC.; RAYMOND GRIECO and ATLANTIC PAVING (& COATING), LLC; JOE ROSARIO & ROSARIO CONTRACTING CORP., d/b/a ROSARIO MAZZA DEMOLITION AND RECYCLING CO.; CUSTOM LAWN SPRINKLER CO., LLC,

Defendants-Respondents,

and

R. BROTHERS CONCRETE, LLC, RICHARD BRAHA and SEASHORE DAYCAMP,

Defendants.

Submitted January 23, 2017 – Decided September 18, 2017

Before Judges Sabatino, Nugent, and Currier.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4039-11.

Hegge & Confusione, LLC, attorneys for appellant (Michael Confusione, of counsel and on the brief).

Ansell, Grimm & Aaron, PC, attorneys for respondents City of Long Branch, Adam Schneider, Mary Jane Celli, Howard Woolley, Kevin Hayes, Michelle Bernich, Terry Janeczek, Michael Irene and Zoning Board of Adjustment (Barry M. Capp, of counsel and on the brief).

Paul R. Edinger, attorney for respondents Edward Bruno and E&L Paving, Inc., Ray Greico and Atlantic Paving (& Coating), LLC, Joe Rosario and Rosario Contracting Corp., and Custom Lawn Sprinkler Co., LLC.

PER CURIAM

Plaintiff Brian D. Asarnow appeals from an October 3, 2014 order granting summary judgment in favor of defendants City of Long Branch and public officials Adam Schneider, Mary Jane Celli, Howard Woolley, Kevin Hayes, Michelle Bernich, Terry Janeczek, Michael Irene, and Long Branch Zoning Board of Adjustment ("Zoning Board"), ("public defendants"). Plaintiff also appeals from trial court orders vacating defaults against certain defendants and from a June 11, 2015 order memorializing a jury verdict entered in favor of defendants Edward Bruno, E&L Paving, Inc., Ray Greico, Atlantic Paving and Coating, LLC, Joe Rosario, Rosario Contracting

Corp., Rosario Mazza Demolition and Recycling Co., and Custom Lawn Sprinkler Co., LLC ("private defendants").

Plaintiff has owned property in Long Branch since 1995 and has used the property as an office, a lab, for light manufacturing, and rental space. Private defendants owned an adjacent lot. Bruno purchased the property in the 1960s to operate an asphalt paving business, E&L Paving, Inc., and he leased the property to other contractors throughout the years. In 2009, Bruno rented the property to Greico, Rosario, and their respective contracting companies. The land straddles an industrial zone, a commercial zone, and a residential zone.

On August 3, 2009, E&L and Atlantic Paving obtained a zoning permit to operate a paving company and contractor's yard. In response to the permit, plaintiff commenced a letter writing campaign to have it revoked, writing letters to the City's Mayor and Business Administrator. On January 27, 2010, the City Director of Building and Development and Fire Marshal sent a "Notice of Violation" to Atlantic Paving, asserting it had exceeded the use of the August 2009 permit. On April 30, 2010, plaintiff filed a verified complaint in lieu of prerogative writs seeking to: void the August 2009 permit issued to E&L and Atlantic Paving; compel Long Branch to enforce the Notice of Violation; and provide plaintiff unfettered access to his property. Asarnow v. City of

Long Branch, A-0999-10 (App. Div. May 6, 2013). He asserted the public defendants' issuance of the permit was "ultra vires."

Subsequently, public defendants filed a motion to dismiss. On August 27, 2010, the trial judge granted defendants' motion, concluding plaintiff failed to exhaust administrative remedies and comply with Rule 4:69-5. Plaintiff appealed. Asarnow v. City of Long Branch, No. A-0999-10 (App. Div. May 6, 2016). We affirmed.

In October 2011, while plaintiff's appeal was pending, he filed a ten-count complaint against the public and private defendants, which included claims for nuisance, intentional infliction of emotional distress, interference with prospective economic advantage, breach of fiduciary duty, civil conspiracy, Section 1983 violations, and breach of contract. The private defendants initially failed to respond to the complaint, prompting the entry of default. Edward Bruno and E&L Paving moved to vacate default. The trial court granted their motion. The trial court granted the remaining defendants' motions and vacated the defaults against them.

After discovery, the public defendants moved for summary judgment. On October 3, 2014, in a comprehensive oral opinion, the court granted the motion for many reasons, including the entire controversy doctrine, the Tort Claims Act, the statute of

limitations, and plaintiff's failure to present a prima facie case for each of his respective claims.

Trial commenced in May 2015 against the private defendants based on plaintiff's claims for nuisance and intentional infliction of emotional distress. During the trial, the court's evidentiary rulings included denying the admission by plaintiff of evidence concerning zoning violations, a website hacking, and an alleged "arson," finding that the probative value of such evidence would be substantially outweighed by undue prejudice and risk of jury confusion. The jury rendered a verdict in favor of the private defendants. This appeal followed.

Plaintiff raises the following arguments:

Point I

> The trial court erred in precluding plaintiff from introducing before the jury at trial evidence of prior and ongoing zoning violations by the private defendants and evidence that defendants' activities on their adjoining properties exceeded those permitted during the time period in question, and in precluding other key evidence relevant to proving plaintiff's nuisance claim against the private defendants. Precluding this evidence at trial deprived plaintiff of a fair trial on his nuisance claim and warrants reversal and remand for a new trial.

Point II

> The trial court erred in granting summary judgment to the City of Long Branch and its public officials and denying [p]laintiff's summary judgment for injunctive relief.

Point III

> The trial court erred in granting the motion to vacate default by defendants Raymond Greico, Atlantic Paving [&] Coating, LLC, Joe Rosario, Rosario Contracting Corp., and Custom Lawn and Sprinkler Company.

Point IV

> The trial court erred in allowing the opposition appraiser's methodology which prejudiced [p]laintiff's damages claim; defendants should not be permitted to violate case law and professional standards upon any remand.

We affirm the grant of summary judgment to the municipal defendants substantially for the reasons expressed by Judge Jamie S. Perri in her comprehensive oral opinion. Plaintiff's remaining claims concerning the order vacating default and alleged trial errors are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following comments.

Motions to "vacate default[s] 'should be viewed with great liberality,'" N.J. Div. of Youth & Family Servs. v. P.W.R., 410 N.J. Super. 501, 508 (App. Div. 2009) (quoting Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div. 1964)) and trial

courts are vested with sound discretion to grant or deny such motions but should resolve all doubts in favor of a party seeking relief, Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993). When we review a trial court's exercise of discretion, "[t]he question is only whether the trial judge pursued a manifestly unjust course." Gittleman v. Cent. Jersey Bank & Trust Co., 103 N.J. Super. 175, 179 (App. Div. 1967), rev'd on other grounds, 52 N.J. 503 (1968). We cannot conclude from our review of the record that the trial court pursued a manifestly unjust course in vacating default here.

Similarly, we review a trial court's evidentiary rulings for an abuse of discretion. Villanueva v. Zimmer, 431 N.J. Super. 301, 310 (App. Div. 2013); Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999) (citing State v. Erazo, 126 N.J. 112, 131 (1991)), certif. denied, 163 N.J. 79 (2000); Bitsko v. Main Pharmacy, Inc., 289 N.J. Super. 267, 284 (App. Div. 1996) (citing Ratner v. Gen. Motors Corp., 241 N.J. Super. 197, 202 (App. Div. 1990)). We will not reverse a trial court's evidentiary rulings absent a palpable abuse of discretion, that is, the court's decision "was so wide of[f] the mark that a manifest denial of justice resulted." Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999) (quoting State v. Carter, 91 N.J. 86, 106 (1982)). Applying those standards, we find that none of the trial court's

evidentiary rulings require such findings of manifest injustice. Consequently, the outcome of the trial should not be set aside.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION