NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0999-10T4

BRIAN D. ASARNOW,

Plaintiff-Appellant,

v.

CITY OF LONG BRANCH, a municipal corporation of New Jersey,

Defendant-Respondent,

and

EDWARD BRUNO and E&L PAVING, INC., ATLANTIC PAVING (& COATING), L.L.C., ROSARIO CONTRACTING CORP., d/b/a ROSARIO MAZZA DEMOLITION AND RECYCLING CORP., CUSTOM LAWN SPRINKLER CO., L.L.C., and R. BROTHERS CONCRETE, L.L.C.,

Defendants.

Submitted December 13, 2011 - Decided May 6, 2013

Before Judges Carchman, Fisher and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2153-10.

Brian D. Asarnow, appellant pro se.

Ansell, Grimm & Aaron, P.C., attorneys for respondent (James G. Aaron, of counsel; Barry M. Capp, on the brief).

PER CURIAM

Plaintiff, Brian D. Asarnow, operates a business on commercial property he owns in the City of Long Branch (the City). Seven months after learning that the City's zoning officer had issued a zoning permit permitting the owner of adjacent lots to continue to operate a paving company, plaintiff filed an order to show cause and a verified complaint in lieu of prerogative writs seeking to have the court void the zoning permit. In the same action, plaintiff sought to compel the City to enforce a notice of violation it had issued to the owner of the nearby properties, and to enforce no parking zones on the street where his business is located. The trial court refused to grant preliminary injunctive relief, discharged the order to show cause, and ultimately dismissed the complaint, with prejudice. The court based its decision on plaintiff's twofold failure to implead indispensable parties and exhaust administrative remedies. Plaintiff appeals from the court's confirming orders and from its order denying plaintiff's motion for reconsideration. We affirm.

I.

Plaintiff owns property in the City located at 55 Community Place, designated on the municipal tax map as Block 237, Lot 22. The property is located in an industrial zone and plaintiff uses it as an office, a lab, and light manufacturing facility. He

also leases space to other businesses. After purchasing the property in 1995, plaintiff obtained preliminary and final site plan approval to expand the structure on the property, add paving and parking, and make site improvements.

Defendant E&L Paving, Inc. (E&L) owns various lots in Block 237 directly across from Community Place to the north of plaintiff's property, contiguous and to the west of plaintiff's property, and within 200 feet of plaintiff's property. On August 3, 2009, E&L obtained a zoning permit to operate a paving company and contractors yard on the property it owns in Block 237. The central issue on this appeal is whether the City's zoning officer, Michelle J. Bernich, had the authority to issue the permit. To provide the factual context for plaintiff's argument that Bernich's issuance of the permit was ultra vires, we recount plaintiff's evidence concerning E&L's previous zoning violations.

According to plaintiff, E&L had a history of zoning violations at its properties. 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. In January 1987, the City as plaintiff, and E&L, Bruno, and Long Branch Asphalt Company terminated litigation by entering into a permanent restraining

order prohibiting E&L from stockpiling dirt on Lot 40. 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 on certain of the lots, and various other violations. In October of the same year, the City zoning officer issued to Bruno and E&L Paving 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. On November 27, 2000, the Zoning Board of Adjustment (the Board) dismissed an E&L application 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.

Bruno and E&L were not deterred. On March 15, 2002, the zoning officer issued a notice of violation "for storage of vehicles and stockpiling/dumping soil and asphalt" on Lots 19, 20, and 21.

On June 1, 2009, plaintiff wrote to the Long Branch Chief of Code Enforcement that E&L and other businesses were stockpiling equipment and materials, and using its properties as a demolition yard. Recounting that Mr. Bruno had been cited in 1996 for maintaining and expanding illegal, non-conforming uses,

and that applications for site plan approval before the Board had been dismissed or withdrawn, plaintiff asked the code enforcement officer to "remedy the situation." Nevertheless, on July 15, 2009, Bruno and E&L submitted the permit application now at issue.

On July 14, 2009, James M. Siciliano, Esquire, in his capacity as attorney for the applicant, "[E&L] c/o Eddie Bruno," filed a permit application to "operate paving company and contractors yard including placing of trucks [and] use of buildings for maintenance of vehicles and storage." E&L designated the property for which the application was sought as the various lots it owned, contiguous to and near plaintiff's property, in Block 237. In a line on the form for "Existing/Previous Use of Building[,]", E&L indicated that the building was used for "mixed used – contractors[.]" In the next printed line on the application for "Existing/Previous Use of Unit," E&L wrote "paving company and other contractors[.]" E&L further represented that it constituted the existing business along with miscellaneous contractors, and that the proposed name of the business was "Atlantic Paving and Misc. Contractors." E&L also represented that there had been no previous "litigation, legal action, and/or violations for this property[.]"

On August 3, 2009, the City of Long Branch zoning officer issued a zoning permit to E&L for Block 37, Lots 13.02, 19, 20, 21, 32.01, 37.01, 38.02 and 39. The zoning permit stated, among other things: "This certifies that an application for the issuance of a Zoning Permit has been examined." The permit also stated, as the use of the property: "Continue Pre-Existing Partially Non-Conforming Use for Paving Company for Two Buildings, Yard and Parking Area." The zoning officer marked a check box on the zoning permit adjacent to "Use is permitted by Ordinance" and wrote after the word ordinance, "commercial/industrial."

When plaintiff learned that the zoning permit had been issued to E&L, he commenced a letter-writing campaign in an attempt to have the permit rescinded and the municipal code enforced. He wrote to the Mayor and Business Administrator on October 1, 2009.

On January 27, 2010, the City Director of Building and Development and Fire Marshall sent a "Notice of Violation" to Atlantic Paving indicating that it had expanded the use of the property beyond the August 3, 2009 zoning permit. The notice stated:

> As a result of a complaint, an inspection was made of the above captioned property on January 21, 2010. We find the following in violation of City Ordinance 345:

> You have expanded the use of the property beyond the scope of your approved Zoning Permit dated 8/3/09. You must comply with the following:
>
> 1. The demolition/disposal business must be removed from the property. All trucks, equipment, dumpster containers and any other items related to this business must be removed.
>
> 2. You must remove all piles of construction material, firewood and dirt/soil that is being stockpiled on the site.
>
> A re-inspection will be made on or about February 26, 2010. Failure to comply will result in a summons being issued in Municipal Court.

Photographic evidence of the E&L or Atlantic Paving properties indicate that the violations still existed on April 29, 2010.

On April 30, 2010, seven months after learning that the permit had been issued to E&L, plaintiff filed a verified complaint in lieu of prerogative writs seeking: to invalidate and void the zoning permit issued to E&L and Atlantic Paving on August 3, 2009; compel the City to expand and enforce its January 27, 2010 Notice of Violation, and provide for unfettered access to and from plaintiff's property "as indicated on his site plan . . . approved by resolution September 16, 2003, and otherwise." The complaint named a single defendant, the City of

Long Branch. On May 14, August 27, and October 15, 2010, the trial court entered the orders now at issue.

On May 14, 2010, the court entered an order denying plaintiff's application for temporary injunctive relief and discharged the order to show cause. The court reasoned, among other things, that plaintiff had demonstrated no irreparable harm for the injunctive relief he requested; had not exhausted his administrative remedies through the Board and through the building inspector or the zoning officer; had only notified Long Branch and had failed to notify other interested parties; and had not demonstrated that he would suffer a hardship if the injunction were denied.

On June 2, 2010, plaintiff filed his amended complaint. Thereafter, defendants filed motions to dismiss the amended complaint "for [p]laintiff's failure to exhaust administrative remedies, failure to name indispensable parties and failure to comply with Rule 4:69-6[.]" On July 29, 2010, plaintiff served and filed his opposition to the motions and a cross-motion for summary judgment. On August 27, 2010, the trial court granted defendants' motions and denied plaintiff's cross-motion.

In an oral decision delivered from the bench, the court noted that "Rule 4:69-5 provides that actions in lieu of prerogative writs shall not be maintainable as long as there is

an available right of review before an administrative agency, which has not been exhausted." The court then explained that the statutory requirement contained in N.J.S.A. 40:55D-72a, that an appeal from an administrative officer's determination must be taken within twenty days of that determination, is jurisdictional in nature; and that the twenty-day time period begins to run from the day a party knew or should have known of the issuance of the permit. The court noted plaintiff's concession that he knew by September 2009, that the zoning permit had been issued.

The court concluded that plaintiff had failed to exhaust his administrative remedies. The court also found that plaintiff had failed to comply with Rule 4:69-6 concerning prerogative writs, and "that the complaint here is inappropriate because there's no clear, and undisputed ministerial duty or exercise of discretion that's involved."

Plaintiff filed a motion for reconsideration which the court denied in an oral opinion delivered from the bench on October 15, 2010. The court concluded plaintiff had failed to demonstrate the court's initial decision was based on plainly incorrect reasoning; that the court had failed to consider evidence; or that there was good reason to consider new information. Plaintiff appealed.

II.

When considering a Rule 4:6-2(e) motion to dismiss a complaint for failure to state a claim upon which relief can be granted, a trial court must determine "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). The court must "'search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Nevertheless, "the motion may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." Edwards v. Prudential Prop. and Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003). "[I]n reviewing a Rule 4:6-2(e) dismissal, we apply the same standard[.]" Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010), certif. denied 205 N.J. 1317 (2011).

Plaintiff did not challenge the zoning officer's issuance of the zoning permit by appealing to the Board. That omission is evident from plaintiff's amended complaint and is undisputed on this appeal. A zoning board is empowered to hear such

appeals. N.J.S.A. 40:55D-70a specifically authorizes a zoning board to "[h]ear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance[.]" N.J.S.A. 40:55D-72a authorizes "any interested party affected by any decision of an administrative officer of the municipality based on or made in the enforcement of the zoning ordinance or official map" to appeal the zoning officer's decision to the board of adjustment, and requires that such an appeal "be taken within twenty days[.]"[1] Rule 4:69-5 provides that actions in lieu of prerogative writs "shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted." The Rule also provides an exception "where it is manifest that the interest of justice requires otherwise[.]" R. 4:69-5.

Plaintiff's primary argument is that the zoning officer had no authority to issue the zoning permit "to grandfather a use which . . . lacked previous subdivision, site plan and use

[1] In Trenkamp v. Twp. of Burlington, 170 N.J. Super. 251, 268 (Law Div. 1979), the Law Division held that "a proper regard for the interests of such [interested] persons mandates that the time for appeal begins to run from the date an interested person knew or should have known of the permit's issuance."

variance approvals." The permit itself characterized the use as: "Continue pre-existing partially non-conforming use for paving company . . . ." Plaintiff maintains that the zoning officer's official action was ultra vires and corrupt.

The precise nature of the zoning officer's action is not entirely clear. It does not appear from the record that either E&L, Bruno, or the other non-municipal defendants, asserted that the permit constituted a certificate of non-conforming use issued under the authority of N.J.S.A. 40:55D-68. N.J.S.A. 40:55D-68 provides, in part, that a "prospective purchaser . . . or any other person interested in any land upon which a non-confirming use . . . exists may apply in writing for the issuance of certificate certifying that the use or structure existed before the adoption of the ordinance which rendered the use or structure non-conforming." Such an application "may be made to the administrative officer within one year of the adoption of the ordinance which rendered the use or structure non-conforming or any time to the board of adjustment." N.J.S.A. 40:55D-68. E&L did not request such a certificate. More significantly, the zoning officer had no authority to issue it, because no ordinance adopted within the previous year rendered the use non-conforming. Under those circumstances, the

certificate would be of no effect. See Cronin v. Twp. Committee of Chesterfield, 239 N.J. Super. 611, 618, n.1 (App. Div. 1990).

To the contrary, the zoning permit purports to reflect the zoning officer's conclusion that the use of the properties "for paving company for two buildings, yard and parking area" is permitted by ordinance in the commercial/industrial zone. The zoning officer had the authority to take such action. Plaintiff should have appealed the zoning officer's issuance of the permit to the Board. See Twp. of Stafford v. Stafford Zoning Bd. of Adjustment, 154 N.J. 62, 69 (1998) (citing with approval the explanation in Bell v. Twp. of Bass River, 196 N.J. Super. 304, 314 (Law Div. 1984), "that exhaustion of remedies requirement is appropriate because zoning board 'is particularly well equipped to address non-conforming use disputes'").

Plaintiff argues the trial court should have imposed either the doctrine of collateral estoppel or the doctrine of judicial estoppel to bar the City's Rule 4:6-2(e) dismissal motion. Plaintiff argues that the City "could have easily sought dismissal of the original complaint by opposing the [temporary restraining order]." Plaintiff reasons that the City should have filed its motion before he amended his complaint to include additional parties.

"Collateral estoppel . . . bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." Tarus v. Borough of Pine Hill, 189 N.J. 497, 520 (2007) (quotations omitted).

> For the doctrine of collateral estoppel to apply to foreclose the relitigation of an issue, the party asserting the bar must show that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding[;] (2) the issue was actually litigated in the prior proceeding[;] (3) the court in the prior proceeding issued a final judgment on the merits[;] (4) the determination of the issue was essential to the prior judgment[;] and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
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> [In re Estate of Dawson, 136 N.J. 1, 20 (1994) (citations omitted).]

These factors obviously do not apply. There was no prior proceeding; the trial court merely denied plaintiff's request for temporary restraints, which was not a final judgment on the merits.

Although plaintiff has raised the doctrine of judicial estoppel in a point heading, he has made no argument in his brief concerning that doctrine. An appellant is required to identify and fully brief any issue raised on appeal. R. 2:6-2(a). Because plaintiff has not done so, we decline to address

his judicial estoppel argument. See 700 Highway 33 L.L.C. v. Pollio, 421 N.J. Super. 231, 238 (App. Div. 2011).

Plaintiff also argues that the trial court erred by requiring him to exhaust administrative remedies and thereby ignored the interests of justice and the doctrine of futility. We disagree. In the context of Rule 4:69-7(c), authorizing a court to enlarge the time for commencing an action in lieu of prerogative writs, the Supreme Court

> has defined three general categories of cases that qualify for the "interest of justice" exception: "cases involving (1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification."
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> [Borough of Princeton v. Mercer County, 169 N.J. 135, 152-53 (2011) (quoting Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975)).]

Plaintiff has made no persuasive argument that any of these categories excuse his failure to exhaust his administrative remedies by appealing the zoning officer's issuance of the permit to the Board. As we previously noted, the Board is particularly well suited to resolve the issues raised by plaintiff.

Plaintiff also argues that it would be futile to undergo zoning board review. We disagree. We decline to accept

defendant's argument, implicit and unsupported by any facts, that the board would not reverse an ultra vires act of its zoning officer.

Plaintiff's other arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following. In the second count of his complaint, plaintiff sought a court order compelling the City to enforce its violation notice. Significantly, the City's Director of Building and Development and Fire Marshall issued the violation because Atlantic Paving had expanded the use of the property beyond the zoning permit that had been issued to it in August 2009. Plaintiff did not allege that the violations for which Atlantic Paving was noticed existed after the February 26, 2010 inspection referenced in the notice. And, as the trial court implied, plaintiff had not sought any relief, including injunctive relief, against the non-municipal defendants.

In the third count of his complaint, plaintiff alleges the City has failed to enforce "no parking zones around and across from the entrances to [p]laintiff's parking lots as delineated on the site plan approval of September 16, 2003." Plaintiff sought enforcement of those no parking zones. The City disputes that its planning board never approved the no parking zones. The City points out that plaintiff did not request the no

parking zones in the application he filed with the City's Planning Board on June 16, 2003, and also that the Planning Board's resolution granting preliminary and final site plan approval to plaintiff did not include any reference to no parking zones. Following the Planning Board's grant of preliminary and final site plan approval to plaintiff in 2003, plaintiff never requested a clarification concerning the no parking zones. Additionally, plaintiff did not implead the planning board in his action in lieu of prerogative writs. Under those circumstances, we cannot conclude that the trial court erred by dismissing count three.

Affirmed.