SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1210-15T3

JOY MCDERMOTT-GUBER AND WILLIAM GUBER,

Plaintiffs-Appellants/ Cross-Respondents,

v.

ESTATE OF MABEL A. MCDERMOTT AND BART ALAN MCDERMOTT,

Defendants-Respondents/ Cross-Appellants.

BART J. MCDERMOTT, INC.,

Plaintiff,

v.

JOY MCDERMOTT-GUBER, a/k/a JOY MCDERMOTT,

Defendant.

Argued April 26, 2017 – Decided May 19, 2017

Before Judges Fuentes, Carroll and Farrington.

On appeal from the Superior Court of New Jersey, Chancery Division, Morris County, Docket No. C-58-12 and Law Division, Docket No. L-2247-12.

Gary Wm. Moylen argued the cause appellants/cross-respondents.

Walter J. Fleischer, Jr. argued the cause for respondents/cross-appellants (Drinker Biddle & Reath LLP, attorneys; Mr. Fleischer and Jennifer G. Chawla, on the briefs).

PER CURIAM

This appeal involves a dispute over ownership of a one-half interest in residential real property located at 49 Arlington Avenue, Parsippany (the property). Plaintiffs Joy McDermott-Guber (Joy)[1] and her husband William Guber appeal from a series of Chancery Division orders that: declared Joy's brother, defendant Bart Alan McDermott (Alan), owner of the disputed one-half property interest; denied plaintiffs' application for partition credits prior to the time Alan acquired title and granted Alan credit for the rental value of the property; and awarded Alan and defendant Estate of Mabel A. McDermott (Mabel) $20,000 in frivolous litigation sanctions. Defendants have filed a "protective" cross-appeal with regard to the partition credits granted by the trial court. They also challenge the sanctions award as inadequate. For the reasons that follow, we reverse the award of sanctions, and affirm in all other respects.

[1] Because this appeal involves several members of the McDermott family, we refer to those individuals by their first names for clarity and ease of reference. We intend no disrespect by this informality.

I.

The property was originally a vacant lot owned by Mabel and her husband Bartholomew McDermott (Bartholomew), who are the parents of Joy and Alan. On December 30, 1986, Bartholomew and Mabel deeded a one-half interest in the property to Joy (the first deed). The deed was recorded the same day in the Office of the Morris County Clerk. This deed is not disputed, and the parties agree that Joy owns this one-half interest.

In 1992, plaintiffs undertook steps to construct a single-family ranch home on the property that they intended to occupy. Bartholomew died on September 1, 1992, leaving Mabel as the sole owner of the remaining one-half interest in the property. According to Joy, Mabel thereafter asked her to change the building plans to include construction of a second floor where Mabel could reside. In return, Joy claims Mabel agreed to convey her remaining half-interest in the property to Joy. Relying on Mabel's promise, plaintiffs constructed the two-story house which was completed in April 1996. Plaintiffs and Mabel moved into the home thereafter without incident.

Mother, daughter, and son-in-law continued to reside there until 2011, when Mabel obtained a temporary restraining order against Joy under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35. Mabel then moved in with Alan before ultimately

relocating to the Franciscan Oaks assisted living facility in Denville. Plaintiffs continue to reside in the property.

On June 11, 2012, Joy filed a quiet title action against Alan and Mabel in the Chancery Division, General Equity Part in Morris County, seeking a declaration that she is the sole owner of the entire property. Joy alleged that Mabel conveyed the remaining one-half interest in the property to her by an unrecorded deed dated August 18, 1993 (the second deed). The complaint also sought to invalidate an October 24, 2011 deed that was recorded in the Morris County Clerk's Office on December 14, 2011 (the fourth deed), pursuant to which Mabel conveyed the remaining one-half interest to Alan. Alan filed a contesting answer and counterclaim in which he sought a declaration that he owned an undivided one-half interest in the property and requested that the property be partitioned. Mabel filed a separate answer and counterclaim seeking similar relief.

Pretrial discovery revealed that, around 2001, Henry Van Houten, Esq. prepared the second deed to Joy at Mabel's request. The deed acknowledged, falsely, that Mabel executed it on August 18, 1993. This second deed was printed on an All-State legal form bearing a 1996 copyright date. Mabel later noticed that, although the deed bore a 1993 date, it was printed on a 1996 form. Since this discrepancy made the backdating of the second deed apparent,

Mabel attested in her answers to interrogatories that she then contacted Van Houten to prepare a new deed conveying the remaining half-interest to Joy. Van Houten did so, on a form bearing a 1982 copyright date (the third deed). This third deed was also dated August 18, 1993, and falsely acknowledged that Mabel executed it on December 27, 1993. Like the second deed, the third deed was not recorded, nor was it given to Joy. Rather, Mabel gave the third deed to Alan to retain. Van Houten kept the second deed in his file, and Joy purportedly became aware of its existence during a visit to Van Houten's office in 2012.[2]

In her interrogatory answers, Mabel asserted that the second deed was never recorded or delivered to Joy. She explained, "I would [have never] given [Joy] my half[-]interest in the [p]roperty while I am alive, because I was afraid that she would throw me out of the [p]roperty, as she threatened to do on a number of occasions." Mabel elaborated: "[Joy] misstates the purpose of the [s]econd [d]eed in . . . the [c]omplaint. My intent was not to convey my half[-]interest in the [p]roperty to her. Instead, the intent of that deed was to avoid inheritance taxes on the

[2] Defendants dispute this account and maintain that Joy removed the original second deed from Mabel's apartment after locking Mabel out around the time Mabel obtained the restraining order. It was represented at oral argument before us that Mr. Van Houten has since passed away, and that no statement was taken from him nor was he deposed in this action.

[p]roperty when it passed to her after my death." Mabel added, "[s]ince that time, and based on [Joy's] mistreatment of me, I made the decision to convey my interest to my son, Alan." In his deposition testimony, Alan confirmed that, around 2000 or 2001, Mabel discussed her wish that Joy have the property and indicated her actions were intended "[f]or inheritance tax reasons of trying to save on inheritance taxes."

On May 22, 2014, defendants moved for partial summary judgment seeking a declaration that Alan owned an undivided one-half interest in the property.[3] In response, Joy's husband, William Guber, certified that Mabel "represent[ed] to us numerous times that she intended to deed her half[-]interest in the property . . . to Joy[.]" Joy similarly certified that Mabel "specifically stated on multiple occasions, and over many years, that she had executed a deed to me conveying her half[-] interest in the [p]roperty to me, which she delivered to our family attorney, [Van Houten][,] [] on my behalf." In addition to these verbal representations, plaintiffs cited documentation that they contended supported their position, including: the unrecorded second deed; a letter written by Mabel to Joy and Alan dated

[3] By this point, Mabel had passed away on June 7, 2013, and her estate was substituted as a defendant. Mabel's will appointed Alan executor and intentionally made no provision for Joy.

October 10, 2011, in which she stated, "Joy, I have seen to it that you got this house free and clear;" and a schedule of several properties owned by the family, dated November 29, 2002, on which Mabel listed 49 Arlington Avenue as owned by Joy.

Following oral argument, the Chancery judge entered a July 2, 2014 order declaring Alan to be the owner of the disputed one-half property interest. The judge found that, even viewing the facts in the light most favorable to plaintiffs, they did not establish any of the elements of their claim that Mabel made a valid inter vivos gift of her remaining interest in the property to Joy. In an oral opinion, the judge reasoned that actual or constructive delivery of the deed was "not accomplished by giving it to your own attorney." The judge also found no evidence of donative intent. Rather, he noted Mabel herself indicated that, while it was her intention that Joy might receive the property on her death, she changed her intention and executed the deed to Alan that was recorded. The judge also found no evidence that Joy had accepted the gift. He determined there was "nothing in the record to indicate Mabel authorized Mr. Van Houten to deliver the deed on her behalf," and noted "[p]laintiffs' material statement of facts admit[s] no agent, lawyer, or anyone else acting on Mabel's behalf ever delivered the [second] deed to her." Ultimately, the judge concluded:

> So [d]efendant has shown by clear and convincing evidence that Mabel did not have the intent to make the inter vivos gift and that [Joy] did not accept it. There are . . . some circumstances, some ambiguity, but they're not material to this issue . . . . A donee cannot accept a gift until they learn of it. The elements of a valid inter vivos gift were not met prior to Mabel transferring her interest to Alan.

On July 7, 2014, plaintiffs amended their complaint to seek a partition of the property and an accounting of partition credits they claimed for the costs associated with improving and maintaining the property throughout the years. Defendants thereafter moved for partial summary judgment on the applicability of the partition credits. Following oral argument, the trial court entered an October 24, 2014, which granted the motion in part and denied it in part. Pertinent to this appeal, the judge ruled that plaintiffs were not entitled to partition credits from Alan for any expenses they paid or improvements they made before Alan took title to the property. The judge also ordered that Alan was entitled to a partition credit for the rental value of the property in an undetermined amount. On January 8, 2015, the court denied plaintiffs' motion for reconsideration.

On February 12, 2015, the parties entered into a stipulation that resolved many of the outstanding issues, including a credit to plaintiffs for expenses they paid in connection with the

property beginning on October 24, 2011, and a monthly rental credit to Alan on and after that date. The parties agreed that Joy would have priority to buy out Alan's interest, with the value of the property being the sole remaining issue for trial. The parties subsequently resolved the valuation issue, and a final judgment was entered on March 9, 2015, which further provided that enforcement of the judgment would be stayed if any party appealed the trial court's interlocutory orders.

On March 30, 2015, defendants moved for frivolous litigation sanctions pursuant to N.J.S.A. 2A:15-59.1 and Rule 1:4-8. On June 4, 2015, the court granted the motion and directed defense counsel to submit an affidavit of services. Defendants' attorneys then submitted a request for attorney's fees plus costs totaling $263,121.16. On October 15, 2015, the court awarded defendants counsel fees of $20,000. In his accompanying written statement of reasons, the judge explained, in part:

> The amount sought [by defendants] far exceeds any amount the [c]ourt contemplated. Significant elements of this litigation cannot be deemed frivolous. As to the title issue, there was an unrecorded deed to [Joy] as well as [Mabel's] statements that she would convey her interest in the house to [Joy]. As to the partition and claims for credits, those claims as a matter of law were not frivolous. . . . The [c]ourt is also aware that this is a court of equity. To order fees of this magnitude or even a substantial portion of the amount sought is viewed as punitive. Yet, plaintiff

> continued to cause legal services to be rendered by defendant after it should have been clear that the positions taken lacked merit. For example, seeking to impose on [Alan] costs relating to the house at a time he did not own it is contrary to the law and simply is not logical.

Plaintiffs now appeal the following orders: (1) the July 2, 2014 grant of partial summary judgment to defendants on the title issue; (2) the October 24, 2014 grant of partial summary judgment to defendant on the applicability of partition credits; (3) the January 8, 2015 denial of plaintiffs' motion for reconsideration; (4) the June 4, 2015 order granting defendants' motion for sanctions; and (5) the October 15, 2015 counsel fee award. While defendants urge us to affirm the first four orders, they have filed a "protective" cross-appeal of the October 24, 2014 order, by which they seek to preserve their right to argue for alternative partition credits that were raised before the trial court. Defendants also cross-appeal from the October 15, 2015 order on the basis that the $20,000 fee award is "too low."

II.

When reviewing the grant of summary judgment, we analyze the decision applying the "same standard as the motion judge." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

> That standard mandates that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."
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> [Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)).]

"To defeat a motion for summary judgment, the opponent must 'come forward with evidence that creates a genuine issue of material fact.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div.), certif. denied, 211 N.J. 608 (2012)), certif. denied, 220 N.J. 269 (2015). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted). "When no issue of fact exists, and only a question of law remains, [we] afford[] no special deference to the legal determinations of the trial court." Templo Fuente De Vida, supra, 224 N.J. at 199 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

It is well-established that state-of-mind issues are frequently viewed as not suited for disposition through the pretrial device of summary judgment, and must instead await plenary

testimony at a trial and credibility assessments by the factfinder. See, e.g., Mayo, Lynch & Assocs., Inc., v. Pollack, 351 N.J. Super. 486, 500 (App. Div. 2002). See also Ruvolo v. Am. Casualty Co., 39 N.J. 490, 500 (1963) (stating a court should hesitate to grant summary judgment when it must "resolve questions of intent and mental capacity").

On the other hand, if the court determines there is no genuine issue of material fact, the court is not precluded from granting summary judgment, notwithstanding issues involving state of mind. Fielder v. Stonack, 141 N.J. 101, 129 (1995); Bower v. The Estaugh, 146 N.J. Super. 116, 121 (App. Div.) (affirming grant of summary judgment where court discerns "no evidence of undue influence"), certif. denied, 74 N.J. 252 (1977). Also, "when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

A.

Plaintiffs first argue that the trial court erred in granting partial summary judgment to Alan declaring him the owner of the disputed one-half interest in the property. They contend that the court failed to recognize that there were disputed questions of

material fact that required a denial of the summary judgment issue. We disagree.

Plaintiffs claim that Mabel made a valid inter vivos gift of the disputed property interest to Joy. An inter vivos gift creates an interest in the recipient prior to the donor's death, provided three elements are met:

> First, there must be actual or constructive delivery; that is "the donor must perform some act constituting the actual or symbolic delivery of the subject matter of the gift." Second, there must be donative intent; that is "the donor must possess the intent to give." Third, there must be acceptance.
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> [Bhaqat, supra, 217 N.J. at 40 (quoting Pascale v. Pascale, 113 N.J. 20, 29 (1988)).]

Our Supreme Court has "also recognized that the donor must absolutely and irrevocably relinquish 'ownership and dominion over the subject matter of the gift, at least to the extent practicable or possible, considering the nature of the articles to be given.'" Ibid. (quoting In re Dodge, 50 N.J. 192, 216 (1967)).

"The burden of proving an inter vivos gift is on the party who asserts the claim." Bhaqat, supra, 217 N.J. at 41 (quoting Sadofski v. Williams, 60 N.J. 385, 395 n.3 (1972). Generally, "the recipient [of the alleged gift] must show by 'clear, cogent and persuasive' evidence that the donor intended to make a gift." Ibid. (quoting Farris v. Farris Eng'g Corp., 7 N.J. 487, 501

(1951)). However, when "the transfer is from a parent to a child, the initial burden of proof on the party claiming a gift is slight," and such transfer is presumed to be a gift. Bhaqat, supra, 217 N.J. at 41 (citing Metropolitan Life Ins. Co. v. Woolf, 136 N.J. Eq. 588, 592 (Ch. 1945), aff'd, 138 N.J. Eq. 450 (E. & A. 1946). Nonetheless, "[a]s the child matures and acquires experience and independence the presumption weakens and at last ceases." Peppler v. Roffe, 122 N.J. Eq. 510, 516 (E. & A. 1937).

In the present case, plaintiffs assert that on numerous occasions Mabel represented to them that she intended to convey her half-interest in the property to Joy. Plaintiffs support these verbal representations with various documents, including the second and third deeds; Mabel's October 10, 2011 letter in which she stated, "Joy, I have seen to it that you got this house free and clear;" and the list of properties prepared by Mabel dated November 29, 2002, which listed 49 Arlington Avenue as owned by Joy. Unlike the trial court, for summary judgment purposes, we view these proofs sufficient to satisfy the element of donative intent.

This finding does not, however, end our analysis. "[T]he evaluation of every motion for summary judgment requires the court . . . to review the motion record against not only the elements of the cause of action but also the evidential standard of that

cause of action." Bhagat, supra, 217 N.J. at 40. As noted, to establish a valid inter vivos gift, plaintiffs must also satisfy the remaining elements. We agree with the trial court that plaintiffs failed to adduce sufficient proofs with respect to those elements to withstand summary judgment. Here, Mabel signed two backdated deeds purporting to convey her remaining half-interest to Joy. It is undisputed that neither deed was delivered to Joy. Rather, after Mabel executed the second deed, she observed it was on a form that facially revealed it was backdated. She then requested that her attorney, Van Houten, prepare a replacement deed to cure the discrepancy. Van Houten did so, and gave this third deed to Mabel, who in turn gave it to Alan. There is nothing in the record to indicate that Mabel wished Alan to deliver the replacement deed to Joy at that time, or at any time prior to Mabel's death. Even though Van Houten thereafter retained the second deed (that arguably was superseded by the third deed) in his files, the record is devoid of any proof that Mabel authorized Van Houten to deliver the second deed to Joy on her behalf, as the trial judge correctly concluded. Moreover, the undisputed proofs show that, until she executed and delivered the fourth deed to Alan for recording, Mabel did not absolutely and irrevocably relinquish control of her remaining half-interest in the property. Dodge, supra, 50 N.J. at 216.

The record further establishes that Joy was not even aware of the second deed until 2011 or 2012, or the third deed until after this litigation commenced. Because she was unaware of the existence of these deeds, she was not in a position to accept them. Consequently, the trial court correctly concluded that the remaining elements of a valid inter vivos gift were not met prior to Mabel transferring her interest in the property to Alan. For these reasons, we affirm the July 2, 2014 order.

B.

As noted, defendants asserted a counterclaim seeking a partition of the property, and plaintiffs amended their complaint to request similar relief following the court's ruling on the title issue. The power to maintain a suit in partition dates back to at least the reign of King Henry VIII in England. Wujciak v. Wujciak, 140 N.J. Eq. 487, 489. (Ch. Div. 1947). It is a right that may be exercised by an adult tenant, "without regard to the interests of the other tenants or the inconvenience or hardship that may result." Ibid. It is equally well settled that as between or among tenants in common, partition may normally be had as of course. Ibid.; see also Newman v. Chase, 70 N.J. 254, 261 (1976). Title, whether legal or equitable, and not the right to immediate possession, is the essential underpinning to a suit for the partition of realty. Hanson v. Levy, 141 N.J. Eq. 103, 106

(Ch. 1947) (citing Scott v. Scott, 112 N.J. Eq., 195, 198 (Ch. 1933)).

Partition is an equitable doctrine. Newman, supra, 70 N.J. at 263. "In the exercise of this power our courts of equity have not hesitated to exercise discretion as to the particular manner in which partition is effected between the parties." Ibid.; see also Baker v. Drabik, 224 N.J. Super. 603, 609 (App. Div. 1988). Among other things, a court may equitably reduce a tenant's share in the property where his or her co-tenant has made expenditures for taxes, mortgage interest, repairs, or other items necessary to maintain or enhance its value. See Baird v. Moore, 50 N.J. Super. 156, 164-65 (App. Div. 1958).

We noted in Baird that generally

> there was no obligation by a cotenant in possession who was not excluding his cotenants to account to them affirmatively for the value of his use and occupation. But it developed that when such a cotenant, in a general accounting between the parties or on partition, sought . . . to enforce contribution by the others for their ratable share of maintenance expenses advanced by the cotenant in possession, many courts deemed it equitable that the occupying tenant give credit for the value of his use and occupation.
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> [Id. at 167-68].

We also acknowledged the prevailing rule in most jurisdictions "that in seeking contribution for maintenance expenses the

cotenant [in possession] will be charged as an offset for the entirety of the rental value of his own occupation." Id. at 171-72. Ultimately, we concluded "the dispositive consideration . . . is the pervading principle . . . where there is a participation in equity, that the allocation of charges and credits as between the cotenants be governed by the basic justice and fairness of the situation." Id. at 173 (citing Woolston v. Pullen, 88 N.J. Eq. 35, 40 (Ch. 1917). See also Esteves v. Esteves, 341 N.J. Super. 197, 200 (App. Div. 2001) (holding "that when plaintiffs sought reimbursement from defendant for one-half of the costs of occupying and maintaining the premises, plaintiffs were required to allow defendant credit for the reasonable value of their occupancy of the house").

The case law therefore makes clear that, in this partition phase of the proceedings, the trial court possessed the authority to award credit to plaintiffs for expenses they incurred in maintaining the property, and a credit to Alan for its rental value. Because partition is a creature of equity, our standard of review of the terms of partition ordered by a chancery judge is limited. In such equitable contexts, we will not set aside the judge's determination unless it is shown to be arbitrary or capricious or an abuse of discretion. See In re Queiro, 374 N.J. Super. 299, 307 (App. Div. 2005) (affording "great deference" to

a chancery judge's findings); Lohmann v. Lohmann, 50 N.J. Super. 37, 44-45 (App. Div. 1958) (finding that a trial court's factual determinations should not be lightly disturbed on appeal).

Here, at the time Alan and plaintiffs asserted their respective partition claims, Mabel no longer had title to any portion of the property. In his October 24, 2014 ruling, the trial judge determined that "any credits between the parties commence on the date the two parties took title to the property." As a result, the judge concluded plaintiffs were not entitled to partition credits from Alan for any expenses they paid before Alan took title to a portion of the property, or for any appreciation in value that may have resulted from their construction of a home on the property in the 1990s.

Plaintiffs challenge the judge's determination that a party to a partition action cannot be held responsible for partition credits for the period prior to his or her ownership. However, plaintiffs offer no legal support for their position, nor do we find any. The judge further found that "the claims that have been raised prior to 2011, when [Alan] took title, are claims against Mabel and the Estate." He noted those claims were not extinguished, but rather "[t]hey are valid claims, or potentially valid claims, but they are as to the prior owner." Thus, they could properly be brought against Mabel's estate, but not against

Alan in this partition action. We find no basis, either legal or equitable, to disturb the trial court's ruling with respect to partition credits. Consequently, we affirm the October 24, 2014 order, and the January 8, 2015 order denying reconsideration.

III.

Finally, plaintiffs appeal the June 4, 2015 order granting defendants' motion for frivolous litigation sanctions, and the October 15, 2015 order awarding defendants $20,000 in counsel fees. Plaintiffs argue that their claims were not frivolous, and were supported by numerous conversations with Mabel regarding title to the property, and the unrecorded deeds and other documentation produced during discovery. Defendants cross-appeal from the October 15, 2015 order. They contend the $20,000 fee award is inadequate, and that the trial judge failed to sufficiently articulate how that fee award was calculated.

We review the trial court's decision for an abuse of discretion. Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 407 (App. Div.), certif. denied, 200 N.J. 502 (2009); see also McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011). "[A]buse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or

amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) (affirming award of sanctions).

To support an award against a represented party under N.J.S.A. 2A:15-59.1, the court must find that the claim was pursued in "bad faith, solely for the purpose of harassment, delay or malicious injury," N.J.S.A. 2A:15-59.1b(1), or "[t]he non-prevailing party knew or should have known ... [it was pursued] without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1b(2). When a frivolous litigation claim is based on the lack of a reasonable basis in law or equity, and the non-prevailing party is represented by an attorney who presumably advised the party to proceed, an award cannot be sustained unless the court finds that the party acted in bad faith in pursuing or asserting the unsuccessful claim. Ferolito, supra, 408 N.J. Super. at 408. A grant of summary judgment without more does not support a finding of bad faith by the losing party. Ibid. Furthermore, the party seeking sanctions bears the burden to prove bad faith. Ibid.

Rule 1:4-8(d) authorizes a sanction against an attorney and pro se party for a violation of Rule 1:4-8(a). It requires an attorney to certify, based on "knowledge, information, and belief" after reasonable inquiry, that, among other things:

> (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> . . . .
>
> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or correct if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support[.]

The rule and statute must be interpreted strictly against the applicant seeking an award of fees. LoBiondo v. Schwartz, 199 N.J. 62, 99 (2009); DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226 (App. Div. 2000). This strict interpretation is grounded in "the principle that citizens should have ready access to . . . the judiciary." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div.), certif. denied, 162 N.J. 196 (1999). "The statute should not be allowed to be a counterbalance to the general rule that each litigant bears his or her own litigation costs, even when there is litigation of 'marginal merit.'" Ibid. (citation omitted). Sanctions should be awarded only in exceptional cases. Iannone v. McHale, 245 N.J. Super. 17, 28 (App. Div. 1990). "When the [non-prevailing party's] conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided,

claim, he or she should not be found to have acted in bad faith." Belfer, supra, 322 N.J. Super. at 144-45.

We recognize that even if there is a good faith basis to commence a lawsuit, an attorney is obliged to withdraw it once it becomes apparent the action is frivolous, and if the attorney does not, he or she may be liable for sanctions to compensate the other party for expenses incurred after that point in time. DeBrango, supra, 328 N.J. Super. at 229-30.

In initially deciding to award sanctions, the trial judge reasoned:

> Primarily, Joy argues that her claims were motivated by goals of great importance to her, the preservation of her marital home, and the recovery of credits for enhancing the value of the property and paying the carrying costs. . . . However, these intentions are insufficient to justify the continuous filing of baseless claims. This [c]ourt has rejected every single argument advanced by Joy.

In large part, the judge retreated from his earlier findings when confronted with defendants' $263,121.16 fee request. In his written statement of reasons accompanying the October 15, 2015 order, the judge found that "significant elements of this litigation cannot be deemed frivolous." The judge noted that plaintiffs' title claim was supported by the unrecorded second deed and Mabel's statements. The judge also found plaintiffs'

claims for partition and credits "as a matter of law were not frivolous."

Having reviewed the record, we conclude plaintiffs' claims had some legal and factual foundation. That the trial court ultimately disagreed, and dismissed a portion of those claims on summary judgment, without more, did not establish that plaintiffs acted in bad faith so as to necessitate an award of attorney's fees for frivolous litigation. Ferolito, supra, 408 N.J. Super. at 408. Accordingly, we are constrained to reverse and vacate the June 4, 2015 and October 15, 2015 orders.

Affirmed in part and reversed in part.