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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-2448-15T3

FRAN E. ADLER,

Plaintiff,

v.

KIMBERLI CRAFT, Montclair
Township Engineer, ANTHONY
MONTOURI, Montclair Building
Sub-code Official, RICHARD
CHARREUN, Montclair Planning
Technician, and MICHAEL J. MURPHY,

Defendants,

v.

MICHAEL J. MURPHY,

Third-Party Plaintiff/
Respondent,

v.

TOWNSHIP OF MONTCLAIR,

Third-Party Defendant/
Appellant,

and

MAYOR AND COUNCIL OF THE TOWNSHIP
OF MONTCLAIR,

Third-Party Defendants,

and

ROBERT P. KRAMER,

Plaintiff-Intervenor/
Respondent-Cross-Appellant,

v.

MICHAEL J. MURPHY, TOWNSHIP OF
MONTCLAIR, MAYOR and COUNCIL OF
THE TOWNSHIP OF MONTCLAIR,
KIMBERLI CRAFT, Montclair Township
Engineer, ANTHONY MONTOURI,
Montclair Building Sub-code
Official, and RICHARD CHARREUN,
Montclair Planning Technician,

Defendants.

Submitted January 18, 2017 – Decided March 27, 2017

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Docket
No. L-5586-02.

Ira Karasick, attorney for appellant
Township of Montclair.

Bendit Weinstock, P.A., attorneys for
respondent/cross-appellant Robert P. Kramer
(Roger J. Desiderio and Sherri Davis Fowler,
on the briefs).

DiFrancesco, Bateman, Kunzman, Davis, Lehrer
& Flaum, P.C., attorneys for respondent
Michael J. Murphy (Timothy P. Beck, on the
brief).

PER CURIAM

We granted Montclair Township's motion for leave to appeal a January 13, 2016 order, which denied plaintiff-intervenor-cross-appellant Robert P. Kramer's motion in aid of litigants' rights under Rule 1:10-3, and directed that Montclair hold a hearing to determine if there are "changed circumstances justifying" its agreement allowing defendant Michael Murphy's to construct a retaining wall within a sewer easement owned by Montclair. We reverse.

I.

Kramer and Murphy own contiguous pieces of property in Montclair. Since 2002, they have been engaged in proceedings related to Murphy's ongoing, and often interrupted, construction of a home and landscape modifications to his property.

In 2002, Murphy sought permission from Montclair to build a retaining wall within a sewer easement that Montclair owned and that ran across the rear of Murphy's property. Kramer opposed Murphy's application, and on May 28, 2002, it was denied.

The same year, Kramer¹ challenged Murphy's construction of a retaining wall located outside of the easement in a prerogative

¹ The lawsuit challenging Murphy's construction of the retaining wall was filed by Fran E. Adler, another owner of property contiguous to Murphy's. Kramer subsequently intervened in the action. Adler later moved and ended her participation in the litigation.

writ action that alleged the wall violated the height restrictions in Montclair's land use ordinance. In that proceeding, Murphy filed a third-party complaint against Montclair challenging its May 28, 2002 denial of his request to build the retaining wall within the easement.

The court resolved the litigation on cross-motions for summary judgment. The court found Murphy's construction of the retaining wall outside of the easement violated the land use ordinance's height restrictions and ordered that Murphy reduce the wall to the height permitted by the ordinance. The court also rejected Murphy's challenge to Montclair's denial of his request for permission to build a retaining wall within the easement. The court found Montclair's "decision [was] soundly within the power of the Township council."

The court entered an order on June 3, 2003, requiring that Murphy reduce the height of the retaining wall within sixty (60) days and affirming Montclair's denial of Murphy's request for permission to construct a retaining wall within the easement. Murphy's subsequent motion for reconsideration was denied. Murphy appealed.

In our decision on the appeal, we affirmed the court's finding that Montclair's denial of Murphy's request to construct a retaining wall within the easement was not arbitrary,

capricious or unreasonable. Adler v. Craft, A-0001-03 (App. Div. Nov. 19, 2004) (slip op. at 14). We reversed the court's order directing that Murphy reduce the height of the retaining wall on the property, and remanded for further proceedings as to whether a reduction in the wall's height was an appropriate remedy. Id. at 12-14.

The parties subsequently resolved the issue for which the remand was ordered -- the court's directive that Murphy reduce the height of the retaining wall. The court entered a September 2, 2015 order of settlement permitting Murphy to apply for a variance for the height of the wall as constructed, and requiring that Murphy reduce the wall to the height permitted under the ordinance if he failed to obtain the variance. Murphy's subsequent application for the variance was denied.

On April 9, 2015, Murphy and Montclair entered into an agreement permitting Murphy to construct a new retaining wall within the easement, subject to the satisfaction of numerous conditions. On September 30, 2015, Montclair issued a construction permit authorizing Murphy's construction of the retaining wall. On October 20, 2015, Montclair adopted resolution R-15-172 ratifying the agreement and authorizing the mayor's execution of the agreement on behalf of the town.

On November 6, 2015, Kramer filed a motion to enforce litigants' rights pursuant to Rule 1:10-3.² Kramer claimed Murphy violated the court's June 3, 2003 order, our decision on the appeal of that order, and the September 2, 2015 order of settlement because Murphy did not obtain a height variance for the retaining wall and had not reduced the wall to a height permitted by the ordinance. Kramer also claimed the June 3, 2003 order, as affirmed on appeal, barred Montclair from authorizing Murphy's construction of a retaining wall within the easement.

The court heard argument on the application and issued a written opinion. The court detailed the history of the proceedings between the parties, the prior orders entered, and addressed Kramer's contention that Montclair's approval of Murphy's request to construct a retaining wall within the easement violated the court's prior order.³ The court did not

² On November 16, 2015, Kramer also filed a separate prerogative writ action under Essex County Docket No. L-7991-15 against Montclair, Murphy and others, challenging the validity of resolution R-15-172 and the April 9, 2015 agreement, and seeking a restraining order prohibiting the issuance of building permits for Murphy's property.

³ The court did not address Kramer's request for relief under Rule 1:10-3 based on Murphy's alleged failure to reduce retaining wall to a height permitted under the ordinance. At oral argument, counsel for Montclair stated that the town had enacted a retaining wall ordinance and Murphy's retaining wall no longer exceeded the applicable height restriction. In any
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find that Montclair violated the June 9, 2003 order and, in fact, concluded that Montclair was "not irrevocably bound by the 2003 order and opinion." The court, however, concluded that

Montclair should not be allowed to change its position and ignore the 2003 court order and 2005 [o]rder [o]f settlement without (a) giving [] Kramer proper notice, and (b) holding a hearing to determine if the circumstances are now so different [that] the original denial [of Murphy's request for permission to construct a retaining wall] should be turned into an acceptance.

The court entered an order denying Kramer's request for relief under Rule 1:10-3 and directing that Montclair "hold a prompt hearing . . . to determine if changed circumstances justify allowing [] Murphy to build the retaining wall" as permitted in the April 9, 2015 agreement. We granted Montclair's motion for leave to appeal and Kramer's cross-motion for leave to appeal.

II.

We defer "to the trial court's factual findings . . . 'when [they are] supported by adequate, substantial and credible

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event, neither party has addressed the wall height issue in the briefs here. An issue not briefed on appeal is deemed waived. Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008); Zavodnick v. Leven, 340 N.J. Super. 94, 103 (App. Div. 2001).

evidence.'" Zaman v. Felton, 219 N.J. 199, 215 (2014) (first alteration in original) (quoting Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)). We review de novo the "trial court's interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The matter was before the court on Kramer's motion in aid of litigants' rights under Rule 1:10-3, which provides a "means for securing relief and allow[s] for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order." In re Adoption of N.J.A.C. 5:96, 221 N.J. 1, 17-18 (2015). "The scope of relief in a motion in aid of litigants' rights is limited to remediation of the violation of a court order." Abbott ex rel. Abbott v. Burke, 206 N.J. 332, 371 (2011). Relief by way of motion under Rule 1:10-3 is "not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of [a] court order." Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997).

To grant relief under Rule 1:10-3, the court must first find that the party against whom the relief is sought disobeyed a prior court order. See Milne v. Goldenberg, 428 N.J. Super. 184, 198 (App. Div. 2012) (finding Rule 1:10-3 permits entry of

an order compelling a "disobedient party['s]" compliance with "a prior order"). Kramer claims he was entitled to relief under Rule 1:10-3 because Montclair's 2015 agreement to allow Murphy to construct a retaining wall within the easement violated the court's June 3, 2003 order. We disagree.

Kramer reads the 2003 order too broadly and out of context. In 2003, the court was neither asked nor required to determine if Montclair lacked authority to permit construction of a retaining wall within the easement. The court's decision was a ruling on Murphy's third-party claim that Montclair's rejection of his request to build within the easement was arbitrary, capricious, and unreasonable. Murphy alleged Montclair's denial of his request was improper, and the court decided nothing more than he was incorrect. We affirmed the court's determination on that precise issue on appeal, finding Montclair's "refusal to encroach upon its easement can hardly be considered arbitrary, capricious or unreasonable." Adler, supra, slip op. at 15.

In his Rule 1:10-3 motion, Kramer attempted to convert the court's June 9, 2003 order into something it was not. The order's declaration that Murphy had "no legal or other right to build a wall or other similar structure on, over or across, or in any way encroach upon the [e]asement" described the reasoning for the court's "dismiss[al] with prejudice" of Murphy's third-

party claim. The court, however, found only that Murphy was without a right to build within the easement because Montclair properly withheld its consent for him to do so. We are satisfied the order was not, as Kramer suggests, a judicial declaration that Montclair lacked the authority to change its decision or subsequently enter into an appropriate agreement permitting construction within the easement.

Accordingly, the premise upon which Kramer's Rule 1:10-3 motion was based finds no support in the record. Montclair's entry into the agreement, issuance of the building permit, and passage of the resolution simply did not violate the 2003 order. The record did not reveal any disobedience of the 2003 order by Montclair or Murphy, and was bereft of any support for the grant of any remedy under Rule 1:10-3. For that reason alone, we are constrained to reverse the court's January 13, 2016 order.

We observe that the court did not expressly find any violation of the 2003 order supporting its grant of a remedy under Rule 1:10-3. Instead, the court determined that even if the 2003 order otherwise barred Montclair's entry into the 2015 agreement with Murphy, Montclair could avoid the order's limitations if the circumstances "now are so different" than those that existed when Montclair denied Murphy's initial request in May 2002, such that the "denial should be turned into

an acceptance." The court directed that Montclair conduct a hearing to determine if the circumstances had sufficiently changed from the May 2002 denial of his request, which was affirmed in the court's 2003 order, to permit Montclair's entry into the 2015 agreement with Murphy. The grant of this remedy, however, is untethered to any finding that the 2003 order actually barred Montclair from entering into the 2015 agreement in the first instance.


A party may seek relief from an order under Rule 4:50-1(e) upon a showing of changed circumstances. D.E.G., LLC v. Township of Fairfield, 198 N.J. 242, 266 (2009). Kramer relies on the Court's decision in D.E.G., arguing Murphy and Montclair were required to show a change in circumstances to obtain relief from the prior orders. In D.E.G., however, relief from a prior judgment was required and requested. Id. at 264-65. Here it was not. For the reasons already stated, the 2003 order did not bar Murphy and Montclair's entry into the 2015 agreement. Thus, it was unnecessary that they obtain relief from the order, or show any change in circumstances under Rule 4:50-1(e). The court erred in ordering otherwise.

In sum, we conclude only that Kramer was not entitled to relief under Rule 1:10-3 because the 2003 order did not bar Montclair from granting Murphy permission to construct a

retaining wall within the easement. We offer no opinion as to whether Montclair's grant of that permission in 2015, reflected by its entry into the agreement and passage of the resolution, was otherwise lawful. Kramer's challenge to the legality of agreement and resolution will be addressed in the pending prerogative writ action.

Reversed. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION