SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4382-15T3

WILLIAM C. ILER,

Plaintiff-Appellant,

v.

BOROUGH OF ATLANTIC HIGHLANDS, THOMAS AMBROSOLE, and STEVEN LEWINSON,

Defendants-Respondents.

Argued November 14, 2017 – Decided December 28, 2017

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-0640-15.

Larry S. Loigman argued the cause for appellant.

Bernard M. Reilly argued the cause for respondent Borough of Atlantic Highlands.

Barbara K. Lewinson argued the cause for respondents Thomas Ambrosole and Steven Lewinson (Barbara K. Lewinson, of counsel; Jeffrey Zajac, on the brief).

PER CURIAM

Plaintiff William C. Iler appeals from orders dated February 14, 2014, January 6, 2015, January 4, 2016, March 4, 2016, and May 13, 2016, which dismissed his complaint, granted partial summary judgment to defendant-counterclaimant the Borough of Atlantic Highlands (Borough), allowed the individual defendants-counterclaimants Thomas Ambrosole and Steven Lewinson (individual defendants) to dismiss their counterclaims, and awarded defendants attorney's fees and costs. We affirm all the orders and the final judgment.

I.

Plaintiff owned two acres of property in the Borough that he used as a residence. In 2002, he sold one acre of the property to the Borough for $88,000 to be used for passive public recreation and open space. Specifically, the deed stated:

> [The] Property herein shall be utilized for passive recreational or woodland preservation activity (including but not limited to walking trails, scenic overlook, small children's play area or related structures for such use and small parking area related to such use in accord and as limited by State of New Jersey Green Acres Regulations.

The deed also granted enforcement rights to plaintiff, as the grantor, or his successors in title to the remainder of the property that contained the residence.

The parcel of land sold to the Borough is wooded and sloped. In 2013, the individual defendants, who own property near the parcel, approached the Borough and proposed to retain a landscaping contractor, Chestnut Arboricultural & Forestry Services, LLC (Chestnut), to remove unsustainable vegetation and trees and to install native plants. The individual defendants believed that the parcel had become overgrown and they proposed, at their own expense, to contract with Chestnut to thin, prune, and plant native plants on the parcel. On October 9, 2013, the Borough adopted a resolution authorizing the agreement under which Chestnut would remove and replace invasive plants with non-invasive plants.

Shortly thereafter, plaintiff, who is an attorney, filed a self-represented complaint seeking to enjoin the Chestnut plan and claiming damages against the Borough and the individual defendants. Plaintiff also sought preliminary injunctive relief. The court denied the request for a preliminary injunction, noting that plaintiff had not demonstrated a likelihood of success on the merits.

Thereafter, the Borough and the individual defendants sent plaintiff letters informing plaintiff of their position that his complaint was frivolous and filed in bad faith, and that they would be seeking reimbursement of attorney's fees in accordance with N.J.S.A. 2A:15-59.1 and Rule 1:4-8. When plaintiff refused

to dismiss his complaint, the Borough and the individual defendants filed answers and counterclaims. In the Borough's counterclaim, it contended that plaintiff trespassed upon the property by building a stone wall and patio that extended from his property sixteen-and-one-half feet onto the Borough's property.

In December 2013, the Borough and the individual defendants filed a motion seeking to dismiss plaintiff's complaint. The court heard oral argument, found that there were no genuine issues of material fact, and concluded that the 2002 deed restriction did not preclude the Borough from thinning, pruning, and planting native plants on the Borough's property. Thus, on February 14, 2014, the court granted the motion and dismissed plaintiff's complaint with prejudice.

Thereafter, the Borough proceeded with its counterclaim for trespass against plaintiff. The Borough hired a land surveyor to conduct a survey and prepare a report. That report showed that plaintiff's wall and patio extended sixteen-and-one-half feet onto the Borough's property. Relying on that survey, the Borough moved for partial summary judgment on its trespass claim. Plaintiff did not present any evidence to dispute that his wall and patio extended onto the Borough's property and, accordingly, the court granted the motion in an order dated January 6, 2015.

In August 2015, plaintiff sold his property. Thereafter, the new owner removed the existing structures from the Borough's property and restored it to its natural condition.

The Borough, therefore, waived its damages claim related to the trespass, preserving only its right to file for reimbursement of attorney's fees and costs. The individual defendants also waived their counterclaims. Over plaintiff's objection, the trial court entered a final order memorializing the withdrawal of the counterclaims on January 4, 2016.

Subsequently, all parties filed motions for attorney's fees and costs. The trial court granted attorney's fees to the Borough, denied fees to plaintiff, and initially denied fees to the individual defendants. The court memorialized that decision in an order entered on March 4, 2016. The fees awarded to the Borough were $10,412.50.

The individual defendants made a motion for reconsideration on the fee issue and, after further argument, the court granted reconsideration and, in an order dated May 13, 2016, awarded the individual defendants $2,671 for attorney's fees. On June 19, 2016, plaintiff filed a notice of appeal.

II.

On appeal, plaintiff makes three arguments: (1) his complaint should not have been dismissed; (2) the counterclaims were

frivolous and not supported by adequate facts; and (3) attorney's fees should not have been awarded to the Borough and the individual defendants. These arguments lack merit and, accordingly, we reject them and affirm.

Having sold his property, plaintiff now lacks standing to pursue his complaint. A party must have a justiciable controversy and standing to sue. O'Shea v. N.J. Schs. Constr. Corp., 388 N.J. Super. 312, 317-18 (App. Div. 2006). "Standing may be found as long as the parties seeking relief have a sufficient personal stake in the controversy to assure adverseness and the controversy is capable of resolution by the courts." Id. at 318.

Here, plaintiff lacks standing to pursue his complaint. Plaintiff's complaint was dependent on his ownership of the property adjacent to the parcel that was sold to the Borough. In accordance with the deed, the owner of the property was the grantor. The deed allowed the owner of the property to enforce the restrictions in the deed. The deed also provided, however, that the rights of the grantor remained with the property and "his successors in title to" the remainder of the property. Thus, when plaintiff sold the property in 2015, he no longer had a right to enforce the restrictions in the deed. We note, moreover, that were the issue still germane, the trial court correctly interpreted

the deed, which does not restrict the activities under the Chestnut plan.

There are two flaws in plaintiff's argument concerning the dismissal of the counterclaims. First, the trespass claim is now moot. If the disputed issue has been resolved, the claim is moot, and thus non-justiciable. Advance Elec. Co., Inc. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 166 (App. Div. 2002). The claim is moot if a judgment cannot grant effective relief, or if no concrete adversity exists between the parties. Ibid. A court should not hear a case regarding a moot claim. Here, the new owner removed the wall and patio and restored the property to its natural condition. Thus, because the Borough is no longer seeking damages, the trespass claim is moot.

Second, both the Borough and the individual defendants had the right to withdraw their counterclaims. Conversely, plaintiff did not have a right to prevent the withdrawal of those counterclaims. On appeal, plaintiff argues that the counterclaims were frivolous and, therefore, should have been dismissed. To the extent that plaintiff is seeking a ruling on the nature of those claims, just so they can thereafter be dismissed, that argument does not merit discussion in an opinion. Accordingly, we reject it without further discussion. R. 2:11-3(e)(1)(E).

Finally, we turn to plaintiff's arguments concerning the award of attorney's fees.[1] We review an award of attorney's fees for abuse of discretion. Noren v. Heartland Payment Sys., Inc., 448 N.J. Super. 486, 497 (App. Div. 2017). Determinations regarding attorney's fees will be disturbed "only on the rarest of occasions, and then only because of a clear abuse of discretion." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)).

New Jersey follows the American Rule that provides that a prevailing party is only entitled to attorney's fees if it is authorized by the party's contract, court rule, or statute. Litton Indus., 200 N.J. at 385, 404 (quoting Packard-Bamberger, 167 N.J. at 444). New Jersey's frivolous litigation statute, N.J.S.A. 2A:15-59.1, seeks to deter frivolous litigation and compensate the party that was adversely affected by a frivolous suit. See Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 67 (2007). "The statute permits a court to award reasonable counsel fees and litigation costs to a prevailing party in a civil action if the court determines that 'a complaint . . . of the nonprevailing

[1] While plaintiff lacks standing to pursue his complaint on the merits, he can defend against the attorney's fees awards, which were premised on his complaint being frivolous.

person was frivolous.'" Ibid. (quoting N.J.S.A. 2A:15-59.1(a)(1)). A complaint is frivolous if it was "commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury[,]" or if "[t]he non-prevailing party knew, or should have known, that the complaint . . . was without any reasonable basis in law or equity . . . ." N.J.S.A. 2A:15-59.1(b)(1) to (2).

Rule 1:4-8 allows a party to seek sanctions against an attorney or self-represented party who files a frivolous claim, motion, or other paper. See Toll Bros., 190 N.J. at 69. Prior to filing a motion for reimbursement for attorney's fees, the prevailing party must provide the attorney or self-represented litigant with written notice that the party will apply for sanctions unless the frivolous pleading is withdrawn within twenty-eight days. Ibid. Motions for reimbursement for attorney's fees are to be filed within twenty days of the final judgment. R. 1:4-8. The court, however, has discretion to hear an untimely motion for attorney's fees unless the application is made after an undue delay. Czura v. Siegel, 296 N.J. Super. 187 (App. Div. 1997) (denying a motion for attorney's fees that was filed eight months after the entry of final judgment).

Here, both the Borough and the individual defendants sent plaintiff letters notifying him that they would seek attorney's

fees under the frivolous litigation statute and Rule 1:4-8. We discern no abuse of discretion in the trial court's decision to grant the Borough and the individual defendants attorney's fees under the statute and rule. Moreover, we see no abuse of discretion in the court's factual findings on the reasonableness of counsels' hourly rate and the hours expended. Accordingly, we affirm the award of fees.

Affirmed.