SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1564-16T1

GRETA MARTIN, JOHN R. BLUM, DEBORAH BLUM, PATRICIA FROMER, TIMOTHY FROMER, BRUCE D. PIGGOT, VINCENT DRENNAN, AMANDA WHITE, EILEEN WHITE, GERARD MONCHEK, DALE MONCHEK, and LOUISE CONNORS,

Plaintiffs-Appellants,

v.

CITY OF BAYONNE and CITY OF BAYONNE PLANNING BOARD,

Defendants-Respondents,

and

975 BROADWAY OWNER, LLC,

Defendant/Intervenor-Respondent.

Argued May 1, 2018 – Decided May 10, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2332-16.

Christine Finnegan argued the cause for appellants (C. Finnegan & Associates Law Firm,

LLC, attorneys; Christine Finnegan, on the briefs).

Gregory K. Asadurian argued the cause for respondents City of Bayonne and City of Bayonne Planning Board (Kaufman, Semeraro & Leibman, LLP, attorneys; Gregory K. Asadurian, on the brief).

Clark E. Alpert argued the cause for respondent 975 Broadway Owner, LLC (Weiner Law Group, LLP, attorneys; Steven R. Tombalakian and Michael Miceli, of counsel; Clark E. Alpert and David N. Butler, on the brief).

PER CURIAM

Plaintiffs appeal from an October 28, 2016 order, which dismissed their complaint in lieu of prerogative writs for lack of transcripts of the proceedings before the City of Bayonne Planning Board (Board) pursuant to Rule 4:69-4. We affirm.

We have not been provided with the transcripts of the proceedings before the Board. However, we derive the facts from the resolution passed by the Board and the parties' briefs.

On March 18, 2016, defendant 975 Broadway Owner, LLC (975 Broadway), applied to the Board for preliminary and final approval to construct a mixed-use building in Bayonne. The plan for the site consisted of up to 91 residential units, ground floor commercial use, and 150 parking spaces. Defendant the City of Bayonne (City) had previously declared this area "blight[ed]", "deteriorate[d]", and in need of redevelopment. This declaration

created a new zone, which also created new land use regulations for the area. 975 Broadway's application to the Board met the new zoning criteria, and did not require any variances.

The application was considered at a special board meeting on April 6, 2016, at which members of the public, including two of the plaintiffs here, testified. 975 Broadway presented testimony from its engineering expert, Joseph Jaworski, P.E., regarding the site plan and its compliance with the City's redevelopment plan. Jaworski also addressed the logistics of the site such as ingress/egress, parking, storm water collection, roof run-off, landscaping, open space, and explained why the application required no need for variances to the zoning regulations. 975 Broadway also presented testimony of its architect Francis Pisani, who similarly testified no variances were needed for the project. Additionally, a traffic engineer, Joseph Staigar, P.E., testified regarding the existing site conditions, the amount of new traffic expected to be generated, and the process used to develop a safe plan.

Following the hearing, the Board passed a resolution adopting 975 Broadway's plan. The resolution was memorialized on April 12, 2017. Because we lack a transcript of the hearing, it is unclear whether plaintiffs contested the Board's conclusions.

On April 18, 2016, 975 Broadway published a "Notice of Action Taken by the Planning Board" in The Jersey Journal. This publication triggered the forty-five day period allowed under Rule 4:69-6(b)(3) to file an action challenging the approval. Plaintiffs filed their complaint in lieu of prerogative writs on June 6, 2016, four days past the June 2, 2016 deadline. Plaintiffs named as defendants the City, the Board, and various "John Does." 975 Broadway was neither named in the complaint nor given notice of the action, but intervened by way of motion.

Plaintiff's complaint was not accompanied by a certification stating all necessary transcripts of the municipal land use board have been ordered as required by Rule 4:69-4. A case management conference occurred as mandated by Rule 4:69-4, during which the motion judge addressed the lack of transcripts of the proceeding before the Board. Plaintiff's counsel assured the motion judge he would obtain the transcripts.[1]

Plaintiff's counsel did not request the transcripts. As a result of the late filed complaint and the lack of transcripts or transcript request, the City filed a motion to dismiss, which 975 Broadway joined. At the initial motion hearing on October 19, 2016, plaintiff's counsel stated he thought the transcripts were

[1] Plaintiff's counsel who appeared before the motion judge is not the attorney who represents plaintiffs on this appeal.

ordered in "late June." The motion judge ordered the submission of sworn statements from the parties. The motion judge specifically directed plaintiff's counsel to provide a detailed description of his efforts to secure the transcripts, and to bring the transcript order form to the next motion hearing. The judge explained:

> I have to see . . . when the transcripts were ordered. . . . [I]f the request was a couple of days after the complaint was filed, that's in violation of [Rule] 4:69-4, but . . . what's a couple of days . . . ? But if [it] turns out that as we sit here on [the next hearing date] they haven't been ordered yet, that could be a serious problem.

We have not been provided with the certification submitted by plaintiff's counsel. However, we understand counsel's certification attached an email from the Bayonne City Clerk's Office dated July 15, 2016, responding to an Open Public Record Act (OPRA) request, N.J.S.A. 47:1A-1 to -13, made by plaintiff's counsel for the transcripts. The City and the Board submitted two certifications, namely, from Lillian Glazewski, the city land use coordinator, and Susan Bischoff, the Board's court reporter.

Glazewski's certification stated she did not receive a transcript request from anyone. Bischoff certified that, as the Board's court reporter, she is the only person who transcribes the proceedings before the Board, and no one ever made a request or

paid a deposit for a transcript of the hearings regarding 975 Broadway's application.

At the motion hearing on October 28, 2016, the motion judge heard oral argument, and learned the transcripts had not been ordered. Addressing plaintiffs' counsel, the judge stated:

> You stand here . . . telling me that of course [you ordered the transcripts] and laughing at the notion that you haven't . . . . You've got nothing here whatsoever to show that you ordered them, and you knew that was an issue. It was a big issue last week. I have the certification . . . indicating that it hasn't been ordered. You laugh at me when I say well, it seems to me you haven't ordered it and you've got nothing to show me that you have ordered it. So . . . you're still not being candid with the court[.]

After oral argument and review of the parties' submissions, the judge granted the motion to dismiss. The judge found plaintiffs had failed to comply with Rule 4:69-4 for failure to produce the transcripts. The judge found defendants had been prejudiced by the passage of five months since the initial filing, and dismissed plaintiffs' complaint with prejudice. This appeal followed.

The issue before us is a question of law. Therefore, our standard of review is de novo. State v. Hubbard, 222 N.J. 249, 263 (2015).

On appeal, plaintiffs argue the motion judge erred because plaintiffs had issued an OPRA request to the City of Bayonne, which did not yield transcripts for the proceeding. Plaintiffs assert the OPRA request sufficed as compliance with Rule 4:69-4. Additionally, plaintiffs argue that since prerogative writ actions are Track IV actions for purposes of discovery, the motion judge should have permitted them the 450 days allotted to such cases for discovery to obtain the transcripts. Plaintiffs also assert the motion to dismiss was improperly decided as a summary judgment motion, which we take to mean plaintiffs believe the judge erred by dismissing the matter with prejudice.

Rule 4:69-4, entitled "The Filing and Management of Actions in Lieu of Prerogative Writs" states:

> The filing of the complaint shall be accompanied by a certification that all necessary transcripts of local agency proceedings in the cause have been ordered. All actions in lieu of prerogative writs will be assigned to Track IV. Within [thirty] days after joinder and in order to expedite the disposition of the action the managing judge shall conduct a conference, in person or by telephone, with all parties to determine the factual and legal disputes, to mark exhibits and to establish a briefing schedule. The scope and time to complete discovery, if any, will be determined at the case management conference and memorialized in the case management order.
>
> [(Emphasis added).]

The annotation to the rule states:

> This rule provides for special case management for actions in lieu of prerogative writs for the purpose of expediting final disposition. First, the complaint must be accompanied by a certification asserting that all agency transcripts have been ordered . . . Second, all actions in lieu of prerogative writs are assigned to Track IV to assure single-judge management throughout, but with the discovery schedule, if any, to be determined by the judge on a case by case basis.
>
> . . . .
>
> Because the 450-day discovery period afforded by [Rule] 4:24-1(a) to Track IV cases is normally inappropriate in lieu of prerogative writ actions, this provision of the rule leaves the issue to the court for determination on a case by case basis.
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> [Pressler & Verniero, Current N.J. Court Rules, cmt. 5.1 on R. 4:69-4 (2018) (emphasis added).]

Plaintiffs never submitted the certification required by Rule 4:69-4 to certify the transcripts for the April 6, 2016 Planning Board Hearing were requested, or provided proof to show the transcripts were ordered or a deposit made. Rather, the record demonstrates plaintiff's counsel misrepresented that he had ordered the transcripts. Indeed, at the initial motion hearing, the motion judge asked plaintiff's counsel: "When in fact did you order the transcripts?" Plaintiff's counsel responded: "I want to say late June." The City and the Board's counsel then stated:

"Judge, the transcripts have not been ordered . . . I've spoken with my clients, they have not been ordered."

As a result of the dispute over this fundamental pre-condition of perfecting the action, the motion judge adjourned oral argument and required the certifications we noted above. When the matter returned for oral argument, the only proof plaintiffs submitted was an email from the city clerk's office dated July 15, 2016, in response to an email sent by plaintiff's counsel, stating "The Planning & Zoning Office has advised they have no transcripts for the requested hearing[.]" Plaintiffs never provided the motion judge with their original email, which they claimed contained the transcript request. Moreover, the subject-line of the response email demonstrated plaintiff's counsel had made an OPRA request to determine if anyone else had ordered the transcripts, but did not actually order the transcripts themselves.

The motion judge addressed this important difference during the second hearing on October 28, 2016.

> I wish [plaintiff's counsel] had the e-mail . . . that [the City's employee] apparently was responding to.
>
> [The response is] literally saying there simply are no transcripts, the reason being that nobody ever ordered them.
>
> . . . .

> I'll accept that you were asking for the transcripts, because she says, "Has advised they have no transcripts." But, transcripts don't automatically appear. Somebody . . . has to request that the recording be transcribed. Then a typist types it up and then the recording . . . becomes a transcript[.]
>
> . . . .
>
> And as I sit here right now you . . . show me nothing that indicates even as of late October that you've ordered them.

The judge concluded:

> This complaint was filed in early June. It's now late October. . . . [I]t's already been five months and I am satisfied [the transcripts have] still not been ordered. There's a reason why when someone challenges a governmental agency, either a planning board or a zoning board or others, that . . . there's a [forty-five] day time limit as opposed to a two-year statute of limitations or a six-year statute of limitations. Those people who are involved have a right to know pretty quickly whether or not this . . . project is really going to be stayed or not by the prerogative writ.
>
> . . . .
>
> I'm going to dismiss your complaint with prejudice because you should have ordered those transcripts back in June. . . . [Rule] 4:69-4 says the complaint shall be accompanied [by the certification of the transcript request].
>
> . . . I suppose, even though it says shall, there could be under some circumstances relaxing it a few days, but here we are . . . almost five months later and you still haven't

> ordered it. Despite . . . a letter that you sent me saying that you ordered it back in July you're referencing court last week saying you ordered it in June, you never ordered it.

There is no basis to disturb the motion judge's decision. The judge referenced his discretion to enlarge the time period necessary for plaintiffs to order the transcripts. Although Rule 4:69-4 does not provide for the ability to do so, arguably Rule 4:69-6 does. This rule addresses the enlargement of the time period for filing a complaint in lieu of prerogative writs and other "particular actions." R. 4:69-6(b). The rule states: "The court may enlarge the period of time provided in [Rule 4:69-6](a) or (b) . . . where it is manifest that the interest of justice so requires." R. 4:69-6(c). Thus, although Rule 4:69-6(c) does not expressly reference Rule 4:69-4, because the certification required by the latter is an integral part of the complaint referenced by the former, the enlargement of time to file a complaint also enlarges the time to file the certification of the transcript request.

We have broadly interpreted the ability of a trial court to enlarge the time period for filing of a complaint in lieu of prerogative writs. See Cohen v. Thoft, 368 N.J. Super. 338, 345-47 (App. Div. 2004) (holding the "interest of justice" standard under Rule 4:69-6(c) exceeded the category of case previously

identified as subject to enlargement, namely, cases involving: "(1) important and novel constitutional questions; (2) informal or [e]x parte determinations of legal questions by administrative officials; and (3) important public . . . interests which require adjudication or clarification" (quoting Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975))). Notably, in Cohen, we reversed a trial court's dismissal of a complaint in lieu of prerogative writs where the failure to file the complaint in a timely manner was caused by misinformation given by a zoning officer to a plaintiff regarding the published notice of approval for setback and coverage variances granted to defendants to expand their home. Id. at 347. We held the trial court should have enlarged the period of time for the filing of plaintiff's complaint because plaintiff reasonably relied on the zoning officer's representations and "plaintiff did not 'slumber on [his] rights[.]'" Ibid. (alteration in original) (quoting Schack v. Trimble, 28 N.J. 40, 49 (1958)). Also, we noted the lack of prejudice to defendants by the filing of the complaint, which was filed only three days out of time. Ibid.

Our Supreme Court has interpreted Rule 4:69-6(c) in a similar fashion. Citing our decision in Cohen, the Court observed "the broad language of the enlargement provision belies the suggestion that the intent of the rule is to restrict enlargement to one of

those three categories. See [Rule] 4:69-6(c) (brooking no limitation as to circumstances that may require enlargement in interests of justice)." Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., LP, 204 N.J. 569, 584 (2011). The facts of Berwind also entailed a plaintiff who was "inadvertently misled" to file a complaint six days late by a planning board's secretary. Id. at 584-85.

The facts here are entirely dissimilar, and anathema to the purpose of Rule 4:69-6(c) and the mode of discovery contemplated by Rule 4:69-4. Indeed, the record demonstrates plaintiffs were not innocent parties who inadvertently perfected their complaint in an untimely fashion because of misinformation provided by the City or the Board. Rather, we are convinced plaintiffs were at all times aware of their obligation to order the transcripts, misrepresented to the motion judge they had ordered the transcripts, but never did so. Moreover, by allowing five months to elapse and still not having ordered the transcripts, plaintiffs not only "slumbered" on their rights, but far exceeded and delayed the reasonable time period for adjudication of their complaint, thereby prejudicing defendants, particularly 975 Broadway.

For these reasons, we affirm the dismissal with prejudice of plaintiffs' complaint. To the extent we have not addressed the other arguments of plaintiffs, it is because they lack merit

warranting further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.