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EAGLE REALTY OF NJ, LLC, Plaintiff, v. 111 KERO HOLDINGS, LLC, BPREP 111 KERO ROAD, LLC and ABC CORPORATIONS 1 and 5, whose names are not yet known, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: GENERAL EQUITY BERGEN COUNTY DOCKET NO. BER-C-198-21 FILED SEP 14 2022 James J. DeLuca, J.S.C.

DECISION ON MOTION FOR SUMMARY JUDGMENT

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Introduction

Before the court is a motion (the "Motion") filed on behalf of 111 Kero Holdings, LLC, ("Kero Holdings"),and BPREP 111 Kero Road, LLC ("BPREP" which together with Kero Holdings are referred to collectively as "Defendants") seeking an order: (i)

dismissing, with prejudice, the claims set forth in the complaint[1] filed on behalf of Eagle Realty of NJ, LLC ("Plaintiff") and (ii) awarding sanctions pursuant to R. 1:4-8 of the Rules Governing the Courts of the State of New Jersey (the "Court Rules"). The Motion was opposed; the court heard oral argument on September 9, 2022 and reserved decision.

Background[2]

Plaintiff owns the commercial building and property commonly known as 707 Commercial Avenue (a/k/a 705-707 Commercial Avenue), Carlstadt, New Jersey (the "Beta Property"). Defendants' SUMF at ¶1 and certification of Kenneth K. Lehn, Esq. dated August 11, 2022, submitted in support of the Motion (the "Lehn Cert.), at **Exhibit D**, ¶1 at 1). Plaintiff is owned by Arnold Serchuk ("Serchuk"). Serchuk also owns Beta Industries, Inc., which occupies a portion of the Beta Property. Defendants' SUMF at ¶2 and Lehn Cert. **Exhibit D**, ¶2 at 1-2). Until June of 2020, Kero Holdings owned the commercial building and property commonly known as 111

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[1] In its complaint, Plaintiff asserts that Defendant breached an easement by prescription and rights conveyed to Plaintiff or its predecessors in title by prior deeds (Count 1); trespass related to the Defendants construction of a curb and fence which according to Plaintiff unlawfully impacted on Plaintiff's prescriptive easement (Count 2); and bad faith related to the non-binding letter of intent dated March 6, 2019 which resulted in the termination of the First Action (as defined herein) (Count 3.)

[2] The Background section is based upon Defendants' Statement of Uncontested Material Facts dated August 11, 2022, submitted in support of the Motion ("Defendants' SUMF"). Plaintiff did not file any response pursuant to R. 4:46-2(b) admitting or deny the facts set forth in Defendants' SUMF. To the extent that such a responding statement is not submitted or supported by facts in the record, then the court is justified in granting the motion for summary judgment based on the assumption that the movant's statement of material facts is true. Leang v. Jersey City Board of Education, 399 N.J. Super 329, 367 (App. Div. 2008), aff'd in part and rev'd in part on other grounds, 198 N.J. 557 (2009). Accordingly, the facts set forth in the Background section are deemed uncontested and true.

Kero Road, Carlstadt, New Jersey (the "Kero Property"). Kero Holdings transferred the Kero Property in June 2020 to BPREP. Defendants' SUMF at ¶3 and Lehn Cert. **Exhibit D**, ¶¶3 & 5 at 2.

The rear portions of the Beta Property and Kero Property back up to one another and share a property line about 100 feet long. Defendants' SUMF at ¶4 and Lehn Cert. **Exhibit D**, ¶¶3 & 7 at 2. Loading docks are located at the rear of the Beta Property. Defendants' SUMF at ¶5 and Lehn Cert. **Exhibit D**, ¶8 at 3 and **Exhibit C**, ¶4 at 2. On November 14, 2016, the New Jersey Sports and Exposition Authority (the "NJSEA") issued a Non-Compliance Warning to the owners of the Kero and Beta Properties relating to unacceptable drainage, flooding and hazardous conditions in the rear parking area of each property. Defendants' SUMF at ¶6 and Lehn Cert.at **Exhibit C**, ¶¶5-6 at 2-3).

Because of the commonality of the flooding problem, Kero Holdings proposed to Plaintiff that they develop a joint remediation plan to satisfy the NJSEA. Serchuk declined, as it was his position that the flooding on the Beta Property was caused by an alteration made by another neighbor, Yoo-Hoo, even though the NJSEA rejected Serchuk's contention. Kero Holdings proceeded independently to address and correct the flooding and drainage issues on its property by constructing a one-foot-high curb with guardrail and security fencing along the property line between the Kero Property and the rear of the Beta Property. This remediation plan was approved by the NJSEA. The curb channeled and directed surface water to a filtered drain built into the curb and to a sump pump. Defendants' SUMF at ¶7 and Lehn Cert at **Exhibit C**, ¶¶5-8 at 2-4).

In its complaint in this action, Plaintiff asserts that these improvements prevent tractor trailers from accessing the loading docks at the rear of the Beta Property because it eliminates the ability to drive around the side of the Beta building and into the adjacent parking area behind the Kero Property and then back into the Beta loading docks. Plaintiff further contends that it has enjoyed such access to the Kero Property to facilitate access to and exit from its loading docks for more than thirty (30) continuous years and, thus, has a prescriptive easement with which Kero Holdings' drainage-related improvements interfere.[3] In March 2018, Plaintiff commenced an action under Docket No. BER-C-80-18 (the "First Action") seeking injunctive relief and removal of the curb, guardrail and fence installed by Kero Holdings. Defendants' SUMF at ¶8 and Lehn Cert. at **Exhibit A**.

In addition to filing its Complaint in the First Action, Plaintiff also filed a supporting certification by Serchuk in support of its Order to Show Cause application that mirrored and reiterated the allegations of the Complaint. In both its Complaint, which was verified by Serchuk, and Serchuk's supporting certification, the following statements were made under oath:

a. The Kero Property was purchased in or about 1977 by a company called Design Craft (Kero Holdings' predecessor in title), and Design Craft "was obviously aware of this ongoing access to the Kero Property by ... [McNaughton Litho

[3] At oral argument, Plaintiff's counsel acknowledged that its claim for trespass against Defendants related to the alleged interference with Plaintiff's asserted prescriptive easement and not to any flooding on the Beta Property.

Co. as a tenant at the Beta Property] and clearly permitted this shared use of the Kero Property." Lehn Cert., **Exhibit A**, ¶13 at 5-6; Lehn Cert., **Exhibit B**, ¶17 at 6.

b. "Permission from Defendants and their predecessors for this ongoing use was admittedly tacit, but it was clearly understood and accepted by all involved ... for at least forty (40) years." Lehn Cert. **Exhibit A**, ¶19 at 8; Lehn Cert., **Exhibit B**, ¶24 at 8.

c. The "shared use"[4] or access to the Kero Property was a type of ". . . mutually beneficial arrangements between neighboring property owners" that allegedly "are commonplace throughout this area of . . . Carlstadt," where "efficient use of the limited industrial property space has necessitated shared access to driveways, shared parking areas and shared use of other space between neighboring buildings, irrespective of precise property lines." Lehn Cert., **Exhibit A**, ¶26 at 10[5] and Defendants' SUMF at ¶9.

In an email dated July 9, 2003, Serchuk wrote to Kero Holdings' employee, JoAnne Zerby, regarding certain maintenance and repair issues in which he stated that Plaintiff bought the Beta Property in 1977 and "formed an agreement with Design Craft, the [then] owners of your [Kero Holdings'] building at that time to allow vehicles to maneuver and have access to the loading docks in both buildings." Lehn

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[4] The complaint characterized the adjacent parking areas behind the Beta Property and the Kero Property where tractor trailers would traverse in order to back into or exit from loading docks at the Beta Property as a "shared use" or "common use." (Lehn Cert., **Exhibit C**, ¶9 at 4).

[5] Plaintiff repeats this allegation in the present or Second Action described hereafter. (Lehn Cert., **Exhibit D**, ¶25).

Cert., **Exhibits B and E**. Serchuk's statement thus indicates that he had the permission or consent of Kero Holdings' predecessor (Design Craft) to allow tractor trailers to drive onto the Kero Property in order to facilitate access to loading docks at the rear of the Beta Property. Plaintiff did not produce in discovery any documents by Kero Holdings or its predecessors in title granting such access to the Kero Property despite the request for same. Defendants' SUMF at ¶10 and Lehn Cert., ¶8 at 2.

In the First Action, Serchuk was deposed on November 15, 2018 and testified that at the time his entity purchased the Beta Property in or about 1977, there was no written or oral agreement with its neighbor to enter into the Kero Property to facilitate access to the loading docks on the adjacent Beta Property. Lehn Cert., **Exhibit E** at 38. Rather, Serchuk testified that he "took it for granted" that he could enter upon the Kero Property to facilitate access to the Beta loading docks. Id. at 78-79 and Defendants' SUMF at ¶11. Serchuk further testified in the First Action that when his entity purchased the Beta Property, his attorney told him "there was an easement" for vehicular traffic from the Beta Property to come onto the Kero Property, but Serchuk knows that no such written easement exists. Lehn Cert., **Exhibit E**. Id. at 143 lines 1-11.

Serchuk knew that if an easement had been granted, it would have been in writing. Id. at 147, lines 16-19. Serchuk further acknowledged that if his attorney thought there was an easement, there would have been something in writing encountered in connection with the closing on the purchase of the property, but no such writing existed. Id. at 144, lines 14-19. Moreover, Serchuk's attorney said nothing more than "there is an easement" and did not explain the type of easement,

its nature or provide a description of its purpose, as Serchuk "would remember" such things if they had been uttered. Id. at 146, line 25 – 147, line 15. The deeds in the chain of title produced by Plaintiff in discovery do not grant a right of access to the Kero Property. Title examination shows that only a utility (water line) easement exists, but nothing for vehicular traffic. Lehn Cert., ¶8 at 2 and **Exhibit G** and Defendants' SUMF at ¶ 12.

The First Action was settled on or about March 6, 2019 by a non-binding letter of intent executed by the parties. The court was notified on March 6, 2019 that the First Action was settled "subject to preparation and execution of . . . transactional documents; primarily a License to permit access to each other's property for tractor trailers seeking access to loading docks" and other terms. Lehn Cert., **Exhibit H**, ¶3 at 2 and Defendants' SUMF at ¶13. The settlement was not consummated, as Plaintiff ceased all communications involving the proposed License and related matters. Lehn Cert., **Exhibit H**, ¶¶15-18 at 6-7 and Defendants' SUMF at ¶ 12.

About a year and a half later, in or about April or May 2021, Plaintiff moved for partial enforcement of the settlement (i.e., to require Kero Holdings to remove the curb, guardrail and fence). Kero Holdings cross moved to enforce the entire settlement. Lehn Cert., **Exhibit H** and Defendants' SUMF at ¶ 15. This court denied the motion and cross motion, finding there was no meeting of the minds as to the material terms of the settlement and entered an order of dismissal providing that Plaintiff could file a new action to pursue its claims within 45 days. Lehn Cert., **Exhibit I** and Defendants' SUMF at ¶ 16..

In or about August 2021, Plaintiff commenced this action (under Docket No. C-198-21) (the "Second Action"), nearly identical to the First Action and seeking similar relief, except that it joined BPREP, the new owner of the Kero Property, as a defendant and added a claim of bad faith against Kero Holdings in connection with the non-binding letter of intent. Lehn Cert., **Exhibit D** and **Exhibit A** and Defendants' SUMF at ¶ 17. In the Second Action, Plaintiff alleges in the complaint verified by Serchuk that "[p]ermission from Defendants and their predecessors for this ongoing access to the Kero portion of the rear lot was clearly understood and accepted by all involved and was never subject to any negotiations or any limiting grant of temporary permission for the use." Lehn Cert., **Exhibit D**, ¶27. Defendants' SUMF at ¶ 18.

On January 26, 2022, counsel for Defendants sent a frivolous claim letter to counsel for Plaintiff, pursuant to R. 1:4-8 of the Court Rules, demanding dismissal of the Second Action based upon the Serchuk's sworn statements and testimony in both the First and Second Actions indicating the permissive nature of the historic access to the Kero Property allowed by Kero Holdings' or its predecessors in title. Plaintiff never responded to that letter. Lehn Cert., ¶11 at 2 & **Exhibit J** and Defendants' SUMF at ¶ 19.

Defendant's Motion

Defendants seek summary judgment dismissing the Second Action since Plaintiff's use of the Kero Property was permissive and with the approval of Kero Holdings and/or its predecessor in title. As such, Defendants assert there can be no prescriptive easement in favor of Plaintiff with respect to the Kero Property. Further,

Defendants assert that the deeds which transferred the Beta Property do not provide for any easement over the Kero Property for the benefit of Plaintiff. Further, since there is no easement in favor of Plaintiff, Defendants cannot have interfered with same and there can be no trespass by Defendants. Finally, Defendants contend that Plaintiff's assertion that Kero Holdings acted in bad faith with respect to the non-binding letter of intent does not withstand scrutiny since this court previously determined that there was no meeting of the minds with respect to the letter of intent and thus, no settlement.

Plaintiff's Opposition

Plaintiff asserts that there are genuine issues of material fact regarding Plaintiff's use of the Kero Property which preclude the entry of summary judgment. In particular, Plaintiff asserts that each party used the other property for more than thirty (30) years and that such use was exclusive, continuous, uninhibited and notorious.

Discussion

Summary judgment is intended to "avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Kopp, Inc. v. United Tech. Inc., 223 N.J. Super. 548, 555 (App. Div. 1988). Rule 4:46-2(c) provides that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits . . . 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."

In determining whether a party is entitled to summary judgment, a court must determine if there is a genuine issue of material fact by viewing all facts in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). A non-moving party "cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Id. Indeed, "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Id. (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)). Further, "[s]ubstantial means '[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or "having real existence, not imaginary[;] firmly based, a substantial argument." Brill, 142 N.J. at 530-31 (internal citations omitted); see also Manalapan Realty, L.P. v. Township Committee Twp. of Manalapan, 140 N.J. 366, 384 (1995).

Plaintiff asserts that it has an easement by prescription with respect to the Kero Property.[6] An easement by prescription is created through adverse use over a period of at least 20 years. Plaza v. Flak, 7 N.J. 215 (1951). The requirements for creation of an easement by prescription are analogous to the acquisition of a fee simple estate by adverse possession, namely, the use must be adverse, hostile, continuous, uninterrupted, visible, and notorious. The period for establishing a

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[6] Easements are generally created in one of three ways: 1) by express grant or reservation; 2) by implication (including necessity); or 3) by prescription. Leach v. Anderl, 218 N.J. Super. 18 (App. Div. 1987). An easement (as opposed to a license or profit) is subject to the provisions of the Statute of Frauds and must be in writing. N.J.S.A. 25:1-1 et seq. and Sergi v. Carew, 18 N.J. Super. 307 (Ch. Div. 1952) However, easements created by prescription need not be in writing.

prescriptive easement is, in general, 30 years. J&M Land Co. v. First Union Nat'l Bank, 166 N.J. 493 (2001) and Randolph Town Center v. County of Morris, 374 N.J. Super. 448 (App. Div. 2005). However, a license or permissive use cannot ripen into a prescriptive right. Mulford v. Abott, 42 N.J. Super. 509 (App. Div. 1957).

Here, the uncontroverted evidence and, in particular, the sworn statements made by Serchuk clearly show that the use of the Kero Property by Plaintiff was neither adverse or hostile. Serchuk acknowledged in the First Action and the Second Action that Plaintiff had "permission" from Defendants or its predecessors to use the Kero Property to access the loading docks on the Beta Property. Further, Plaintiff acknowledged that he has no written easement agreement and that the permission was "tacit." Further, by e-mail dated July 9, 2003, Serchuk advised an employee of Kero Holdings that there was an agreement which allowed the use of the Kero Property to allow for access to the loading docks. The acknowledgment of an agreement precludes the notion that the use of the Kero Property was hostile or adverse.

In light of Serchuk's own statements/admissions, Plaintiff cannot show that its use was adverse or hostile. Rather, Plaintiff's access over the Kero Property occurred with the consent and approval of the Defendant or their predecessors and essentially was a form of a revocable lease which Defendants could modify at any time. Thus, Count 1 of Plaintiff's complaint is dismissed with prejudice.[7]

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[7] In light of the dismissal of Plaintiff's claim for a prescriptive easement, Plaintiff's claim for trespass (Count 2), which relies solely upon alleged interference with the claimed prescriptive easement, is also dismissed, with prejudice.

Bad Faith Claim as to Non-Binding Settlement

As to Count 3 of Plaintiff's complaint for bad faith related to the non-binding letter of intent, the court previously determined that there was no meeting of the minds with respect to any alleged settlement. Since there was no agreement, Defendants could not have violated same or acted in bad faith as to same. Accordingly, Count 3 is dismissed with prejudice.

Defendants' request for fees against Plaintiff's counsel pursuant to R. 1:4-8

The Frivolous Claim Rule (R.1:4-8) provides , in pertinent part, as follows:

> (a) Effect of Signing, Filing or Advocating a Paper. The signature of an attorney . . . constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney . . . certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (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; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (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 corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and (4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support. If the pleading, written motion or other paper is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the document had not been served. Any adverse party may also seek sanctions in accordance with the provisions of paragraph (b) of this rule.
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> (b) Motions for Sanctions. (1) Contents of Motion, Certification. An application for sanctions under this rule shall be by motion made separately from other applications and shall describe the specific conduct alleged to have violated this rule.

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(d) Order for Sanctions. A sanction imposed for violation of paragraph (a) of this rule shall be limited to a sum sufficient to deter repetition of such conduct. The sanction may consist of (1) an order to pay a penalty into court, or (2) an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation, or both. Among the factors to be considered by the court in imposing a sanction under (2) is the timeliness of the movant's filing of the motion therefor. In the order imposing sanctions, the court shall describe the conduct determined to be a violation of this rule and explain the basis for the sanction imposed.

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(f) Applicability to Parties. To the extent practicable, the procedures prescribed by this rule shall apply to the assertion of costs and fees against a party other than a pro se party pursuant to N.J.S.A. 2A:15-59.1 (the "Frivolous Claim Act).[8]

The Frivolous Claim Rule applies to attorneys, while the Frivolous Claim Act applies to both attorneys and litigants. In re Farnkopf, 363 N.J, Super. 382 (App.

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[8] The Frivolous Claim Act provides, in pertinent part, as follows:

a.

(1) A party who prevails in a civil action . . . against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous.

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b. In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:

(1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or

(2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was 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.

Div. 2003). Both the Frivolous Claim Act and the Frivolous Claim Rule must be interpreted restrictively so as not to discourage creative advocacy or access to the courts. Port-O-San Corp. v. Teamsters Local Union No. 863, Welfare & Pension Funds, 363 N.J. Super. 431, (App. Div. 2003). In the context of a claim related to frivolous litigation, it is not a party's belief that should be considered but rather the action of the party should be considered on an objective basis. Wolosky v. Fredon Twp., 31 N.J. Tax 373 (Tax Ct. 2019). Pursuant to the Frivolous Claim Act or Frivolous Claim Rule, in order for fees and costs to be awarded, there must be a showing that the complaint was in bad faith, solely for the purpose of harassment, delay or malicious injury, or that the complaint had no reasonable basis in law or equity. Buccinna v. Micheletti, 311 N.J. Super. 557 (App. Div. 1998).

Here, Defendants' assertion that there has been a violation of the Frivolous Claim Rule must fail because its motion for sanctions is included as part of Defendants' summary judgment motion, which is contrary to the specific terms of R. 1:4-8(b). Further, even if the motion for sanctions were filed separately, it would be denied since there has been no showing that the complaint was filed in bad faith, solely for the purpose of harassment, delay or malicious injury or that the complaint had no basis in law or equity. While Plaintiff has not prevailed on its claims, this court cannot conclude that the action was commenced in bad faith, for the purpose of harassment or malicious injury or the Complaint had no basis in law or equity. Rather, this court determines that Plaintiff was mistakenly seeking to protect an alleged property interest, which allowed him the right to use the Kero Property. It appears that the use extended for a significant period of time. While Plaintiff's claim

has been rejected, the court does not conclude that sanctions are appropriate. As such, the request for sanctions is denied.

Conclusion

The Motion is granted to the extent set forth herein. Plaintiff's claims against Defendant as set forth in Counts 1, 2 and 3 of Plaintiff's Complaint are dismissed, with prejudice. Defendants' request for sanctions pursuant to R. 1:4-8 is denied. In light of the court's decision on the Motion, the trial scheduled to begin on October 11, 2022 is hereby cancelled. A order consistent with this Decision is being entered simultaneously herewith.

Dated: September 14, 2022

James J. DeLuca

Hon. James J. DeLuca, J.S.C.