SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0212-20

SAS HOTEL, LLC,

Plaintiff-Respondent,

v.

FRIENDS OF HISTORIC FLEMINGTON, JOANNE BRAUN, CHRISTOPHER PICKELL, KENNETH R. CUMMINGS, GARY SCHOTLAND, and LOIS STEWART,

Defendants-Appellants.

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Argued February 7, 2022 – Decided April 26, 2022

Before Judges Accurso, Rose, and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-0263-19.

Erin E. Simone argued the cause for appellants (Maley Givens, PC, attorneys; M. James Maley, Jr., and Erin E. Simone, on the briefs).

Thomas Kamvosoulis argued the cause for respondent (Brach Eichler, LLC, attorneys; Charles X. Gormally,

of counsel and on the brief; Edward A. Velky, on the brief).

PER CURIAM

Defendants Friends of Historic Flemington (FHF), Joanne Braun, Christopher Pickell, Kenneth R. Cummings, Gary Schotland and Lois Stewart appeal from a September 11, 2020 order denying their application for sanctions against plaintiff SAS Hotel, LLC.[1] We affirm.

I.

FHF is a non-profit entity claiming to advocate for the preservation and reuse of historic structures within the Borough of Flemington (Borough). The individual defendants serve as trustees of FHF. Plaintiff previously owned the Union Hotel (Hotel), a large, historic and now dilapidated building located in the Borough's Historic District which was closed to the public as of 2008.

In June 2010, after conducting a study, preparing a report, and holding hearings for public commentary, the Borough designated the Hotel as an "area in need of redevelopment, pursuant to N.J.S.A. 40A:12A-5." Although two developers were designated in succession to implement the Hotel redevelopment

[1] Plaintiff was a single-asset limited liability company created for the sole purpose of holding title to real estate, and it dissolved in July 2020. The company had only one member.

project, financial concerns prevented either developer from proceeding with the project.

A third individual, John J. Cust, Jr., expressed interest in redeveloping the Hotel. Cust presented the Borough with a redevelopment plan in early 2016 and formed Flemington Center Urban Renewal, LLC (FCUR) in anticipation of pursuing the redevelopment project. The project's purpose was to revitalize downtown Flemington.

In 2017, the Borough adopted a resolution designating FCUR as the "redeveloper for the Redevelopment Area" and entered into a redevelopment agreement with FCUR. The agreement included the Hotel and other properties not owned by the Borough as part of the redevelopment area.

Plaintiff purchased the Hotel at a sheriff's sale in May 2018, and as part of the redevelopment plan, FCUR agreed to buy the Hotel from plaintiff. Plaintiff and FCUR executed a contract of sale for the property in July 2018; the sale was contingent upon FCUR obtaining publication of all necessary approvals. The redeveloper was permitted to cancel the contract if appeals pertaining to the requisite approvals were not resolved within two years.

Plaintiff regarded the acquisition of the Hotel by any redeveloper as a significant part of the redevelopment plan and "the only way that money

previously expended" by it and its sole member could be recovered. Plaintiff's "overarching concern" was "FCUR's total abandonment of the" project, which would have led not only to the termination of the sales contract for the Hotel, but "a significant reduction in value of the [H]otel."

According to plaintiff, the closing on the Hotel was delayed for over a year due to defendants' ongoing attempts to frustrate the redevelopment plan through litigation. In fact, before and after FCUR agreed to buy the Hotel, defendants filed several actions challenging the Borough's redevelopment efforts; they also sought records under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and alleged violations of the Open Public Meeting Act, N.J.S.A. 10:4-6 to -21. One of defendants' complaints was dismissed via consent order in July 2017; another suit was dismissed by stipulation in May 2019. Additionally, in February 2020, defendants lost an appeal wherein they contested the approval given by New Jersey's Department of Environmental Protection for the Borough's sale of publicly owned historic property to FCUR as part of the redevelopment plan. See In re Hunterdon County, No. A-2658-17 (App. Div. Feb. 24, 2020) (slip op. at 2). Further, defendant's action challenging the redevelopment designation of additional properties was dismissed in August 2018, but defendants appealed from the dismissal; they lost their appeal in that

matter in May 2020. See Friends of Historic Flemington, LLC v. Bor. of Flemington, No. A-0613-18 (App. Div. May 6, 2020) (slip op. at 2). An additional suit involving the amended redevelopment agreement and original agreement was dismissed by the court with prejudice in July 2020, and two more suits instituted by defendants in October 2018 and January 2019 were dismissed in 2021. Judge Michael F. O'Neill presided over a number of these related lawsuits.

As its fear FCUR might abandon the redevelopment project grew, and defendants' steady stream of litigation continued, plaintiff filed suit against defendants in June 2019, alleging five causes of action: (1) tortious interference with contract; (2) conspiracy; (3) malicious use of process; (4) interference with prospective economic advantage; and (5) fraud and misuse of tax-exempt status. Plaintiff asserted the lawsuit was

> instituted to seek redress and relief from the impact of the Defendants['] malicious, concerted efforts to delay and destroy the Plaintiff['s] property as a direct consequence of their anti-competitive actions designed to prevent sorely needed rehabilitation of the principal business district in the Borough of Flemington while the Trustees further their own individual interests disguised by the shield of a tax[-]exempt organization.

Additionally, plaintiff alleged

> The Defendants, all acting in concert with one another, have resolved to delay, obstruct and prevent the Borough's redevelopment plan to proceed. In doing so, . . . Defendants intend to prevent SAS from ever being able to convey its property to the redeveloper and to cause its contract to be substantially delayed and [on] the brink of terminat[ion].

Two months later, defendants' counsel sent plaintiff's attorney a letter, asserting the complaint was frivolous, and demanding plaintiff withdraw the complaint within twenty-eight days or risk being sanctioned under Rule 1:4-8. Defendants also asserted the first four counts of plaintiff's complaint "lack[ed] evidentiary and legal support" and plaintiff had "no standing" to pursue the fifth count (the tax fraud claim). Despite their contentions about the complaint's viability, defendants never moved to dismiss any counts of the complaint.

Plaintiff did not withdraw its complaint in response to defendants' letter; instead, it served discovery requests upon defendants. In September 2019, defendants filed an answer and counterclaim, in which they asserted "plaintiff's action [was] frivolous under N.J.S.A. 2A:15-59.1 and Rule 1:4-8" and was "barred by the Noerr-Pennington Doctrine."[2] A month later, plaintiff moved to

[2] This judicial doctrine, which immunizes suits that seek to petition the government for redress, was derived from the principles set forth in E. R.R. Presidents' Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

dismiss the counterclaim; its motion was withdrawn once defendants agreed to dismiss the counterclaim without prejudice.

In February 2020, this matter was referred to mediation, but no amicable resolution was reached. Around this same time, defendants lost their appeal in In re Hunterdon County, so plaintiff proposed to voluntarily dismiss its complaint and have the parties absorb their own fees and costs. Defendants declined this proposal. Still, plaintiff continued to engage in discussions with defendants through mid-May 2020 to resolve the matter.

Although defendants lost two of their appeals involving the redevelopment project in February and May 2020, they pressed forward in this matter and filed a motion against plaintiff to compel discovery, extend discovery deadlines, and for an award of counsel fees. In June 2020, Judge O'Neill granted defendants' discovery motion, but denied their request for counsel fees. That same month, plaintiff and FCUR closed on the sale of the Hotel, thereby "alleviating some — but not all — of [plaintiff's] damages" in maintaining the Hotel to that point.

Considering plaintiff's principal damage claim was mooted by the sale, it filed a motion to voluntarily dismiss its complaint. Defendants neither opposed nor agreed to the dismissal; instead, they notified the court by letter that they

"reserve[d] the right to file a Motion for Sanctions pursuant to New Jersey Court Rule 1:4-8(b)." Judge O'Neill granted plaintiff's motion to dismiss in July 2020.

Approximately three weeks after plaintiff's complaint was dismissed, defendants moved for sanctions against plaintiff, pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1. They sought attorney's fees and costs exceeding $75,000. Plaintiff opposed the motion, asserting it filed its complaint in good faith and noting defendants had never moved for dismissal of the complaint. Plaintiff subsequently contended defendants "ginn[ed] up the[ir] counsel fees" during the litigation.

After hearing argument on September 11, 2020, Judge O'Neill denied defendants' motion for sanctions. He preliminarily noted "all parties who file pleadings in any case in New Jersey . . . are presumed to have acted in good faith," including "defendants here in their various lawsuits challenging the proposed redevelopment plan" as well as "plaintiff . . . in alleging . . . defendants were acting in bad faith and lacked a good faith basis for their various challenges to the proposed redevelopment of downtown Flemington."

Additionally, Judge O'Neill found plaintiff had a "good faith basis for the claims that [it] asserted against . . . defendants," and that plaintiff "subjectively believed . . . defendants . . . were acting in bad faith in attempting to stop the

redevelopment plan and attempting to stop the sale of the [H]otel from going through." The judge further concluded plaintiff "had the right to assert these various claims against . . . defendants."

Quoting Bove v. AkPharma Inc., 460 N.J. Super. 123, 151 (App. Div. 2019), Judge O'Neill reminded the parties that "[t]he burden of proving . . . a non-prevailing party acted in bad faith . . . is on the party who seeks fees and costs under the Frivolous Litigation Statute, or . . . under Rule 1:4-8." Citing Iannone v. McHale, 245 N.J. Super. 17, 32 (App. Div. 1990), the judge also observed, "[s]anctions are appropriate only when the pleading as a whole is frivolous or of a harassing nature, not when one of the allegations or arguments in the pleading may be so characterized," adding, "that's important here because . . . defendants essentially would have to prove that all of the counts that . . . plaintiff[] alleged here were frivolous."

Moreover, the judge stated, "looking at the [counts of the] complaint objectively, most of them, and maybe all of them meet an objective standard of reasonableness." The judge found plaintiff's sole member thought "defendants were out to thwart the sale of the [Hotel] property and . . . were acting themselves in bad faith in attempting to stop the redevelopment of downtown Flemington."

Further, the judge noted:

> [D]efendants argue that . . . plaintiff can't . . . prove any of the elements of the . . . various counts in the complaint, beginning with tortious interference. . . . And of course . . . plaintiff appropriately points out that they don't . . . need to prove all the elements of tortious interference to defeat this application for counsel fees. . . . All . . . plaintiff needs to show is that it had a legitimate good faith basis from an objective standpoint that . . . defendants here were tortiously interfering with their contract to sell this property. And I think objectively viewing the . . . pleading, there is an adequate basis for asserting that theory.
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> . . . .
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> [F]rom . . . plaintiff's standpoint, there [was] the threat that the deal would get scuttled, and I'm sure that the building could – there was certainly an articulable basis for . . . plaintiff[] asserting the claim when it did, and asserting that it stood to suffer economic damages if the sale did not close in a timely fashion.
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> . . . .
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> And I'm satisfied that there was at least . . . a good faith basis for the various theories . . . that the plaintiff asserted in the complaint.

Regarding defendants' argument that plaintiff's action amounted to a SLAPP[3] suit, Judge O'Neill disagreed. Relying on LoBiondo v. Schwartz, 199 N.J. 62, 88 (2009), Judge O'Neill quoted the Court's warning that trial courts are to be "vigilant . . . so as not to so zealously seek to deter SLAPP suits and those who

[3] SLAPP stands for Strategic Lawsuit Against Public Participation.

file them [by] . . . unintentionally punish[ing] the plaintiff who seeks redress in good faith for a genuine reputational wrong but whose case unfortunately resembles the paradigm SLAPP." Judge O'Neill continued:

> And I think, at least viewing the complaint objectively . . . as the court is required to, that's what we are dealing with here, a plaintiff who had a legitimate belief that . . . [its] economic rights were being interfered with by these defendants. And so the . . . argument that these defendants here . . . qualif[y] for protection under the . . . SLAPP line of cases I don't find holds . . . merit.

Accordingly, the judge denied defendants' request for sanctions.

II.

On appeal, defendants raise the following contentions for our consideration:

POINT I

[FHF is] Entitled to an Award of Sanctions for Frivolous Litigation

A. The Trial Court Erred by Applying a Subjective Standard When Determining if Plaintiff's Claims were Frivolous

B. Plaintiff is Liable for Attorneys' Fees Because this Lawsuit was an Improper SLAPP Suit

1. Plaintiff's Own Admissions Indicate that the Lawsuit was Filed for an Improper Purpose

2. Plaintiff's Lawsuit was for an Improper Purpose Because Plaintiff Was Never Damaged

C. Plaintiff's Claims Lacked Legal and Evidentiary Support

1. Plaintiff's Tortious Interference Claims Lacked Evidentiary and Legal Support

   a. Plaintiff did not have an Objectively Reasonable Basis to Establish Actual Damages or Actual Interference

   b. Plaintiff did not have an Objectively Reasonable Basis to Establish Malice

2. All of Plaintiff's Other Claims Lack an Objectively Reasonable Basis in Law and Fact

3. A Motion to Dismiss was not Filed Because Evidence Necessary to Prove the Frivolousness of Plaintiff's Claims [was] Solely within Plaintiff's Possession

POINT II

Sanctions Should have Been Awarded to Compensate Defendants, a 501(c)(3) Organization and its Trustees for Defending a Frivolous Lawsuit

We are not persuaded.

We review an award of sanctions and attorney's fees for an abuse of discretion. Occhifinto v. Olivo Constr. Co., 221 N.J. 443, 453 (2015); Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 407 (App. Div. 2009). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571

(2002) (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)). "Reversal is warranted when 'the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amount[ed] to a clear error in judgment.'" Ferolito, 408 N.J. Super. at 407 (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)). However, we review a trial judge's legal conclusions de novo. Occhifinto, 221 N.J. at 453.

"Sanctions for frivolous litigation against a party are governed by the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1"; Rule 1:4-8 "authoriz[es] similar fee-shifting consequences as to frivolous litigation conduct by attorneys." Bove, 460 N.J. Super. at 147.

The Frivolous Litigation Statute establishes a "disjunctive, two-prong" test for determining whether "the action of the non-prevailing party [was] frivolous." Matter of K.L.F., 275 N.J. Super. 507, 524-25 (App. Div. 1993). However,

> When a prevailing party's allegation is based on an assertion that the non-prevailing party's claim lacked a reasonable basis in law or equity, and the non-prevailing party is represented by an attorney, an award cannot be sustained if the [non-prevailing party] did not act in bad faith in asserting or pursuing the claim.

> [Bove, 460 N.J. Super. at 150 (alteration in original) (internal quotations omitted).]

When an attorney or pro se party signs, files, or advocates a "pleading, written motion, or other paper," that attorney or pro se party "certifies that to the best of his or her knowledge, information, and belief":

> (1) [T]he 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;
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> (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;
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> (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
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> (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.
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> [R. 1:4-8(a)(1)-(4).]

"A court may impose sanctions upon an attorney if the attorney files a paper that does not conform to the requirements of Rule 1:4-8(a), and fails to

withdraw the paper within twenty-eight days of service of a demand for its withdrawal." United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 389 (App. Div. 2009) (citing R. 1:4-8(b)(1)). But "the Rule imposes a temporal limitation on any fee award, holding that reasonable fees may be awarded only from that point in the litigation at which it becomes clear that the action is frivolous." LoBiondo, 199 N.J. at 99 (citing DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 229-30 (App. Div. 2000)).

"The nature of conduct warranting sanction under Rule 1:4-8 has been strictly construed[.]" First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007). In fact, the term "frivolous" has a restrictive meaning. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561 (1993). Thus "[a] claim will be deemed frivolous or groundless [only] when no rational argument can be advanced in its support, when it is not supported by any credible evidence, when a reasonable person could not have expected its success, or when it is completely untenable." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div. 1999).

An award of attorney's fees and costs is not warranted where the plaintiff "had a reasonable, good faith belief in the merits of the action." Wyche v. Unsatisfied Claim & Judgment Fund of N.J., 383 N.J. Super. 554, 561 (App.

Div. 2006) (citing DeBrango, 328 N.J. Super. at 227). Likewise, sanctions should not be "imposed because a party is wrong about the law and loses his or her case." Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 580 (App. Div. 2016). Hence, a judge should only award sanctions for frivolous litigation in exceptional cases. See Iannone, 245 N.J. Super. at 28.

This restrictive approach recognizes the principle that: citizens presumptively should have ready access to our courts, Belfer, 322 N.J. Super. at 144 (citing Rosenblum v. Borough of Closter, 285 N.J. Super. 230, 239 (App. Div. 1995)); "honest, creative advocacy" should not be discouraged, DeBrango, 328 N.J. Super. at 226-27; and litigants generally should bear their own costs, where the litigation at least possesses "marginal merit." Belfer, 322 N.J. Super. at 144 (citing Venner v. Allstate, 306 N.J. Super. 106, 113 (App. Div. 1997)).

With these principles in mind, we have carefully reviewed the record, including certifications submitted by defendants' counsel in support of the motion for sanctions. Based on our examination and aware Judge O'Neill was intimately familiar with the facts of this case, as well as the facts of related actions instituted by defendants, we cannot conclude he abused his discretion in finding defendants failed to show plaintiff displayed the "requisite bad faith or

knowledge of lack of well-groundedness" in pursuing its claims. Iannone, 245 N.J. Super. at 31.

We need only briefly discuss a couple of defendants' remaining contentions.

Regarding Point I.A., defendants argue the judge "erroneously interchanged subjective and objective standards for determining good faith." This contention lacks merit. R. 2:11-3(e)(1)(E). In fact, when Judge O'Neill rendered his opinion on September 11, he specifically observed "the legal standard to be applied in ruling on the defendant[s'] application here . . . [is] not a subjective one. . . . It's an objective standard." (Emphasis added). The judge also cited to numerous cases describing the objective standard to be utilized when addressing a frivolous litigation claim.

Turning to Point I.B., defendants urge us to conclude the judge erred in failing to recognize plaintiff's action was "nothing more than a SLAPP [s]uit" meant to pressure defendants into dismissing their remaining lawsuits. Again, we disagree.

In rejecting defendants' SLAPP suit claim, the judge stated, "viewing the complaint objectively here, as the [c]ourt is required to, . . . what we are dealing with here [is] a plaintiff who had a legitimate belief that . . . their economic

rights were being interfered with by these defendants." This conclusion is supported by plaintiff's submissions in opposition to defendants' application for sanctions, including a certification from plaintiff's sole member, wherein he stated:

> [A]s FCUR's redevelopment efforts continued, so did defendants['] crusade to destroy the redevelopment project. The vendetta against the redevelopment presented by FCUR seemed personal for FHF's trustees, as two of its trustees, Pickell and Schotland, told me that they did not want a large, new hotel . . . in their backyard. And as a result, it is my understanding that additional legal actions and/or appeals of administrative approvals were filed by FHF in 2017.
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> . . . .
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> I could not afford to lose money on the Hotel. But as time went on, due to Defendant's actions, that is exactly what happened.
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> [J]ust ninety-three . . . days after the Sales Contract was entered, Defendants escalated their crusade to thwart FCUR's redevelopment project, . . . knowing that Plaintiff relied on the sale of the Union Hotel.
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> [I]f Defendants did not file [their] appeal in October of 2018, the sale of the Union Hotel would have been completed later that year or at latest in early to mid-2019. But Defendants['] crusade continued in 2019 as they commenced yet another action — this time challenging the administrative approval of FCUR's site plan. . . . This was devastating to Plaintiff.

Under these circumstances, we do not quarrel with the judge's exercise of discretion in denying defendants' request for sanctions. We also do not ignore that plaintiff offered to withdraw its complaint several months before it formally moved for dismissal, yet defendants never consented to the dismissal. In other words, litigation continued long after defendants asserted plaintiff's complaint was utterly baseless, despite plaintiff's attempts to end the matter.

To the extent we have not addressed defendants' remaining arguments, we are satisfied they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.