SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0416-21

ERIK C. DIMARCO,

Plaintiff-Appellant,

v.

ZONING BOARD OF ADJUSTMENT OF THE BOROUGH OF EDGEWATER and THREE Y, LLC,

Defendants-Respondents.

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Submitted May 9, 2022 – Decided May 18, 2022

Before Judges Fasciale and Sumners.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5588-21.

The Law Offices of Richard Malagiere, PC, attorneys for appellant (Richard Malagiere, of counsel; Leonard E. Seaman, of counsel and on the brief).

Beattie Padovano, LLC, attorneys for respondent Three Y, LLC (Daniel L. Steinhagen, of counsel and on the brief; Jason A. Cherchia, on the brief).

Denise M. Travers, attorney for respondent Zoning Board of Adjustment of the Borough of Edgewater, joins in the brief of respondent Three Y, LLC.

PER CURIAM

Plaintiff, a resident of Edgewater who lives approximately two and one-half miles from the project,[1] appeals from a September 27, 2021 order granting Three Y, LLC's (defendant) motion to dismiss the complaint in lieu of prerogative writs with prejudice. Plaintiff's complaint challenged a decision by the Zoning Board of Adjustment of the Borough of Edgewater (Board).[2] The judge dismissed the complaint, without oral argument, for two reasons. First, relying on Rule 4:69-6(a) (setting forth a forty-five-day deadline for such actions), plaintiff's complaint was untimely by one month. Second, citing Rule 4:6-2(e), the judge determined plaintiff lacked standing to "bring a claim of this nature" because plaintiff did not "operate a competing business whose interests

[1] The project includes a thirteen-story hotel, and a fourteen-story residential building over a four-story parking garage. Defendant's merits brief points out that a separate action in lieu of prerogative writs complaint (Coffee action) dated July 19, 2021 by "another objector [Coffee Associates (Coffee)] to the project that also challenged the Board's decision," is pending in the Law Division. Plaintiff had filed a motion to consolidate with the Coffee action, which the judge denied on September 24, 2021, a few days before the judge issued the order under review here.

[2] The Board submitted a letter supporting defendant's arguments on appeal.

would be affected." Under Rule 4:69-6(c),[3] we conclude the interest of justice requires enlargement of the filing deadline. And we disagree that plaintiff was without standing. We therefore reverse.

We derive the facts from the allegations in plaintiff's complaint. Defendant applied for preliminary and final site plan approval as well as multiple variances to construct the hotel, residential building, and garage. The Board passed a resolution memorializing its approval after conducting various hearings.

Plaintiff's complaint contains six counts. Count one alleged the Board failed to provide "sufficient zoning analysis," rendered conclusory findings, ignored "height restrictions," and erroneously granted D4 and C variances. Count two alleged the Board's decision was arbitrary, capricious, and unreasonable; was otherwise unsupported by sufficient facts; violated the law; and "damag[ed] the rights of [p]laintiff." Count three alleged that defendant failed to properly notify the "affected properties located within the required distance from [the property]." Count four alleged that defendant failed to

[3] Rule 4:69-6(c) provides a judge "may enlarge the period of time provided in paragraph (a) or (b) of this rule where it is manifest that the interest of justice so requires." The text of this rule does not explicitly require a party to move for this relief, meaning a judge may sua sponte permit a late filing under certain circumstances.

"properly publish the Notice of Hearing." Count five alleged insufficient facts to support the Board's arbitrary conclusions that the project would not significantly adversely create traffic problems or decrease the safety of residents. Count six alleged that the Board violated the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-12, and the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21, by proceeding without public notice and meeting informally with defendant to discuss the project. Plaintiff requested the Board's resolution be invalidated and that he be awarded counsel fees.

Although the judge referenced Rule 4:6-2(e), this is not the typical case where a party argues that a judge misapplied the standard applicable to motions to dismiss for failure to state a claim upon which relief can be granted. Indeed, defendant filed a motion to dismiss "in lieu of answer" relying on Rule 4:69-6, arguing the complaint was untimely, rather than arguing it was entitled to relief under Rule 4:6-2(e).

As plaintiff's arguments on appeal reveal, the question is not whether plaintiff established a cause of action upon which relief can be granted. Rather, plaintiff argues the judge erred by not permitting the untimely complaint and by finding that he lacked standing. These two contentions do not require us to address whether plaintiff can overcome a Rule 4:6-2(e) motion. This appeal

requires us to determine whether the judge abused his discretion by not enlarging the deadline for filing the complaint, and whether the judge erred as a matter of law on the standing question.

I.

Plaintiff admits he filed his complaint one month beyond the deadline imposed by Rule 4:69-6(a). He should have filed the complaint by July 20, 2021, but filed it on August 20, 2021. We review a judge's decision not to enlarge the deadline under Rule 4:69-6(c) for abuse of discretion. Reilly v. Brice, 109 N.J. 555, 560 (1988). Apparently, plaintiff did not oppose defendant's motion by explicitly asking the court to apply Rule 4:69-6(c).[4] The judge, however, could have permitted the late filing on his own.

In In re Ordinance 2354-12 of W. Orange v. Twp. of W. Orange, 223 N.J. 589, 601 (2015), our Court addressed the subject of enlargement of time in which to file an action in lieu of prerogative writs. We explained that generally, the interest-of-justice provision of Rule 4:69-6(c) for expanding the limitation

[4] Again, there was no oral argument and plaintiff's related motion to consolidate this case with the Coffee action was pending when defendant filed its motion to dismiss. Without oral argument, plaintiff was unable to more fully develop the motion record. Rather than remand with instructions to conduct argument, we are reversing and giving the parties an opportunity to re-file position papers on plaintiff's previous consolidation motion.

period, applies to cases involving (1) "important and novel constitutional questions"; (2) "informal or ex parte determinations of legal questions by administrative officials"; (3) "important public rather than private interests which require adjudication or clarification"; and (4) "a continuing violation of public rights." Ibid. (quoting Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, 152 (2001)). Any expansion of the limitation period must be balanced against the "important policy of repose" expressed in the rule. Borough of Princeton, 169 N.J. at 153-54 (quoting Reilly, 109 N.J. at 559). "[T]he longer a party waits to mount its challenge, the less it may be entitled to an enlargement." Casser v. Twp. of Knowlton, 441 N.J. Super. 353, 367-68 (App. Div. 2015) (quoting Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 424 (App. Div. 2002)). Relaxation depends on all relevant equitable considerations under the circumstances presented. See Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., L.P., 204 N.J. 569, 583-84 (2011). Hence, our standard of review.

In dismissing the complaint under Rule 4:69-6, the judge relied on the first category and found plaintiff had not "present[ed] a constitutional issue or an issue of law." Acknowledging that these categories are not exhaustive, Cohen

v. Thoft, 368 N.J. Super. 338, 346 (App. Div. 2004) (stating that under Rule 4:69-6(c), enlargement is not dependent on fitting into one of these categories but rather provides "more flexible criteria" (quoting Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 262 (1958))), plaintiff however argues primarily that the third category, "important public rather than private interest which requires adjudication or clarification," applies.

To that point, the judge found the facts present "personal issues that do not present widescale public interests that would preempt" the filing deadline. Although we disagree that the facts here only present personal interests, "[e]ven if a case involves purely private interests, a [judge] may [still] conclude that the 'interest of justice' warrants an enlargement of the forty-five[-]day period." Gregory v. Borough of Avalon, 391 N.J. Super. 181, 189 (App. Div. 2007) (quoting Cohen, 368 N.J. Super. at 346). At any rate, the interests are not purely private, although the project's alleged overdevelopment, increased traffic, and congestion purportedly impact plaintiff's commute to work in New York City.

Plaintiff contends that the project is large enough to impact the look and feel of Edgewater for many years to come and is, therefore, considered to be an important public concern. He emphasizes that the project here can be distinguished from minor site or bulk variance applications that do not have the

same impact as a fourteen-story residential building, a thirteen-story hotel with restaurants and a pool, and a four-story parking deck. Plaintiff characterizes this project as a "massive development" that required two D variances, a D4 floor area ratio variance of an unspecified density, and a D6 height variance of forty-six feet, plus a five-story variance. He argues further that the project, which size and density exceed that allowable in this zone, will severely impact the entire Borough, its services, schools, and traffic.

Our Court has commented that Rule 4:69-6's deadline is "aimed at those who slumber on their rights." Hopewell Valley Citizens' Grp., Inc., 204 N.J. at 579 (emphasis omitted) (quoting Schack v. Trimble, 28 N.J. 40, 49 (1958)). Plaintiff provided a reason for not meeting the filing deadline. He certified that revised temporary changes to the Board's procedures, which were implemented during the COVID-19 pandemic, affected his ability to follow the case. He encountered difficulty accessing pending land use matter documents online during the pandemic. He explained that he was not permitted in the Borough Hall to review documents and found that the online documents were not timely updated for pending land use applications. According to plaintiff, these COVID-19-related difficulties particularly applied to this land use application, which consisted of at least six hearings between August 2020 and May 2021.

His explanation implies no excusable neglect and precludes a finding that he "slumbered" on his rights. See ibid. Importantly, the short delay did not prejudice defendant, especially since defendant is a party in the pending and timely filed Coffee action in lieu of prerogative writs challenging the Board's resolution here.

Thus, when balancing all relevant equitable considerations under the circumstances presented, including entering the order without conducting oral argument, we conclude the judge mistakenly dismissed the complaint with prejudice without permitting the late filing under Rule 4:69-6(c).

II.

We now turn to the standing question. "Whether a party has standing to pursue a claim is a question of law subject to de novo review." Cherokee LCP Land, LLC v. City of Linden Plan. Bd., 234 N.J. 403, 414 (2018).

As the Court in Cherokee explained under the MLUL, "[a]ny interested party may appeal to the governing body any final decision of a board of adjustment approving an application for development." Id. at 416 (alteration in original) (quoting N.J.S.A. 40:55D-17(a)). An "interested party" is defined as:

> any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action taken under [this act], or whose rights to use, acquire, or enjoy

> property under [this act], or under any other law of this State or of the United States have been denied, violated or infringed by an action or a failure to act under [this act].
>
> [N.J.S.A. 40:55D-4(b).]

Our Supreme Court recently pointed out that our "courts have long taken a liberal approach to standing in zoning cases and . . . [thus] have broadly construed the MLUL's definition of 'interested party.'" Cherokee, 234 N.J. at 416 (alterations in original) (quoting DePetro v. Twp. of Wayne Plan. Bd., 367 N.J. Super. 161, 172 (App. Div. 2004)). For example, a taxpaying citizen has standing as an interested party to challenge the approval of variances that may sufficiently impact "the integrity of the zoning plan and the community welfare." Booth v. Bd. of Adjustment of Rockaway Twp., 50 N.J. 302, 305 (1967). Standing, however, still "requires that, in addition to establishing its 'right to use, acquire, or enjoy property,' a party must establish that that right 'is or may be affected.'" Cherokee, 234 N.J. at 416-17 (quoting N.J.S.A. 40:55D-4).

Plaintiff argues the D variances grant major deviations in use or intensity allowed in this zone, and otherwise affect school capacity, traffic, safety, budgetary considerations, aesthetics, and other considerations of the Borough.

Plaintiff emphasizes he has standing to challenge a D variance that grants, like here, a major deviation from the zoning ordinance.

Plaintiff asserts that this is not a situation where a homeowner two miles away is challenging a resident's side yard variance. Rather, it is a challenge to variances that allow major construction of a large and prominent commercial development. Plaintiff reiterates that any resident of a municipality should have standing to challenge a D variance granting a major deviation from a zoning ordinance. He concedes that "[t]his might not be so for bulk variances or small deviations in height or density," but here, plaintiff's counsel contends that plaintiff has the right to challenge the approvals granted because the variances are major.

We conclude, employing the Court's recent statement that we are to utilize a liberal approach to standing in zoning cases and broadly construe the MLUL's definition of interested party that plaintiff has standing. Id. at 416.

Reversed.