SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0334-20

NICHOLAS HOLDINGS, LLC,

Plaintiff-Respondent,

v.

CURTIS POINT PROPERTY OWNERS ASSOCIATION, ENGNJSHORE, LLC, EILEEN MULLERY, MICHAEL and SANDY MAFFATTONE, PAULINE COSTELLO, c/o STACY POLANSKI, CHRISTOPHER J. MCCARTHY, ROBERT and LAURA MATTURO, ERNEST J. and JOAN M. MUIR, PHYLLIS W. TOZZI, GARY and LOUISE TRABKA, TODD A. CARNEVALE, ROBERT A. and VALERIE A. ESTI, WILLIAM and ROSEMARY HEINZERLING, MATTHEW SMITH, ROSEMARIE RICCIARDELLI, THOMAS and BONNIE GRAZIANO, DAVID R. and JENNIFER REIM, and FRANK M. and CYNTHIA PISANI,

Defendants,

and

MANUEL J. LOPES,

Defendant-Appellant.

Argued March 20, 2023 – Decided March 31, 2023

Before Judges Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. C-000044-18.

Paul V. Fernicola argued the cause for appellant (Paul V. Fernicola & Associates, LLC, and Robert J. McGowan, attorneys; Paul V. Fernicola, on the brief).

Respondent has not file a brief.

PER CURIAM

This is a one-sided appeal in which defendant Manuel J. Lopes appeals from two trial court orders. The first order, dated January 30, 2020, partially granted summary judgment in favor of plaintiff Nicholas Holdings, LLC, and partially granted summary judgment in favor of defendant.[1] The second order, dated May 22, 2020, denied defendant's motion for reconsideration. Based on

[1] As discussed more fully below, other defendants involved in this matter did not appeal.

our review of the record and the applicable legal principles, we reverse in part, affirm in part, and remand for trial.

I.

In 2000, defendant purchased real property in Curtis Point, which is located in Brick Township. The properties within Curtis Point are subject to the Curtis Point Property Owners Association (CPPOA)'s rules, regulations, and by-laws. The CCPOA rules state that all properties in Curtis Point are subject to deed restrictions, one of which is "[n]o dwelling may exceed [two] stories of living space."

In 2001, defendant submitted an application for a construction permit because he wanted to make some improvements to the third floor.[2] The Brick Township Zoning Board (Board) approved defendant's application and issued him a zoning permit, on the condition he also obtained approval from the CPPOA. Defendant subsequently received the CCPOA's approval. The

[2] Defendant was permitted to install two dormers on the third floor. As noted below, however, it is not clear from the record what other improvements may have been made to defendant's property either before or after he purchased it, such as hardwood floors, drywall, or recessed lightings, which were found to exist in other defendants' properties involved in the litigation.

CPPOA's approval letter stated defendant's proposed improvements to his property met the deed restrictions.[3]

Plaintiff also owns property in Curtis Point. In July 2017, plaintiff submitted a proposed plan to the CPPOA's architect for third floor renovations. Plaintiff's plan included an office, theater, bathroom, and balcony. The architect reviewed the plan and concluded it did not comply with the deed restriction because it exceeded the two-story height limit.

Plaintiff filed a complaint on March 1, 2018, against the CPPOA alleging breach of contract, breach of fiduciary duty, and breach of the covenant of good faith and fair dealings. Plaintiff also filed a complaint against defendant and several Curtis Point homeowners alleging breach of contract and unjust enrichment. Plaintiff alleged eighteen individual homeowners, including defendant, were in violation of the same deed restriction used to deny his construction plan because they were utilizing the third floor for "living space," as opposed to storage, which was allowed. Essentially, the case centered around the enforcement of the third-story building restrictions in the CPPOA's rules and regulations.

[3] The approval did not permit defendant to utilize the third floor as living space.

On September 16, 2019, defendants filed a motion for summary judgment.[4] Plaintiff filed an opposition and a cross-motion for summary judgment. Plaintiff argued the CPPOA allowed defendant to have a habitable third floor by approving a "third bedroom" for defendant's property. Defendant countered the room on the third floor of his house is an attic he uses exclusively for storage, and it already had a bathroom when he purchased the property. He further argued he relied on the approvals he received from the Board and the CPPOA in 2002. Defendant also advanced arguments based on estoppel and the doctrine of laches.

The trial court determined habitable attics are not permitted under the deed restriction. The court focused on qualities that made the third floors "living spaces" and found several defendants violated the deed restriction. The January 30, 2020 order required every remaining defendant to remove: finished floors including but not limited to hardwood and/or carpeting, partitions including but not limited to sheetrock, drywall, or doors; access to any decks; bathrooms;

[4] On May 1, 2019, the trial court granted partial summary judgment in favor of the CPPOA and certain homeowners. The court also denied plaintiff's initial motion for summary judgment.

refrigerators; televisions; and any furniture or finished featured in the area above the second story.[5]

Defendant filed for a motion for reconsideration. In addition to claiming he used the third floor exclusively for storage, defendant argued he purchased his home from the previous owner with a bathroom already in the attic. He further contended it was his understanding when he purchased the home it was compliant with the deed restrictions and was lawful. Moreover, defendant asserted the doctrines of estoppel and laches should apply in this case. In denying the motion for reconsideration, the court held representations by a previous tenant or by a salesperson are no substitute for the CPPOA approval. Furthermore, the court held:

> In sum, in applying the standard actual use is one of the factors in a multi-factor analysis used to determine whether a third floor is a habitable attic. In applying the definition of story[,] the [CPPOA] and this [c]ourt looked at two features or indicia[,] which would indicate that the space could be used for anything other than storage. The subject third floors in question have features that indicate that the space is used for more than storage and, indeed, in at least one of the cases they've acknowledged so much.
>
> Further, as defendants have failed to produce any evidence of habitable space being approved on the third

[5] Other than defendant's bathroom, it is not clear from the record what other improvements were present on defendant's third floor.

> floor the doctrines of estoppel and [laches] do not apply here. Without evidence of approval, there is no act for which defendants could have relied on for estoppel . . . .
>
> . . . .
>
> As to the doctrine of [laches,] there is no evidence that the Board was aware of the violations and delayed–to the prejudice of defendants . . . .
>
> For those reasons, the motions for reconsideration are denied.

Defendant raises the following points on appeal:

> . . . .
>
> POINT II
>
> THE TRIAL COURT'S ORDER OF JANUARY 30, 2020[,] REQUIRING DEMOLITION OF PORTIONS OF [DEFENDANT'S] HOME SHOULD BE REVERSED AS SUMMARY JUDGMENT WAS INAPPROPRIATE.
>
> POINT III
>
> THE TRIAL COURT'S ORDER OF MAY 22, 2020[,] DENYING [DEFENDANT'S] MOTION FOR RECONSIDERATION SHOULD BE REVERSED.

II.

In our review of a summary judgment decision, we are required to measure the motion court's findings and conclusions "against the standards set forth in

Brill . . . ."[6] Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 498 (App. Div. 2000). Those standards are well-established: summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, 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." Brill, 142 N.J. at 528-29 (quoting R. 4:46-2(c)). Issues of law are subject to the de novo standard of review, and the trial court's determination of such issues is accorded no deference. Kaye v. Rosefielde, 223 N.J. 218, 229 (2015).

Notwithstanding our de novo standard of review, "our function as an appellate court is to review the decision of the trial court, not to decide the motion tabula rasa." Est. of Doerfler v. Fed. Ins. Co., 454 N.J. Super. 298, 301-02 (App. Div. 2018) (internal citation omitted). We have recognized "[t]he duty to find facts and state conclusions of law is explicit in [Rule] 1:7-4, iterated in connection with motions for summary judgment in [Rule] 4:46-2, and mandated where there is an appeal by [Rule] 2:5-1(b)." In re Will of Marinus, 201 N.J. Super. 329, 339 (App. Div. 1985); see also Pardo v. Dominguez, 382 N.J. Super. 489, 491-92 (App. Div. 2006) (reversing summary judgment, in part, due to the

[6] Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

trial court's failure to provide reasons); Raspantini v. Arocho, 364 N.J. Super. 528, 533-34 (App. Div. 2003) (reversing orders granting summary judgment and denying reconsideration "to ensure that the parties and, in the event of a further appeal, the court may have the benefit of findings of fact and conclusions of law consistent with our analysis of the applicable rules.").

III.

The CPPOA's "Deed Restriction Summary" in its rules, regulations, and by-laws state, "[n]o dwelling may exceed two stories of living space." (Emphasis added). However, the rules, regulations, and by-laws do not define "living space."[7] The trial court's May 1, 2019 initial denial of plaintiff's motion

[7] Instead, defendant relies on the Brick Township Code's definition of "story" to determine whether his storage attic violates the deed restrictions and the CPPOA rules, regulations, and by-laws. The Code states:

> A split-level story shall be considered a story if its floor level is four feet or more above the level of the line of the finished floor below it, except a basement. An unfurnished or flood-resistant enclosure, useable solely for the parking of vehicles, building access or storage in an area other than a basement, is not considered a story for zoning purposes.
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> C. 245, Part 1, § 245-3 (Emphasis added).

for summary judgment found there were fact issues as to whether defendant's third floor space was "suitable for habitation." As to defendant, the court noted, "[t]he property owned by [defendant] . . . has a third floor with: no heating, no kitchen and a pull[-]down stairway for access." The court further noted, "[a]dditionally, its improvements were approved by [CPPOA], and it was purchased with improvements having already been made. However, the third-floor does have a half-bathroom."

The January 30, 2020 oral decision granting plaintiff's summary judgment and May 22, 2020 oral decision denying defendant's motion for reconsideration did not make specific factual findings as to defendant's use of the third floor. The court's amplification of reasons for denying the motion for reconsideration provided some clarification. The court noted defendant did not provide any documents in discovery to demonstrate the CPPOA had approved the third floor to be used as anything but storage. The court further stated defendant's "attic is bi-level completely finished, fully carpeted[,] and decorated and has a bathroom, a bedroom[,] and seating and observation area with decks."[8] The court noted,

[8] Based on the record before the court, it is not clear from where this information was derived. Despite this finding, defendant maintains the third floor was only used for storage.

however, the primary argument advanced by defendant was that the third floor was "used only for storage."[9]

The court noted when applying the definition of story, it "looks at features and indicia which would indicate that the space could be used for anything other than storage. Here the subject third floors [had] features that indicate the space is used for more than storage." The court rejected the estoppel and laches arguments, noting defendant did not produce any evidence of "habitable space being approved on the third floor."[10] Importantly, the court noted the deed restriction "has been established to mean space above the second floor[,] which is used for [anything] other than storage; where the space is only used for storage[;] it is not a story." (Emphasis added). In applying this definition to the facts, the court noted it found no issues of fact as to defendant and granted summary judgment in favor of plaintiff "requiring [defendant] to remediate [his home] to remove [the] third floor living space."

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[9] The court did not squarely address defendant's certification in granting plaintiff's summary judgment motion and denying defendant's motion for reconsideration.

[10] The court further stated that even if there was evidence, the CPPOA could not grant authority to violate the deed restriction.

As referenced by the trial court, defendant certified he did not have a "livable third floor" and that it is "a basic attic with a standard drop down ladder providing access from the ceiling of the second floor." Defendant further certified his third floor was used "solely for storage and not for living space."[11] This certification creates a genuine issue of material fact that cannot be resolved on summary judgment. Although the court determined defendant's "attic is bi-level completely finished, fully carpeted[,] and decorated and has a bathroom, a bedroom[,] and seating and observation area with decks," it did not reconcile defendant's statement that the third floor is used exclusively for storage. As noted above, the court observed that when the space above the second floor is only used for storage, it is not considered a story and therefore would not exceed two stories of living space. Given defendant's assertion the space is used exclusively for storage, a hearing is necessary to resolve this disputed fact.[12]

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[11] As noted above, defendant also had a pre-existing bathroom in the attic.

[12] The court should clarify for the parties on remand if the dispositive issue concerning whether defendant ran afoul of the deed provision at issue—"[n]o dwelling may exceed [two] stories of living space"—is "indicia of habitability" or whether the space was actually used for storage. Perhaps it is some combination of the two, but it appears the court only focused on the "indicia of habitability" despite noting that if the space was utilized for storage, it is not a story. In spite of recognizing storage spaces are not stories, the court did not address the fact issue created by defendant's certification that he "solely used" the third floor for storage.

Based on the foregoing, we are constrained to reverse the trial court's order granting plaintiff's motion for summary judgment and the denial of defendant's motion for reconsideration.[13] We affirm the trial court's denial of defendant's affirmative motion for summary judgment for the same reasons noted above based on the disputed facts. To the extent we have not otherwise addressed any of defendant's other arguments, we have determined they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed in part, affirmed in part, and remanded. We do not retain jurisdiction.

[13] Our decision remanding this matter shall not be construed as an expression of any opinion of ours on the merits of defendant's claims.