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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0439-21  
A-1444-21

BOROUGH OF LINCOLN PARK,

Plaintiff-Respondent,

v.

A.G. CONSTRUCTION  
CORPORATION, A.G.C.  
HOLDINGS, LLC, ANTONIO  
L. GONCALVES, and MARIA D.  
GONCALVES,

Defendants-Respondents,

and

TORRE SERVICE, INC., ROYAL  
KLM, INC., and ICE FREIGHT LLC,

Defendants-Appellants.

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BOROUGH OF LINCOLN PARK,

Plaintiff-Appellant,

v.

A.G. CONSTRUCTION  
CORPORATION, A.G.C.  
HOLDINGS, LLC, TORRE  
SERVICE, INC., ROYAL KLM,  
INC., and ICE FREIGHT LLC,

Defendants-Respondents,

and

ANTONIO L. GONCALVES and  
MARIA D. GONCALVES,

Defendants.

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Argued (A-0439-21) and Submitted (A-1444-21)  
March 20, 2023 – Decided July 28, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law  
Division, Morris County, Docket No. L-1214-20.

Borce Martinoski argued the cause for appellants Torre  
Service, Inc., Royal KLM, Inc., and ICE Freight, LLC,  
in A-0439-21 (Borce Martinoski, LLC, attorney; Borce  
Martinowski, on the briefs).

Arthur M. Neiss argued the cause for respondent (A-  
0439-21) and appellant (A-1444-21) Borough of  
Lincoln Park (Beattie Padovano, LLC, attorneys;  
Arthur M. Neiss, of counsel and on the briefs).

Stephen C. Schepis argued the cause for respondents  
A.G. Construction Corporation, A.G.C. Holdings, LLC,  
Antonio L. Goncalves, and Maria D. Goncalves (The

Law Office of Steven C. Schepis, LLC, attorneys;  
Steven C. Schepis, on the briefs).

## PER CURIAM

We have consolidated these back-to-back matters for purposes of this opinion. In A-1444-21, the Borough of Lincoln Park (the "Borough") appeals from the Law Division's December 23, 2021 order denying reconsideration of two October 27, 2021 orders, which: (1) barred the Borough from introducing untimely expert witness testimony; (2) barred the Borough from utilizing information contained in their August 30, 2021 amended answers to interrogatories; (3) granted summary judgment in favor of defendant-landowners A.G. Construction Corporation and A.G.C. Holdings, LLC. (collectively, "AGC"); and (4) entered declaratory judgment for AGC, rendering all contested uses of the subject property permissible pursuant to N.J.S.A. 40:55D-62(c) and/or Borough Ordinance 28-4.4. In A-0439-21, defendant-tenants Torre Services, Inc., Royal KLM, Inc., and Ice Freight, LLC appeal from the Law Division's August 30, 2021 order denying reconsideration of the court's July 8, 2021 order, which struck their pleadings with prejudice. For the reasons that follow, we affirm in A-1444-21 but reverse in A-0439-21.

These appeals primarily arise from a zoning and land-use dispute between AGC and the Borough. Specifically, the Borough alleges that AGC used the

subject property, which consists of approximately 17.6 acres and is designated as Block 3, Lot 20, and Lot 20.1 on the Borough's zoning map, in violation of applicable zoning ordinances and codes.

AGC acquired the subject property in 2001 and, since then, have utilized it for purposes related to their construction business. Before AGC's acquisition, in 1966, the Borough approved a portion of the subject property for use as a storage yard following an application to do so by a previous owner. Since then, the Borough has authorized the property for further construction business-related uses via ordinances, site plan exemptions, and waivers. Notably, in 1984, the Borough implemented Lincoln Park Borough Ordinance 28-4.4 ("Ordinance 28-4.4"), which "established an Airport Safety Area as an overlay on the Zoning Map of the Borough []" and permitted "[t]ransportation", "[c]ommercial," and "[i]ndustrial" uses of the subject property.<sup>1</sup>

The Airport Safety Overlay Zone, created by Ordinance 28-4.4, encompassed the subject property but, for reasons unknown, was not represented on the Borough's zoning maps at any time pertinent to this appeal. Therefore,

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<sup>1</sup> Ordinance 28-4.4 was implemented in accordance with N.J.S.A. 40:55D-62(c), and pursuant to the New Jersey's Air Safety Zoning Act of 1983, N.J.S.A. 6:1-80 to -88.

the subject ordinance was allegedly unknown to either party until late into the discovery process.

In 2016, over three decades after the Borough implemented Ordinance 28-4.4 and over two decades after AGC acquired the subject property, the Borough began receiving "complaints about a large-scale truck facility on the [p]roperty where, on any given day, dozens of tractor-trailers and large trucks were traveling to and being parked." The Borough zoning officer investigated the allegations and filed an official report, which found AGC's use of the property to be in violation of applicable zoning ordinances and codes. The report cited several violations, including the storage of tractor trailers and abandoned vehicles; truck sales and repairs; and the construction of several structures without permits.

As a result, the Lincoln Park municipal court issued summonses to AGC in July 2019. AGC paid a portion of the fines but continued their activities until June 9, 2020, when the Borough filed the instant complaint. In its complaint, the Borough sought relief in the form of a declaratory judgment, finding AGC's uses of the property impermissible; a permanent injunction of AGC's ongoing uses; and a finding of public nuisance. The complaint further asserted that

AGC's activities were knowing, unlawful, and clearly proscribed by the applicable zoning and land use ordinances.

AGC filed an answer on July 28, 2020, in which they denied any violation in their use of the subject property. Specifically, AGC asserted that:

The [p]roperty is located in an industrial zone of the Borough [], where the use of the [p]roperty for the parking of construction vehicles, trucks, equipment, and storage yard is permitted by [o]rdinance or has otherwise been approved by the Borough [], which approval remains valid or is otherwise lawful.

On January 11, 2021, following a period of unproductive discovery and motion practice, the parties engaged in a case-management conference. The resulting case-management order extended the discovery end date to March 26, 2021 and compelled the parties to respond to discovery requests and to complete requested depositions. However, issues regarding discovery persisted.

On March 25, 2021, AGC again filed a motion to extend the discovery end-date from March 26, 2021 to May 26, 2021, arguing that the Borough had denied depositions of their officers and administrators, including zoning officer Salvatore Marino. AGC's motion was granted on April 16, 2021 and the judge compelled the requested depositions.

On April 23, 2021, AGC amended their answers to interrogatories to include proposed expert witness Peter G. Steck, L.P.P., who AGC commissioned

to curate an expert report of the zoning ordinances applicable to the subject property. While Steck was preparing his report, AGC conducted the judge ordered deposition of Marino on May 27, 2021. There, Marino testified that AGC's uses of the property, including the parking of trucks, trailers, outdoor storage of equipment and materials, were violative of the Borough's zoning ordinances and codes.

On June 20, 2021, AGC received Steck's expert report, which—for the first time—brought to light the existence of Ordinance 28-4.4. That ordinance rendered all of AGC's "[t]ransportation", "[c]ommerical," and "[i]ndustrial" uses of the subject property lawful. The next day, AGC filed a motion to amend their answers to interrogatories and document demands to include Steck's report and testimony. In recognition of the approaching July 12, 2021 trial date, and pursuant to the requirements of Rule 4:17-7, AGC accompanied their motion with a certification of due diligence. That certification explained that "[o]mitted from the document demand responses and the [] responses provided by the [Borough] . . . , was Ordinance 28-4.4," which "renders all of the uses conducted on the [AGC's] properties[,] alleged to be in violation of the Borough Zoning Ordinance[,] compliant with" Ordinance 28-4.4.

On June 24, 2021, the Borough filed a motion to strike AGC's amended answers to interrogatories, arguing that AGC had not complied with Rule 4:17-7, which requires that an amendment filed within twenty days of the discovery end-date be accompanied by a certification of due diligence that explains why the information was not reasonably available or discoverable beforehand.

On July 1, 2021, AGC filed a cross-motion to adjourn the approaching July 12, 2021 trial date; extend the discovery period; compel the continued deposition of Marino; and permit the introduction of Steck's report and testimony at trial. On July 23, 2021, the judge denied the Borough's motion to strike and granted AGC's motion. In so doing, the judge extended discovery until August 31, 2021.

On August 12, 2021, Marino was deposed for a second time. There, in contradicting his May 27, 2021 deposition testimony and the Borough's discovery responses, Marino stated that he became aware of Ordinance 28-4.4 "a while ago"; that he was aware that Ordinance 28-4.4 encompassed the subject property; and that AGC's uses of the subject property were permitted, according to his understanding of Ordinance 28-4.4.

On August 30, 2021, one day before the adjusted discovery end date, the Borough served an amendment to its interrogatory answers, which sought to



introduce a zoning expert report commissioned by the Borough in response to Steck's report. The Borough's amendment, however, was not accompanied by a certification of due diligence and was, therefore, not compliant with Rule 4:17-7.

On September 10, 2021, AGC filed a motion requesting: (1) summary judgment; (2) a declaratory judgment, rendering all of the contested uses of the subject property permissible; and (3) a dismissal with prejudice of all pending municipal court summonses related to the Borough's zoning violation allegations. On September 22, AGC filed a motion requesting an order to bar the Borough's expert report and amended answers to interrogatories. Shortly thereafter, on October 12, 2021, the Borough filed a cross-motion opposing AGC's summary judgment motion on multiple grounds, including that AGC had not exhausted their administrative remedies and that AGC should request the Lincoln Park Zoning Board's interpretation of ambiguous terms, such as "transportation," as used within Ordinance 28-4.4.

On October 27, 2021 the judge filed two orders, which ultimately: (1) barred the Borough from introducing the untimely expert witness testimony; (2) barred the Borough from utilizing information contained in their August 30, 2021 amended answers to interrogatories; (3) granted AGC's motion for

summary judgment; and (4) entered declaratory judgment in favor of AGC, rendering all contested uses of the subject property permissible pursuant to N.J.S.A. 40:55D-62(c) and/or Borough Ordinance 28-4.4.

In barring the Borough's amendment, Judge Franzblau's statement of reasons relied on the requirements set forth by Rule 4:17-7. Specifically, the judge pointed to the Borough's failure to submit such a certification and noted the absurdity of the Borough's assertion that the content of their amendment was not reasonably available or discoverable before the discovery end date. In so doing, the judge reasoned:

During the entire course of this litigation, [the Borough] was in possession of all applicable zoning ordinances affecting the [p]roperty, which could have been reviewed by their expert at any time during discovery. . . . Assuming arguendo that [the Borough] was initially unaware of the applicability of the [Ordinance 28-4.4] to the [p]roperty, [the Borough] was certainly aware of it upon receipt of Mr. Steck's June 20, 2021 expert report[,] and [still] failed to amend interrogatories, produce a timely expert report[,] or even move for an extension of discovery. . . . [Furthermore], Mr. Marino testified on August 12, 2021 that he had been aware of the [ordinance] "a while ago[.]"

In granting AGC's motion for summary judgment, the judge provided the following reasons:

First, there is no dispute that the [p]roperty is located in the Airport Zone, which uses are governed by Ordinance [] 28-4.4. This is evidenced by [] [AGC's] [s]tatement of [u]ndisputed [m]aterial [f]acts and the supporting documents and record.

. . . .

Second, it is not subject to reasonable dispute that the Airport Zone, as governed by [Ordinance] 28-4.4, permits transportation, commercial, and industrial uses. In fact, [those uses are] confirmed by Mr. Marino's deposition testimony on August 12, 2021. . . .

. . . .

[A]ny argument that the uses permitted by the Airport Zone are not applicable to the [p]roperty because a portion of the [p]roperty lies outside that zone is rejected. In this regard, [the Borough] fails to provide any reference to the record indicating that any portion of the [p]roperty lies outside the [z]one.

. . . .

[AGC's] motion for summary judgment is granted [] [a]s a result of this court's conclusion that [AGC's] uses are in conformance with applicable zoning ordinances, particularly [28]-4.4.

On November 16, 2021, the Borough filed a motion for reconsideration of the judge's decisions to grant AGC summary judgment and to bar the untimely expert witness testimony. During a December 22, 2021 motion hearing, the judge rejected the Borough's argument that Rule 4:17-7 was ambiguous as to its

requirement that a certification of due diligence must accompany any amendment within twenty days of a discovery end-date. The judge denied the Borough's motion for reconsideration the very next day. This appeal followed.

On appeal, the Borough presents the following arguments for our consideration:

#### POINT I

BARRING PLAINTIFF'S INTERROGATORY AMENDMENT WAS AN ABUSE OF DISCRETION. THE AMENDMENT WAS SERVED PRIOR TO THE END OF THE DISCOVERY PERIOD FIXED BY ORDER AND PLAINTIFF'S EXERCISE OF DUE DILIGENCE IN OBTAINING AND SERVING ITS EXPERT REPORT APPROXIMATELY ONE MONTH AFTER THE ORDER ESTABLISHING THE DISCOVERY END DATE WAS CLEAR IN THE RECORD.

A. The interrogatory-amendment Rule is ambiguous and does not specify when or the manner in which a "due diligence" certification is to be provided. The Court's strict construal of the Rule unnecessarily visited injustice on Plaintiff.

#### POINT II

IN GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFF'S ACTION ON A RECORD PREDICATED ONLY ON A ONE-SIDED ZONING ANALYSIS BY DEFENDANTS' EXPERT, THE TRIAL COURT DID NOT ADDRESS PLAINTIFF'S CLAIMS THAT THE PROPERTY

HAD BEEN DEVELOPED IN VIOLATION OF THE BOROUGH'S SITE PLAN ORDINANCE AND DID NOT INTERPRET THE ZONING ORDINANCE.

A. The Summary Judgment Standard.

B. Dismissal of the Borough's claims for site plan violations was improper and unwarranted.

C. As presented in the summary judgment context the Court was required to decide complex, novel and disputed issues of zoning in the absence of a complete record.

D. The Court did not interpret the ambiguous terms in the Airport Safety Area overlay and instead merely accepted the opinions of the Steck Report.

E. As presented to the Court the motion for summary judgment required the interpretation of the Act, its regulations and the Borough's ordinances applicable to the Defendants' Property and the uses occurring on it. The cross-motion to require exhaustion of administrative remedies -- a course eschewed by the Defendants for years -- sought to serve the purpose of providing a record for consideration of the dispositive issue on the summary judgment motion.

Generally, we "accord substantial deference to a trial court's disposition of a discovery dispute." Brugaletta v. Garcia, 234 N.J. 225, 240 (2018). Thus, we "will not ordinarily reverse a trial court's disposition of a discovery dispute

'absent an abuse of discretion or a judge's misunderstanding or misapplication of the law.'" Ibid. (quoting Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017)). 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 Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. I.N.S., 779 F.2d 1260, 1265 (7th Cir.1985)). Accordingly, "we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant[,] and reasonably credible evidence as to offend the interests of justice." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Trust Created By Agreement Dated Dec. 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)).

Guided by these principles, we affirm the judge's decision to bar the Borough from introducing the untimely expert witness testimony and from utilizing the information contained in its August 30, 2021 amended answers to interrogatories. In so ruling, the judge relied on Rule 4:17-7, which states that:

Amendments [to interrogatories] may be allowed [later than 20 days prior to the end of the discovery period] only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by

the exercise of due diligence prior to the discovery end date. In the absence of said certification, the late amendment shall be disregarded by the court and adverse parties.

First, it is undisputed that the Borough's amendments were untimely, as they were submitted on the eve of the discovery end date and, therefore, later than twenty days prior to the end of the discovery period. Second, the Borough failed to include a certification of due diligence alongside its amendment as required by the rule.

In addition, we find the judge's denial of the Borough's amendment especially warranted in this matter as the Borough is clearly unable to establish that "the amendment was not reasonably available or discoverable by the exercise of due diligence[.]" See R. 4:17-7. Here, the Borough "was aware of [] [d]efendants' position regarding the applicability of [the] Airport Zone to the [p]roperty long before the discovery end date and took no action to serve [a] timely [] expert report or [] extend discovery." Moreover, the judge correctly charged the Borough with knowledge of the existence of its own ordinances since it was "in possession of all applicable zoning ordinances affecting the [p]roperty, which could have been reviewed by their expert at any time during discovery." Even if the Borough was "initially unaware of the applicability" or

existence of Ordinance 28-4.4, we agree that it certainly became aware "upon receipt of [] Steck's . . . expert report." In strictly applying the requirements of Rule 4:17-7, we discern no abuse of discretion in the judge's decision on this matter.

We next turn to the judge's grant of summary judgment in this matter, a matter in which we review "de novo, . . . apply[ing] the same standard as the trial court." Conley v. Guerrero, 228 N.J. 339, 346 (2017). A motion for summary judgment must be granted when, considering the competent evidence presented, viewed in the light most favorable to the non-moving party, there is "no genuine issue as to any material fact challenged" and "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).


Based on our review of the record and applicable law, we find no error in the judge's conclusion that AGC's uses were permitted pursuant to Ordinance 28-4.4, as testified to by Marino. In that regard, the Borough has failed to submit any competent evidence to contradict the judge's finding on this matter. Accordingly, we affirm the judge's decision to grant AGC's motion for summary judgment.



Finally, our affirmance of the judge's grant of summary judgment in A-1444-21 renders the claims in A-0439-21 unsustainable as a matter of law and that appeal is hereby dismissed as moot. To the extent we have not addressed the Borough's remaining arguments, they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part and reversed in part. The appeal in A-0439-21 is dismissed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION