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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0485-21**

VALLATA GARDENS, LLC,

Plaintiff-Respondent,

v.

BOROUGH OF LAVALLETTE,

Defendant-Respondent,

and

EDWARD THAYRES, PETER
DUNN, and ROBERT D'ANTON,

Intervenors-Appellants.

Argued March 8, 2023 - Decided June 2, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law
Division, Ocean County, Docket No. L-0630-19.

Michele R. Donato argued the cause for intervenors-
appellants.

Brian L. Whiteman argued the cause for respondent Vallata Gardens, LLC, (Whiteman Law Group, LLC, attorneys; Brian L. Whiteman, on the brief).

Philip G. George argued the cause for respondent Borough of Lavallette (Eric M. Bernstein & Associates, LLC, attorneys; Eric M. Bernstein, of counsel and on the brief; Philip G. George, on the brief).

PER CURIAM

Intervenors own residences in the Borough of Lavallette (Borough) adjacent or in close proximity to plaintiff's property, a preexisting nonconforming four-family residential dwelling. After plaintiff's property was damaged in Superstorm Sandy (Sandy) in 2012¹, it applied for and obtained permits to elevate and repair the dwelling. Plaintiff relied on the statute enacted after Sandy, N.J.S.A. 58:16A-103 (Sandy statute), that permitted the owner of a structure damaged by Sandy to bypass the requisite zoning approval process to elevate the structure and repair the damage. After plaintiff began repairs, the Borough issued a construction stop work order.

Plaintiff instituted suit against the Borough. Ultimately, the parties settled their dispute and the court dismissed the complaint. The court granted

¹ Superstorm Sandy struck New Jersey on October 28, 2012.

Intervenors' subsequent motion to intervene. In response, plaintiff moved to enforce the settlement agreement; Intervenors moved for summary judgment.

Intervenors appeal from the court's September 1, 2021 order granting plaintiff's motion to enforce settlement and denying Intervenors summary judgment. We affirm.

I.

Plaintiff's property is located within a residential zone, which currently permits only single-family residential dwellings. Although the property sustained damage during Sandy, plaintiff's architect, Frank Mileto, certified the damage was less than fifty percent of the property's assessed value and, therefore, the dwelling was only partially destroyed. The Borough did not disagree with this assessment.

Between the fall of 2015 and the spring of 2016, plaintiff submitted multiple versions of construction plans to the Borough's construction official to obtain permits to elevate the property, add new landings and stairs, and make other repairs, including re-roofing the house, replacing windows and doors, replacing siding, and repairing interior walls as necessary. Mileto certified that plaintiff obtained permits to perform work on portions of the property that were not damaged "but were practical since construction was being performed

anyway (i.e., replacement of windows and siding) which . . . [wa]s permissible without any need for a variance."

On July 6, 2016, the Borough approved plaintiff's plans and issued a permit. Thereafter, the Borough issued additional permits for repairs of damage caused by Sandy and for improvements as noted above.

Plaintiff began construction in late summer of 2016. The Borough's construction official inspected the property on a regular basis. However, in December 2016, the construction official was replaced. When the new construction official inspected the property, he determined the work done by plaintiff exceeded the scope of the issued permits. Therefore, the Borough issued a stop work order on December 19, 2016.

Mileto certified that "[t]he house was built exactly as per the plans which were approved by the Borough" and "[t]he construction did not deviate from the approved permits and did not go beyond the scope of the approved permits and plans." Mileto explained that "[t]he house when lifted is the identical height, width and length as prior to Sandy with the exception of the height added to lift the house . . . to the elevation required under the law." Mileto stated that "[t]he dispute between the parties related to the change in the roof pitch which increased the volume (height of the ceilings in some rooms on the third level)

but the [h]orizontal dimensions remained the same resulting in a de minimis area change from pre-Sandy."

According to plaintiff's complaint, at the time of the stop work order, it had expended over \$250,000 to raise and renovate the property. Plaintiff also alleged that subsequent to the stop work order, the property sustained substantial damage because plaintiff could not "protect or complete the incomplete construction."

Plaintiff appealed the stop work order to the Construction Board of Appeals (CBA). During the March 2, 2017 hearing, the construction official and Mileto testified. Mileto stated:

that he felt that all work that was done was within the scope of the permit that was issued. He indicated that, when it was lifted, the building was not stable and they proceeded to reinforce walls with sistered beams. In addition, a Microlam beam was installed from the front to the back for support of the structure.

The CBA noted that "[m]ultiple plans were submitted into evidence by the parties and . . . Mileto acknowledged that there was a roof line that was changed which added additional volume to the premises and, therefore, was in fact an expansion of a prior non-conforming use." The CBA, however, dismissed the appeal, determining that it did not have jurisdiction to hear the case, and explaining:

Considering all of the evidence that was placed on the record, the [CBA] indicated it felt that the [s]top [w]ork [o]rder was properly issued and that, under the circumstances, the [CBA] had no jurisdiction to hear the case since [plaintiff] would be required to obtain prior zoning approval from the Borough of Lavallette. As a result, it was concluded that this appeal should be dismissed and that [plaintiff] be directed to the Borough of Lavallette for further action from a zoning perspective.

Plaintiff did not appeal from that ruling.

II.

In 2019, plaintiff filed a complaint against the Borough alleging estoppel, conspiracy to defraud, common law fraud, tortious interference with economic advantage, and negligence as a result of the stop work order. Thereafter, the parties participated in mediation resulting in a settlement agreement regarding the stop work order and the scope of the permits issued to plaintiff.

In pertinent part, the settlement agreement provided:

5. The Plaintiff voluntarily agrees to reduce the usage of the premises from four units to three units to make it more conforming to the zoning ordinances of the Borough of Lavallette. . . .

. . . .

7. The premises shall be rebuilt in accordance with the Rehabilitation Code and FEMA Code. Second floor front roof on the east elevation from front second floor face to prior to existing dormer east face and ridge line

to drip line shall be modified to restore it to the height pre-existing Super Storm Sandy so as to eliminate the additional cubic feet of volume that is present in the current plan and thereby to make it more conforming

8. A portion of the front porch has been removed making the premises more conforming than it existed prior to Super Storm Sandy. The front flat roof shall be replaced with a pitched roof similar to that which existed prior to Super Storm Sandy. . . .

. . . .

11. This settlement is subject to approval by the Borough Council of the Borough of Lavallette and has been recommended for approval by the parties and the [mediator].

12. Upon approval by the Borough Council all claims shall be dismissed with prejudice.

On December 16, 2019, the Borough Council adopted a resolution approving the settlement agreement. Thereafter, the parties filed a stipulation of dismissal with prejudice.

In November 2019, Intervenors moved to intervene.² In January 2020, Intervenors renewed their motion to intervene and moved to vacate the

² Because plaintiff's complaint was dismissed prior to the return date of the intervention motion, the motion was dismissed.

dismissal. The court granted Intervenor's motions and vacated the order of dismissal.

Thereafter, plaintiff moved to enforce the settlement agreement; Intervenor's opposed the motion and cross-moved for dismissal. Intervenor's subsequently filed a motion for summary judgment, contending that plaintiff could not assert the Sandy statute, N.J.S.A. 58:16A-103, to envelop all the renovations and improvements done to its property. Instead, Intervenor's asserted plaintiff was required to obtain the necessary variances from the municipal planning and zoning boards for the extensive construction work.

In an oral decision on August 31, 2021, the motion judge granted plaintiff's motion to enforce the settlement and denied Intervenor's summary judgment. The court noted the Borough issued plaintiff a permit in 2016 to elevate the building, install new stairs and landings, remove a front section of the porch and roof, and alter the roof. The court referenced the exemption of the applicability of the Sandy statute if a "repair or reconstruction plan . . . alter[ed] the original dimensions of the structure." The court found Mileto, "without any contest by the [I]nterven[o]rs" certified the dwelling remained in the same footprint as before the storm. Therefore, the court determined the Borough had appropriately issued the construction permits and the settlement

agreement was valid and enforceable. The court issued a conforming order on September 1, 2021.

III.

On appeal, Intervenors contend the court erred in denying their motion for summary judgment and in granting plaintiff's motion to enforce settlement.

Our review of a summary judgment order is de novo—we employ the same standard as the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016).

Summary judgment should be granted when, considering the competent evidence presented, viewed in the light most favorable to the nonmoving 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). Competent evidence requires evidence "beyond mere 'speculation' and 'fanciful arguments.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Hoffman v. AsSeenOnTV.com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009)).

However, "[i]f there is the slightest doubt as to the existence of a material issue of fact, the motion should be denied." Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). A summary judgment motion may not be defeated

by conclusions lacking factual support, Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011), self-serving statements, Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013), or disputed facts "of an insubstantial nature." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 4:46-2 (2023).

Intervenors assert their version of the material facts was uncontested by plaintiff. The record reflects the opposite. In opposing the motion for summary judgment, plaintiff filed both a counterstatement of material facts and its own statement of material facts.

Plaintiff disputed Intervenors' contentions that: the property was almost totally reconstructed and enlarged after it was elevated; the property virtually disintegrated when it was elevated due to decay, age and damage that preexisted Sandy; and that the Borough did not issue any construction permits to reconstruct the property. Furthermore, in its statement of material facts, plaintiff stated that "[t]he Property was severely damaged by Superstorm Sandy," which explicitly contradicts Intervenors' position that the damage to the property preexisted Sandy.

The record demonstrates that plaintiff disputed all of the essential allegations supporting Intervenors' summary judgment motion. The parties'

conflicting statements of material facts and supporting certifications created genuine issues of material facts in dispute, precluding a grant of summary judgment. See R. 4:46-2(c); Brill, 142 N.J. at 540.

Moreover, as will be discussed in the next section, when the evidence is viewed in the light most favorable to plaintiff—the property was damaged by Sandy and plaintiff obtained the necessary approvals and permits—plaintiff was entitled to elevate and repair its property pursuant to the Sandy statute and, therefore, intervenors were not entitled to judgment as a matter of law. See R. 4:46-2(c); Brill, 142 N.J. at 540.

A.

Intervenors contend the motion judge erred in interpreting the Sandy statute because: (1) the property did not meet the definition under N.J.S.A. 58:16A-103(a) of a "Sandy-damaged structure" (2) the reconstruction of the property was not "lawful"; and (3) the statute does not authorize the complete reconstruction of a nonconforming use.

Our review of a court's statutory construction is de novo. Saccone v. Bd. of Trs. of Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014).

"[T]he goal of statutory interpretation is to ascertain and effectuate the Legislature's intent." Cashin v. Bello, 223 N.J. 328, 335 (2015). "[T]he best

indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). "Accordingly, '[t]he starting point of all statutory interpretation must be the language used in the enactment.'" Spade v. Select Comfort Corp., 232 N.J. 504, 515 (2018) (alteration in original) (quoting N.J. Div. of Child Prot. & Permanency v. Y.N., 220 N.J. 165, 178 (2014)). "If the plain language leads to a clear and unambiguous result, then our interpretative process is over." Johnson v. Roselle EZ Quick, LLC, 226 N.J. 370, 386 (2016) (citation omitted).

As we have stated, in "[r]ecognizing that safe construction in flood areas requires the elevation of first floors, the Legislature enacted N.J.S.A. 58:16A-103 [the Sandy statute] to spare owners from having to obtain variances and other land use approvals in order to elevate existing buildings, including Sandy-damaged structures, located in flood-prone areas." Gross v. Iannuzzi, 459 N.J. Super. 296, 303 (App. Div. 2019).

N.J.S.A. 58:16A-103 provides in pertinent part:

b. (1) Notwithstanding the provisions of any other law to the contrary, except as otherwise provided pursuant to paragraph (2) of this subsection, a person shall be exempt from any development regulation, including any requirement to apply for a variance therefrom, that otherwise would be violated as a result of raising an existing structure to a new and appropriate elevation, or constructing a staircase or other attendant structure

necessitated by such raising, provided, however, this exemption shall apply only to the minimum extent or degree necessary to allow the structure to meet the new and appropriate elevation with adequate means of ingress and egress.

. . . .

c. (1) Notwithstanding the provisions of any other law to the contrary, except as otherwise provided pursuant to paragraph (2) of this subsection, a person shall be exempt from any development regulation, including any requirement to apply for a variance therefrom, that otherwise would be violated as a result of using a new and appropriate elevation when lawfully repairing or reconstructing a Sandy-damaged structure, or constructing a staircase or other attendant structure necessitated by use of the new and appropriate elevation, provided, however, this exemption shall apply only to the minimum extent or degree necessary to allow the Sandy-damaged structure to meet the new and appropriate elevation with adequate means of ingress and egress.

N.J.S.A. 58:16A-103(b)(2) and (c)(2) render the exemption inapplicable "to a person who has altered the original dimensions of a structure if, had the alteration not been made, the structure could have been raised to meet the new and appropriate elevation either without the exemption or with an exemption of lesser degree than is needed with the alteration."

The statute defines a "Sandy-damaged structure" as "any structure that existed on October 28, 2012 and was damaged or destroyed by Hurricane

Sandy," and "original dimensions" as "the exact vertical and horizontal dimensions of a structure as it existed on October 28, 2012." N.J.S.A. 58:16A-103(a).

The trial court found plaintiff was entitled to the exemption under N.J.S.A. 58:16A-103(c)(1), because "[t]he certifications from the architect, and really without any contest by the [I]nterven[o]rs, [stated that] the house remains in the same footprint as it existed at the time of the storm. There's no expansion of the use." The reconstruction plan did not alter the original dimensions of the property. The court also noted the exemption did not require "substantial" damage as a result of Sandy, as asserted by Intervenors, but rather plaintiff needed to only demonstrate its dwelling sustained damage in the storm.

We disagree with Intervenors' assertion that the property did not meet the definition under N.J.S.A. 58:16A-103(a) of a "Sandy-damaged structure."

Mileto certified he inspected the property on November 28, 2012, and found "that due to the storm surge created by Hurricane Sandy, the entire first floor of the four-unit building ha[d] been substantially damaged." Furthermore, one of plaintiff's members certified that "[t]he [h]ouse suffered significant damage during Superstorm Sandy in 2012," and "[a]s a result of the [s]torm, it

became necessary for [plaintiff] to raise the [h]ouse and undertake various other repairs to make the [h]ouse structurally sound."

Intervenors have not presented any credible evidence to support their contention that the property was not damaged during Sandy. To the contrary, one of the Intervenors stated, in a certification supporting their motion to intervene and vacate dismissal, that plaintiff's building "was damaged by Superstorm Sandy, but not enough to require elevation." It is clear plaintiff met the definition of a "Sandy-damaged structure" under N.J.S.A. 58:16A-103(a).

Intervenors further contend the trial court erred in its interpretation of the Sandy statute because "the reconstruction [by plaintiff] was not lawful" as required under N.J.S.A. 58:16A-103(c)(1). The statute specifies that the exemption is available when "lawfully repairing or reconstructing a Sandy-damaged structure."

The Borough issued numerous approvals and permits for the property; construction did not begin until after the permits issued. Thereafter, the Borough's construction official inspected and approved the progress of the construction on multiple occasions. Even though a stop work order eventually issued, it was not because of unapproved or illegal repairs or construction. As

the court noted, the stop work order stemmed from a dispute over whether the construction exceeded the scope of the permit.

That dispute was resolved through the parties' settlement agreement, in which plaintiff agreed to, among other things, adjust the roof line that added additional volume which made it an expansion of a prior nonconforming use. The plans submitted to effectuate the settlement conformed to the footprint and volume requirements of the Sandy statute. Therefore, the reconstruction was not subject to development regulation review. Intervenor cannot support their contention that the construction on the property was unlawful under N.J.S.A. 58:16A-103(c)(1).

We turn to Intervenor's assertion that the court's interpretation of the Sandy statute authorized the illegal reconstruction of a nonconforming use. According to Intervenor, "[t]he Sandy . . . Statute was not intended to allow the rebuilding of nonconforming uses," and "[t]he construction that took place after elevation of the nonconforming, multiunit commercial use was illegal and cannot be approved without a full application for a use variance." We are unconvinced.

N.J.S.A. 40:55D-68 provides: "Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the

lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof." The Sandy statute is a limited exemption that applies "only to the minimum extent or degree necessary to allow the structure to meet the new and appropriate elevation with adequate means of ingress and egress." N.J.S.A. 58:16A-103(b)(1). However, the Sandy statute does not restrict a property owner's construction to repair the damage caused by Sandy, provided the vertical and horizontal dimensions of a structure remain as they existed on October 28, 2012. N.J.S.A. 58:16A-103(a).

Intervenors assert the court erred in not properly considering Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132, 143 (App. Div. 2013). In Motley, we acknowledged it was well-settled that New Jersey "disfavors the continuation of nonconforming uses and structures." Ibid.

The Motley court further explained that while N.J.S.A. 40:55D-68 provides that a nonconforming use or structure "may be restored or repaired in the event of partial destruction thereof," "total destruction of such a structure, 'whether by the owner's design or by accident,' terminates a nonconforming use and the owner's right to continue that use likewise ceases." Id. at 144 (quoting S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford, 373 N.J. Super. 603, 619-20 (App. Div. 2004)). "In essence, the test of whether

a nonconforming use or structure may be restored or repaired is whether there has been some quantity of destruction that surpasses mere partial destruction." Id. at 144-45.

Preliminarily, we note the discrepancies in Intervenor's assertions regarding the damage Sandy caused to plaintiff's property. Intervenor has argued at times that plaintiff's dwelling sustained no or not enough damage to be entitled to the statutory exemption under the Sandy statute as a Sandy-damaged structure.

However, in asserting this argument, Intervenor contends plaintiff's building was totally destroyed, therefore terminating its nonconforming use and eligibility for exemption from municipal regulations under the Sandy statute.

Intervenor has presented no evidence that plaintiff's property was completely destroyed. Nor have they demonstrated the reconstruction on the property was illegal. Therefore, plaintiff was permitted to repair the property and maintain its preexisting nonconforming status under N.J.S.A. 40:55D-68. In concluding plaintiff was entitled to the Sandy statute exemption, the court found the repairs to the property were authorized under the permits issued by the Borough.

Moreover, Intervenor's reliance on Motley is misplaced. The Motley court found the existing property was completely destroyed, stating "the record establishe[d] that plaintiff's dismantling of all of the interior and exterior walls and his attempt to rebuild the house exceeded the scope of the zoning permit that had been issued to him." Id. at 136. The court further found that "[t]he building was not habitable before construction began, and evidently had not been habitable [for three or four years]" and that the plaintiff had essentially demolished the entire structure. Id. at 139.

Unlike in Motley, plaintiff's property was habitable prior to Sandy. Although the property was damaged during Sandy, the record does not support Intervenor's contention that it collapsed nor that it was completely destroyed. Furthermore, the Borough did not deem the building totally destroyed or order its demolition. To the contrary, Mileto certified that "[t]he basic box of the house was lifted and intact when lifted."

The court's findings are well-supported that the property was damaged by Sandy and met the definition of a "Sandy-damaged structure" under N.J.S.A. 58:16A-103(a). Plaintiff applied for and obtained permits to elevate the property and repair the damage caused by Sandy. Therefore, plaintiff lawfully elevated and reconstructed its Sandy-damaged structure within the meaning of

N.J.S.A. 58:16A-103. There was no evidence of an increase in the footprint of the building as the vertical and horizontal dimensions of a structure remained as they existed on October 28, 2012. The evidence requires a conclusion that plaintiff's property fell under the Sandy statute exemption and plaintiff was authorized to repair the damage under the permit issued by the Borough.

B.

We turn to the court's order enforcing the settlement agreement between plaintiff and the Borough. Intervenors contend the order "lacks factual and legal support." We disagree.

New Jersey has a strong public policy in favor of the settlement of litigation. Gere v. Louis, 209 N.J. 486, 500 (2012); Brundage v. Est. of Carambio, 195 N.J. 575, 601 (2008) (stating "settlement of litigation ranks high in our public policy"). "This policy rests on the recognition that 'parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone.'" Gere, 209 N.J. at 500 (quoting Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 563 (App. Div. 2007)). "In furtherance of this policy, our courts 'strain to give effect to the terms of a settlement wherever possible.'" Brundage, 195 N.J. at 601 (quoting

Dep't of Pub. Advoc. v. N.J. Bd. of Pub. Utils., 206 N.J. Super. 523, 528 (App. Div. 1985)).

"Interpretation of a settlement agreement implicates significant legal and policy principles, and the standard for vacating a settlement is not easily met." Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474 (App. Div. 2009). New Jersey courts "have refused to vacate final settlements absent compelling circumstances. In general, settlement agreements will be honored 'absent a demonstration of fraud or other compelling circumstances.'" Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (internal quotation marks omitted) (quoting Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div. 1983)). "Before vacating a settlement agreement, our courts require 'clear and convincing proof' that the agreement should be vacated." Ibid. (quoting DeCaro v. DeCaro, 13 N.J. 36, 42 (1953)).

In granting plaintiff's motion to enforce the settlement agreement, the court stated:

The [c]ourt finds that the permits were appropriately issued; that the town and the homeowner had a dispute as to whether or not the stop work order should have been issued and continued; that the Borough and the homeowner entered into an agreement. It was executed, and both parties stand before this [c]ourt being willing to be bound to that agreement. The [c]ourt will allow that agreement to go forward

under a contractual analysis. That they understood the benefits of entering into that agreement rather than allowing these matters to be litigat[ed] and then appealed.

. . . .

[The court] will grant the application of the plaintiff to compel the Borough to continue with the agreement that was executed voluntarily by both parties

. . . .

After a de novo review, we see no reason to disturb the court's order. Plaintiff's property was damaged by Sandy. Plaintiff obtained the necessary permit to elevate its property, as well as numerous other permits to repair the Sandy damage and to perform renovations required as a result of the damage. Thereafter, plaintiff elevated the property and began repairs until the Borough issued the stop work order.

The parties' dispute centered around whether the stop work order was appropriately issued and whether the construction was within the scope of the permits. After mediation, the parties settled their dispute in good faith. Under the settlement, plaintiff agreed to forfeit its claim for damages and to reduce the nonconforming use from a four-unit to a three-unit dwelling. The Borough approved the settlement agreement.

Any other issues raised by Intervenors were rendered moot by the parties' settlement agreement or were not deemed sufficient to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION