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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0660-21**

**GALLERIA CONSTRUCTION,
INC.,**

Plaintiff-Appellant,

v.

**TOWNSHIP OF KINGWOOD
and GREGORY J. BONIN,**

Defendants-Respondents.

Submitted October 31, 2022 – Decided January 3, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Hunterdon County, Docket No. L-0114-21.

Carter, Van Rensselaer and Caldwell, attorneys for
appellant (William J. Caldwell, on the brief).

Gebhardt & Kiefer, PC, attorneys for respondents
(Richard P. Cushing and Noel A. Lesica, on the brief).

PER CURIAM

Plaintiff appeals from the September 20, 2021 order granting defendants summary judgment. We affirm.

Defendant Gregory Bonin, a zoning officer for defendant Kingwood Township, issued plaintiff two summonses for failing to submit a site plan regarding a change of use of its commercial property in contravention of Kingwood Township Ordinance § 132-110(A)(1)(c), and for storing an unauthorized construction trailer on its property in contravention of Ordinance § 132-11(B).

During the municipal court trial in August 2020, Bonin testified the summonses were issued after he observed that plaintiff had installed asphalt millings on its property to create a parking lot on which it was storing ten to fifteen cranes. On cross-examination, he conceded he did not provide the required forty-five-day notice to plaintiff, which would permit plaintiff to comply with the ordinances before the issuance of summonses. Therefore, the municipal court judge found plaintiff not guilty on the summonses. The judge added that "if the Township finds there[] [is] continuing notice, they are free to bring . . . violations . . . after they comply with the requisite Township ordinance."

On January 19, 2021, Bonin sent plaintiff a notice of violation that read:

You are hereby notified that you are in violation of Kingwood Township Code 132-110: Preliminary Site Plan. You have [forty-five] days to remedy the matter or you will be issued a notice of violation for not having a site plan for improvements made to the above reference property. Please be advised that you are subject to daily violations so long as illegal operations continue on your property.

On March 23, 2021, plaintiff filed a complaint in lieu of prerogative writ in the Law Division. Plaintiff asserted defendants were "forever barred and enjoined from seeking to enforce the same or substantially similar [o]rdinance provisions against [it]" because the municipal court had previously found plaintiff not guilty of the offense. Defendants moved for summary judgment, asserting the summonses were dismissed on procedural grounds and not adjudicated on their merits.

The Law Division judge granted defendants summary judgment in a September 20, 2021 oral decision. The court cited to applicable case law and found double jeopardy did not apply since the acquittal was on procedural grounds and not on the merits.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Green v. Monmouth Univ., 237 N.J. 516, 529 (2019). Thus, we consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in

consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

Plaintiff renews its argument before this court, contending double jeopardy prevents defendants from issuing and prosecuting the January 19, 2021 summons. We disagree.

First, we address defendants' assertion that double jeopardy does not apply here because the violation of a zoning ordinance is a civil proceeding. Our Supreme Court and this court have previously considered this argument and found a municipal zoning violation can be criminal in nature or, at a minimum, quasi-criminal. See State, Twp. of Pennsauken v. Schad, 160 N.J. 156, 171 (1999) (finding "municipal court proceedings to prosecute violations of ordinances are essentially criminal in nature"); City of Newark v. Pulverman, 12 N.J. 105, 114 (1953) (stating zoning ordinances can be "essentially criminal in nature"); State v. Carlson, 344 N.J. Super. 521, 527 (App. Div. 2001) (stating "[t]here is no doubt that this case involving an ordinance violation, commenced on municipal court summons and in which the State acknowledged its burden beyond a reasonable doubt, is a quasi-criminal matter").

The summons for violating Ordinance § 132-110(A)(1)(c) was subject to penalties denoted in Ordinance § 1-15, which provides:

[f]or violation of any provision of the Code of the Township of Kingwood . . . unless a specific penalty is otherwise provided in connection with the provision violated, the maximum penalty upon conviction of the violation shall be by one or more of the following: imprisonment in the county jail or in any place provided by the Township for the detention of prisoners, for a term not exceeding [ninety] days; or by a fine not exceeding \$2,000; or by a period of community service not exceeding [ninety] days.

[Kingwood, N.J., Mun. Code § 1-15 (2021).]

In addition, "[e]ach and every day [a] violation continues shall be deemed a separate and distinct violation." Kingwood, N.J., Mun. Code § 132-147 (2021).

Because the violation of the ordinance was at minimum a quasi-criminal proceeding, double jeopardy would attach, if applicable. But it is clear that double jeopardy did not apply in these circumstances. There was no adjudication of the summonses on their merits in the municipal court; the judge dismissed the summonses on procedural grounds after determining defendants did not comply with the notice requirement, thus depriving plaintiff of the opportunity to rectify the violation.

In United States v. Scott, 437 U.S. 82 (1978), the district court dismissed two counts of an indictment for preindictment delay. Id. at 84. The Sixth Circuit

dismissed the government's subsequent appeal on grounds of double jeopardy. Ibid. On appeal to the Supreme Court, in addressing the issue of whether double jeopardy applied, the Court stated "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." Id. at 91.

However, in considering the circumstances presented where the disposition of the criminal counts was not on the merits, but because of a procedural issue, the Court stated double jeopardy did not apply since an acquittal is "only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" Id. at 97 (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

In Scott, the dismissal for preindictment delay was a legal judgment that a defendant, "although criminally culpable, may not be punished because of a supposed constitutional violation." Id. at 98. The Court reversed, finding double jeopardy did not protect a defendant in that situation, as there was no adjudication of the merits of the charged offenses. Id. at 99-100.

Our Supreme Court applied Scott in State v. Barnes, 84 N.J. 362, 366 (1980). After pleading guilty in municipal court, the defendant appealed to the Law Division. Id. at 365-66. The court vacated the plea, finding the ordinance was unconstitutional on vagueness and overbreadth grounds. Id. at 366. We dismissed the State's appeal, finding it was precluded under then Rule 2:3-1. Ibid.

The Court determined the ruling on the constitutionality of the ordinance "was unrelated to the guilt or innocence of the defendant." Id. at 372. The Court allowed the appeal to continue because "[t]he fulfilment of . . . [double jeopardy] policy considerations does not require that an accused go free every time his trial falls short of a final judgment." Id. at 371. Applying Scott, the Court noted, "[w]here the proceedings against an accused are terminated during trial on a basis unrelated to factual guilt or innocence, the State may appeal from a ruling of the trial court in favor of the defendant without offending the principles expressed in the double jeopardy clause." Ibid. (citing Scott, 437 U.S. at 99); see also State v. Brito, 345 N.J. Super. 228, 230 (App. Div. 2001) (concluding the dismissal of a domestic violence action because of complainant's failure to appear is not a disposition on the merits and the State was permitted to appeal).

Here, the municipal court judge found plaintiff not guilty because defendants did not follow a procedural requirement prior to issuing the summonses. There was no judicial determination regarding the factual elements of the zoning violations. The judge did not adjudicate the merits of the summonses. Therefore, there was no disposition of the action on its merits. See Carlson, 344 N.J. Super. at 525-28 (finding the Law Division's ruling that the defendants in a zoning action were engaged in a permissible activity instead of a prohibited one and thus were not guilty was a disposition on the merits). The Law Division properly granted defendants summary judgment.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION