SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1474-21

546 OG, LLC,

Plaintiff-Appellant,

v.

BOROUGH OF EDGEWATER,

Defendant-Respondent.

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Argued April 25, 2023 – Decided August 28, 2023

Before Judges Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7744-19.

Paul V. Fernicola argued the cause for appellant (Paul V. Fernicola & Associates, LLC, attorneys; Paul V. Fernicola, of counsel and on the briefs; Robert E. Moore, on the briefs).

Joseph R. Mariniello argued the cause for respondent (Mariniello & Mariniello, PC, attorneys; Joseph R. Mariniello, on the brief).

PER CURIAM

In 2019, plaintiff 546 OG, LLC filed a complaint about an ordinance defendant Borough of Edgewater had adopted in 2008 and the purportedly resulting "[i]nverse [c]ondemnation" of property plaintiff purchased nearly nine years later. Plaintiff appeals from December 17, 2021 orders denying plaintiff's summary-judgment motion and granting defendant's cross-motion for summary judgment based on the untimeliness of plaintiff's complaint. Plaintiff also appeals from a November 17, 2019 order changing the track assignment of the case. We affirm.

I.

We discern the material facts from the summary-judgment record, viewing them in a light most favorable to the non-moving parties. See Memudu v. Gonzalez, 475 N.J. Super. 15, 18-19 (App. Div. 2023).

This case involves property designated as Block 3, Lots 9.01 and 9.02 on defendant's official tax map (the property). It is more commonly known as 33 Leary Lane in Edgewater. The property is adjacent to other fully-developed properties.

On October 20, 2008, defendant introduced Ordinance No. 1396-2008 for public comment. The ordinance is entitled "AN ORDINANCE VACATING A PORTION OF LEARY LANE IN THE BOROUGH OF EDGEWATER AND

EXTINGUISHING ALL PUBLIC RIGHTS THEREIN" and states in relevant part:

> WHEREAS, Leary Lane in the Borough of Edgewater is a public thoroughfare under the jurisdiction and control of the Borough of Edgewater; and
>
> WHEREAS, pursuant to N.J.S.A. 40:67-1(b), the governing body of a municipality may, by ordinance, vacate any public street, dedicated to public use but not accepted by the municipality, whether or not the same, or any part, has been actually opened or improved; and
>
> WHEREAS, a portion of Leary Lane, located between the retaining wall located at the western boundary of the developed portion of Leary Lane and the western boundary of the Borough of Edgewater with the Borough of Fort Lee, known as Leary Lane Paper Street[1] remains unimproved; and
>
> WHEREAS, the Borough of Edgewater has determined that Leary Lane Paper Street is unnecessary to the Borough's traffic flows, and that the unique topography of the property on which this portion of Leary Lane is located makes it particularly unsuitable for improvement as a public road; and
>
> WHEREAS, the Mayor and Council have determined that the public interest will be best served by vacating said portion of Leary Lane Paper Street; and

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[1] A "paper street" is "an unimproved street appearing on a map." Jersey Cent. Power & Light Co. v. Twp. Comm. of Lakewood, 174 N.J. Super. 394, 397 (Law Div. 1980), aff'd o.b., 178 N.J. Super. 610 (App. Div. 1981).

. . . .

> Section 1. The Borough of Edgewater hereby vacates, abandons, releases and extinguishes any and all Borough or public rights in and [around] Leary Lane Paper Street as depicted on the Tax Map of the Borough of Edgewater and as set forth in the attached metes and bounds description(s) . . . and the survey attached . . . and all portions thereof shall be divided and conveyed to the adjoining property owners in accordance with the law.

Gregory S. Franz, defendant's Borough Administrator since 2006, described the portion of Leary Lane to be vacated under the ordinance as "a dead end adjoining a cliff face."

The idea of vacating a portion of Leary Lane originated in communication between defendant's then-counsel and the attorney for Robert Gonzalez, who at that time owned the property. Gonzalez was interested in constructing some type of residential development within the adjoining parcels or parcels he owned and thought vacating the paper street and taking a portion of it would help in that construction effort. Gonzalez was represented by counsel, who was in contact with defendant's counsel, and was provided with notice of the ordinance.

On November 10, 2008, after a public hearing on the proposed ordinance following all necessary notice and publication and with no objection to the proposed ordinance, the mayor and council voted to approve the ordinance. The

mayor and two of the council members who had voted on the ordinance are deceased, another council member suffers from dementia, and the person who was the Borough Clerk is retired. The copy of the ordinance in the record provided by plaintiff contains a stamp indicating the Bergen County Clerk recorded it on January 21, 2009, in book 00012, page 0146-0156.

Around October 30, 2017, plaintiff purchased the property at a sheriff's sale. According to plaintiff's managing member Mark Klein, when preparing an application to develop the property, plaintiff learned the ordinance had "landlocked" the property because pursuant to the ordinance, defendant had "relinquished the public right-of-way in and over Leary Lane."

On November 6, 2019, plaintiff filed a complaint against defendant, challenging the validity of the ordinance "because when the Borough relinquished the public right-of-way in and over Leary Lane, the Borough blocked the [p]roperty from accessing the Borough's public street system." In the first count of the complaint, plaintiff alleged the ordinance failed to comply with N.J.S.A. 40:67-19 because it did not maintain plaintiff's "right to access the Borough's public traffic system via Leary Lane." Plaintiff sought a judgment declaring the ordinance to be invalid and restraining defendant from "any further enforcement or application of [the o]rdinance . . . as to . . . [p]laintiff's

[p]roperty." In the second count, plaintiff made an inverse-condemnation claim, alleging it had "invested in the property at a level commensurate with reasonable expectations that the [p]roperty could be developed for residential development" and, by adopting the ordinance, defendant made the property "undevelopable." In the civil case information statement, plaintiff's counsel identified the "Case Type" as "REAL PROPERTY." See General Requirements for Pleadings, Pressler & Verniero, Current N.J. Court Rules, Appendix XII-B(1) to R. 4:5-1, www.gannlaw.com (2023).

During the course of discovery, plaintiff served on defendant a notice seeking the deposition of a representative of defendant "most knowledgeable" about: the ordinance; "[t]he determination that Leary Lane Paper Street as more specifically described in [the o]rdinance was unnecessary to the Borough's traffic flows, and that the unique topography of the property on which this portion of Leary Lane is located makes it particularly unsuitable for improvement as a public road"; and "[t]he public interest [that] would be best served by vacating a portion of Leary Lane Paper Street as more specifically described in [the o]rdinance." A judge granted plaintiff's subsequent unopposed motion to compel that deposition. Defendant produced Franz as its representative.

When asked what defendant had done after Gonzalez's attorney introduced the idea of vacating a portion of Leary Lane, Franz responded:

> Well, typically what . . . the Borough attorney[] would have done at that point was report to the full mayor and council most likely at a work session where requests of these natures . . . would be discussed and probably discussed with the Borough council that was there . . . and in consultation with the engineer there was really no need to maintain the paper street . . . .

When asked how defendant had determined that Leary Lane Paper Street was unnecessary for defendant's traffic flows, Franz responded, "[i]n all likelihood it was probably in consultation with the Borough engineer" and gave plaintiff's counsel the name of the engineer and his firm. Franz, who testified he had played no role in the adoption of the ordinance, did not know the facts on which the mayor and council had relied in determining that the public interest would be best served by vacating a portion of the Leary Lane Paper Street pursuant to the ordinance nor was he able to set forth his own understanding as to how vacating a portion of the street was in the public's interest in 2008. When asked to explain his understanding as to why the portion of the Leary Lane Paper Street vacated by the ordinance was unnecessary for defendant's traffic flows, Franz testified:

> Well, essentially the portion that was eventually vacated by the ordinance was simply a dead end

> adjoining a cliff face. Actually if my memory serves me correctly, I believe a portion of the metes and bounds actually went into the cliff face of the Palisades Cliffs. So, there was – and again based on my review of documents and from my memory, there was no need for the Borough to retain ownership of that portion.

After the close of discovery, plaintiff moved for summary judgment, arguing defendant had failed to demonstrate the adoption of the ordinance benefitted the public. Defendant opposed that motion and cross-moved for summary judgment based on the untimeliness of the complaint.

While the parties' summary-judgment motions were pending, the presiding civil judge sua sponte entered an order on November 17, 2021, changing the track assignment of the case to "Track IV, Case Type 701" and reassigning the case "to the next [j]udge in rotation for prerogative writ assignment." Case Type 701 is "Actions in Lieu of Prerogative Writs." General Requirements for Pleadings, Pressler & Verniero, Appendix XII-B(1) to R. 4:5-1.

After hearing argument, the motion judge denied plaintiff's motion and granted defendant's cross-motion, as memorialized in orders entered on December 17, 2021, with attached riders. The judge held "[p]laintiff's action whether in challenging the [o]rdinance or alleging inverse condemnation fail because both [causes of] action[] are grossly out of time." The judge cited Rule

4:69-6(a), requiring an action in lieu of prerogative writs to commence within forty-five days "after the accrual of the right to the review, hearing or relief claimed," and Klumpp v. Borough of Avalon, 202 N.J. 390, 409-10 (2010), in which the Court held an inverse-condemnation action must be commenced within a six-year statute of limitations. The judge declined to enlarge the time for commencement of an action in lieu of prerogative writs under Rule 4:69-6(c), finding "no interests of justice at stake to compel the court to enlarge the time after more than [ten] years. . . . [T]he interest at stake here is the private interest of [plaintiff], which apparently failed to do its due diligence prior to the purchase of the property at the [s]heriff's sale."

On appeal, plaintiff argues its action was not time-barred, it was entitled to summary judgment because defendant did not act in furtherance of the public good when vacating a portion of Leary Lane, and, accordingly, the ordinance should be declared void. Unpersuaded by those arguments, we affirm.

II.

We review a grant of summary judgment de novo, applying the same standard as the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Whether a cause of action is barred by a statute of limitations is a question of law, also reviewed de novo. Catena v. Raytheon Co., 447 N.J. Super. 43, 52 (App. Div.

2016). "Statutes of limitations, by their nature, are intended to compel plaintiffs to file their lawsuits within a prescribed time to allow defendants a fair opportunity to respond and safeguard their interests." The Palisades at Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC, 230 N.J. 427, 443 (2017). They also "encourage diligence and penalize dilatoriness by allowing the dismissal of stale claims." Ibid.

"It is not the label placed on the action that is pivotal but the nature of the legal inquiry." Couri v. Gardner, 173 N.J. 328, 340 (2002); see also Hill Int'l, Inc. v. Atl. City Bd. of Educ., 438 N.J. Super. 562, 594 (App. Div. 2014) (directing the trial court on remand to "consider the actual substance of [the plaintiff's] allegations . . . rather than simply accept the [plaintiff's] label"); Zoning Bd. of Adjustment v. Datchko, 142 N.J. Super. 501, 508 (App. Div. 1976) (finding a plaintiff's "characterization" or "designation of the nature of an action" does not determine the plaintiff's substantive rights). Plaintiff may have labelled this case a "Real Property" action in its civil case information statement and may have framed the first count of the complaint as a declaratory-judgment claim, but a review of the complaint makes clear plaintiff is seeking to invalidate on non-constitutional grounds an ordinance enacted years before plaintiff

purchased the property. Thus, the trial-court judges properly treated the case as an action in lieu of prerogative writs.

"Insofar as plaintiffs' complaints challenged the constitutionality of a municipal ordinance, they were maintainable either as declaratory judgment actions, Bell v. Township of Stafford, 110 N.J. 384, 390-91 (1988), or as actions in lieu of prerogative writs, Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 44-45 (1986)." Ballantyne House Assocs. v. City of Newark, 269 N.J. Super. 322, 330 (App. Div. 1993). A prerogative-writ action "has long been available in New Jersey to afford judicial review of administrative agency actions in general and of municipal ordinances in particular." Alexander's Dep't Stores, Inc. v. Borough of Paramus, 125 N.J. 100, 107 (1991) (quoting Hills Dev. Co., 103 N.J. at 44-45). Rule 4:69, the court rule that addresses actions in lieu of prerogative writs, "governs challenges to municipal action." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:69 (2023). The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, "confers the declaratory action right on a person whose legal rights are affected by a municipal ordinance." Id., cmt. 1.3 on R. 4:42-3. Its "mandate is to afford relief from uncertainty with respect to a party's rights, including property rights." ML Plainsboro Ltd. P'ship v. Township of Plainsboro, 316 N.J. Super. 200, 204 (App. Div. 1998).

Arguing the forty-five-day time limit for actions in lieu of prerogative writs under Rule 4:69-6 does not apply, plaintiff likens its case to Ballantyne. But the plaintiffs in Ballantyne, 269 N.J. Super. at 328, alleged the enactment of an ordinance violated the equal-protection guarantees of the federal and state constitutions. See also Bell, 110 N.J. at 388 (plaintiff sought a declaration that a billboard ordinance was on its face an unconstitutional regulation of speech contrary to the First Amendment). Plaintiff makes no such constitutional argument here.

Instead, relying on N.J.S.A. 40:67-19, plaintiff argues simply that the public interest was not "better served by releasing" the portion of the Leary Lane Paper Street at issue in the ordinance. Plaintiff had no interest in or legal rights to the property when the ordinance was enacted in 2008. Plaintiff is not now seeking "relief from uncertainty with respect to" its rights. ML Plainsboro Ltd. P'ship, 316 N.J. Super. at 204. Its rights are clear and were clear when it purchased the property in 2017. Under these circumstances, the presiding civil judge correctly determined plaintiff's complaint was substantively an action in lieu of prerogative writs, and the motion judge correctly applied the forty-five-day time limit of Rule 4:69-6(a) to that claim.

Rule 4:69-6(c) authorizes a trial court to "enlarge the period of time provided in paragraph (a) . . . of this rule where it is manifest that the interest of justice so requires." The decision "to grant or deny an enlargement involves a sound exercise of judicial discretion, with consideration given both to the potential impact upon the public body and upon the plaintiff." Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 424 (App. Div. 2002). Rule 4:69-6(a)'s forty-five-day time limit "is designed to give an essential measure of repose to actions taken against public bodies." Id. at 423 (quoting Wash. Twp. Zoning Bd. v. Wash. Planning Bd., 217 N.J. Super. 215, 225 (App. Div. 1987)). "Because of the importance of stability and finality to public actions, courts do not routinely grant an enlargement of time to file an action in lieu of prerogative writs." Ibid.

When considering the timeliness of an action in lieu of prerogative writs, a trial court should consider whether the action involves "(1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Ibid. (quoting Borough of Princeton v. Bd. of Chosen Freeholders, 169 N.J. 135, 152 (2001) (internal quotation marks omitted)). With none of those considerations applying

here, we are satisfied the motion judge did not abuse her discretion by declining to enlarge the time provided in Rule 4:69-6(a).

Plaintiff's inverse-condemnation claim is without merit. In an action for inverse condemnation, "a landowner is seeking compensation for a de facto taking of his or her property." Greenway Dev. Co. v. Borough of Paramus, 163 N.J. 546, 553 (2000). "[I]t is a basic requirement of inverse condemnation that the plaintiff-land owner show that any deprivation of the beneficial use of his property is the result of the exercise of government authority and that the property has in fact been impaired." Pinkowski v. Township of Montclair, 299 N.J. Super. 557, 575 (App. Div. 1997). A party is not entitled to compensation for the taking of property it never owned. City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 486 (2010).

Plaintiff did not own the property when defendant enacted the ordinance. It never owned property that had adjacent to it the pre-ordinance, intact Leary Lane Paper Street. Thus, nothing was taken from plaintiff. Cf. Klumpp, 202 N.J. at 398-99 (plaintiffs purchased property in 1960 that was later impacted by government regulations adopted in 1969 and 1971); Mansoldo v. State, 187 N.J. 50, 54 (2006) (plaintiff obtained property in 1975 that was later impacted by government regulations adopted in 1982); Gardner v. N.J. Pinelands Comm'n,

125 N.J. 193, 197 (1991) (plaintiff's family owned since 1902 farmland impacted by the New Jersey Pinelands Protection Act, N.J.S.A. 13:18A-1 to -29, which was enacted in 1979, and subsequent regulations). If plaintiff suffered losses because it "invested in the property" based on "expectations that the [p]roperty could be developed for residential development," its losses were not caused by an ordinance enacted and recorded nearly nine years before it purchased the property. See, e.g., Pinkowski, 299 N.J. Super. at 576 (finding if plaintiffs had "suffered damage[,] it was not from the [governmental action], it was from the lack of adequate notice provided within the property's chain of title or inadequate inquiry at the time of purchase. This is not the type of damage for which [the town] would be liable").

Affirmed.