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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1628-20**

**DANIEL A. DESILVIO and
DANA DESILVIO,**

Plaintiffs-Appellants,

v.

BOROUGH OF GLASSBORO,

Defendant-Respondent.

Submitted January 17, 2023 — Decided January 30, 2023

Before Judges Whipple, Mawla, and Marczyk.

On appeal from the Superior Court of New Jersey, Law
Division, Gloucester County, Docket No. L-0576-20.

Potter and Dickson, attorneys for appellants (Peter D.
Dickson, on the briefs).

Maley Givens, attorneys for respondent (M. James
Maley, Jr., and Erin E. Simone, on the brief).

PER CURIAM

Plaintiffs Daniel A. and Dana DeSilvio appeal from an October 30, 2020 order granting defendant Borough of Glassboro's motion to dismiss plaintiffs' complaint in lieu of prerogative writs for failure to state a claim. Plaintiffs also challenge a January 8, 2021 order finding their complaint was frivolous and awarding the Borough counsel fees, and a May 3, 2021 order denying a subsequent motion for reconsideration. We affirm.

In Borough of Glassboro v. Grossman, we reversed the trial court's order permitting the Borough to acquire plaintiffs' property because the Borough presented no evidence the property was necessary to its redevelopment plan as required by the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 to -49. 457 N.J. Super. 416, 422 (App. Div. 2019). Our reversal was "without prejudice to the Borough's ability . . . to attempt a future acquisition of [the] parcel that is reasonably supported and substantiated by competent evidence." Id. at 439-40.

The Borough followed suit. This appeal concerns plaintiffs' opposition to the Borough's designation of an entity other than plaintiffs as the redevelopers of the area, which included plaintiffs' property. In May 2019, following our reversal, plaintiffs presented a redevelopment plan to the Borough. The Borough instead passed a June 6, 2019 resolution designating Glassboro

Cornerstone Group, LLC (Cornerstone) as the conditional redeveloper for the project site.

The June 2019 resolution cited N.J.S.A. 40A:12A-8(f), noting the statute "authorizes the Borough to arrange or contract with a redeveloper for the planning, construction or undertaking of any project or redevelopment work in an area designated as an area in need of redevelopment," and indicated Glassboro had "been in discussion with [Cornerstone] regarding redevelopment"

Plaintiffs claimed the June 2019 resolution was adopted in a closed working session that was not recorded. The Borough explained it received the Cornerstone redevelopment proposal in January 2017, and the proposal remained under consideration—along with several alternatives—for most of 2017 and 2018. In the meanwhile, the Borough attempted to condemn plaintiffs' property. The Borough found plaintiffs' proposal was "not realistic" given their lack of resources and was "inconsistent" with the Borough's plan.

Plaintiffs filed their complaint in July 2019, and amended the complaint in August 2019, challenging the June 2019 resolution. The complaint alleged the resolution "infringed on [their] right to be designated as redevelopers of their own property[,]" and violated plaintiffs' equal protection and due process rights

under Article 1, Paragraph 1 of the New Jersey Constitution. They alleged, insofar as the LRHL authorized the resolution, it too violated their equal protection and due process rights under Article 1, Paragraph 1 of the New Jersey Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. Plaintiffs alleged the resolution was "part of an effort to exclude [them] from the development of their property[]" and the Borough's "approval and entering into [a] [Memorandum of Understanding (MOU)] [with Cornerstone] was arbitrary, capricious, contrary to law and unenforceable . . . [and] done in bad faith"

The Borough served plaintiffs with a frivolous litigation notice and demand to withdraw the complaint pursuant to Rule 1:4-8. When plaintiffs declined to do so, the Borough moved to dismiss the complaint. One month later, plaintiffs moved to dismiss their complaint as moot. The court dismissed the complaint on December 18, 2019.

The Borough and Cornerstone's MOU appended to the June 2019 resolution had an exclusive negotiation period, which ran out, leading the Borough to pass a resolution on November 26, 2019, giving Cornerstone and the Borough 180 days from September 28, 2019, to negotiate a redevelopment project agreement. Plaintiffs filed a second complaint in December 2019,

making the same allegations as the first complaint. It alleged both resolutions were "inconsistent with the Master Plan and . . . [the Borough's] recent amendments to the redevelopment plan . . . [and] were specifically intended to punish [plaintiffs] for successfully opposing" the Borough's condemnation efforts in the first appeal. Plaintiffs further alleged Glassboro's responses to their Open Public Records Act requests for documentation underlying each resolution were incomplete and misleading.

The Borough responded with a notice and demand to withdraw the second complaint pursuant to Rule 1:4-8. When plaintiffs failed to do so, the Borough moved to dismiss and alternatively sought summary judgment.

The motion judge granted the Borough summary judgment on April 28, 2020. Citing Vineland Construction Company, Incorporated v. Township of Pennsauken,¹ he found that "[i]n the absence of any locally legislated selection criteria, the designation of a redeveloper, like all municipal actions, is a discretionary act vested with a presumption of validity." Further, "even if the challenger establishes the capability to redevelop its own property, N.J.S.A. 40A:12A-8(f) provides municipalities with the authority to select another redeveloper of their choosing to execute the redevelopment plan if it reasonably

¹ 395 N.J. Super. 230, 255 (App. Div. 2007).

found it convenient to do so." The judge concluded plaintiffs' constitutional claims lacked merit.

Quoting Grossman, the motion judge held pursuant to N.J.S.A. 40A:12A-8(f), "[t]he discretion to contract with a private redeveloper . . . is part of the municipality's broad authority to '[d]o all things necessary or convenient to carry out its powers.'" 457 N.J. Super. at 429. Pursuant to Vineland, the judge found "[t]he plain language of N.J.S.A. 40A:12A-8(f) . . . supports the long-standing interpretation of the LRHL as affording discretion to a municipality's authority to select a private redeveloper." 395 N.J. Super. at 254. Therefore, the Borough had authority to designate Cornerstone as the redeveloper—even on a conditional basis, pending the resolution of a final redevelopment project.

The motion judge also dismissed plaintiffs' argument the Borough's selection of Cornerstone was arbitrary, capricious, and in bad faith. He concluded that "[h]ere, as in Vineland, [plaintiffs] seek[] to be designated as the redeveloper[s] of their own land and here, as in Vineland, the municipal authority made a determination that the public good would be best serviced by the designation of someone other than [plaintiffs] as the redeveloper." Further, plaintiffs had not "advanced any arguments in support of the allegation of bad faith"

Plaintiffs moved for reconsideration and their motion added new arguments, including an allegation of a conflict of interest in the Borough's selection of Cornerstone, and an assertion the Borough misrepresented the condemnation litigation to the court. The Borough cross-moved for counsel fees and costs pursuant to Rule 1:4-8. On July 1, 2020, the motion judge denied the reconsideration motion and found the additional arguments raised by plaintiffs meritless. He also denied the Borough's cross-motion.

Two days before the negotiation timeframe designated by the November 2019 resolution lapsed, the Borough adopted a March 24, 2020 Resolution, extending the negotiation timeframe to September 22, 2020. Plaintiffs filed a third complaint challenging the March 2020 resolution, in addition to the two prior resolutions. The third complaint mirrored the two prior complaints. The Borough again served a frivolous litigation letter, and when plaintiffs failed to withdraw the complaint, filed a motion to dismiss for failure to state a claim and alternatively sought summary judgment. Plaintiffs opposed the motion.

On October 30, 2020, the motion judge granted the Borough's motion to dismiss the complaint with prejudice, largely on res judicata grounds. In a thorough oral opinion, he found "all three resolutions had substantially the same effects on [plaintiffs]. In fact, the [c]omplaints are virtually identical paragraph

for paragraph." The judge concluded the validity of the resolutions had been litigated when the court adjudicated the second complaint.

Following dismissal of the third complaint, the Borough filed a motion pursuant to Rule 1:4-8, seeking \$13,785.34 in counsel fees. Plaintiffs opposed the motion. On January 8, 2021, the motion judge granted the Borough fees. He found the third complaint was frivolous because plaintiffs' "legal argument remained wholly unchanged between the second complaint and the third complaint. . . . [And] the . . . third complaint . . . was not supported by any credible evidence on the record." He awarded the Borough \$9,346.34 in counsel fees.

Plaintiffs moved for reconsideration. On May 3, 2021, the motion judge denied plaintiffs' motion. He reiterated even though the third complaint was brought pursuant to a different resolution "it's the exact same issue that [plaintiffs] w[ere] already on notice that the [court] ruled upon in the dismissal of the second [c]omplaint . . . [the March 2020 resolution] simply served to extend the time that the older [resolution] was effective."

I.

On appeal, plaintiffs argue the motion judge erred in dismissing their third complaint on res judicata grounds because the complaint concerned a different

resolution and each resolution passed by the Borough gave rise to a distinct injury sufficient to substantiate its own complaint. Plaintiffs argue the resolutions twice-extended the timeframe for negotiations between the Borough and Cornerstone, leaving their property in limbo and depriving them of their constitutional rights. They claim the judge did not address their arguments and applied the wrong legal standard when he granted the motion to dismiss.

Rule 4:6-2(e) permits a court to dismiss a complaint for "failure to state a claim upon which relief can be granted" The court "must accept as true the facts alleged in the complaint, and credit all reasonable inferences of fact therefrom, to ascertain whether there is a claim upon which relief can be granted." Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008). However, "the legal requisites for [the] claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003). We review a Rule 4:6-2(e) dismissal de novo, employing the same standard applied by the trial court. Donato v. Moldow, 374 N.J. Super. 374, 483 (App. Div. 2005).

Under principles of res judicata, a "cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction

cannot be relitigated by those parties . . . in a new proceeding." Velasquez v. Franz, 123 N.J. 498, 505 (1991). Res judicata requires:

(1) [T]he judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

[McNeil v. Legis. Apportionment Comm'n of State, 177 N.J. 364, 395 (2003) (quoting Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 412 (1991)).]

The LRHL provides that "[u]pon the adoption of a redevelopment plan . . . the municipality or redevelopment entity . . . may proceed with the clearance, replanning, development and redevelopment of the area designated in that plan." N.J.S.A. 40A:12A-8. "There is no statutory procedure for a municipality to designate a redeveloper." William M. Cox & Stuart R. Koenig, Current N.J. Zoning & Land Use Administration § 11-7.1 (2022). Instead, "[t]he LRHL simply authorizes the redevelopment entity to contract with redevelopers for the undertaking of redevelopment work" under N.J.S.A. 40A:12A-8(f). Ibid. The statute contains no time limit to designate a redeveloper, instead, a governing body simply must designate a redeveloper by a resolution that "set[s] forth the reasons for selecting the redeveloper, including statements related to the redeveloper's experience and financial ability to complete the project." Ibid.

Following the designation of a redeveloper, "[t]he redevelopment entity and designated redeveloper will ordinarily engage in negotiations over the terms of a redevelopment agreement, which will set forth the terms and obligations of the parties with respect to the redevelopment project." Id. at § 11-7.2. The terms of a municipal authority and designated redeveloper's redevelopment agreement are regulated by N.J.S.A. 40A:12A-9, which recites the key provisions of such agreements. Redevelopment agreements may contain any number of additional terms "as may be deemed necessary to effectuate the purposes of the LRHL." Id. at § 11-7.2. A "redevelopment agreement need not mirror the applicable redevelopment plan so long as it is consistent with it." Ibid. (citing Bryant v. Atl. City, 309 N.J. Super. 596, 620-23 (App. Div. 1998)).

Here, the motion judge cited Vineland, wherein we held:

"Necessity" does not govern a municipality's selection of a redeveloper. There are no statutory or constitutional limitations on a municipality's selection of a private developer to carry out a redevelopment plan. The discretion to contract with a private redeveloper, pursuant to N.J.S.A. 40A:12A-8(f), is part of the municipality's broad authority to "[d]o all things necessary or convenient to carry out its powers." N.J.S.A. 40A:12A-8(n). . . . Consequently, even if plaintiff established that it was capable of redeveloping its own property, the Township nonetheless had the authority to designate a master redeveloper to execute the redevelopment plan if it reasonably found it

convenient to do so in carrying out its redevelopment plan

[395 N.J. Super. at 254 (first alteration in original) (emphasis added).]

Moreover, contrary to plaintiffs' contentions on appeal, we have previously upheld agreements between municipal authorities and private developers as not violative of an affected property owner's rights. Ibid. (noting that the township and conditional redeveloper were in "negotiations . . . regarding the terms of a final redevelopment agreement" for approximately one year before a "resolution authorizing the execution of a final redevelopment agreement" was adopted); see also Town of Kearny v. Disc. City of Old Bridge, Inc., 205 N.J. 386, 396 (2011) (the private developer eventually selected was designated a "conditional redeveloper" by the town council for a year before a final redevelopment plan was adopted).

The record shows the resolutions passed were for purposes of renewing the negotiation timeframe between the Borough and Cornerstone, nothing more. This extension of time spanned a total of one year and three months, which was reasonable given the scale of the redevelopment project. Indeed, as we previously noted in this case, "redevelopment projects often take years to complete . . . and redevelopment agencies accordingly must retain a degree of

flexibility in deciding which parcels they will need, and for what specific purpose they will need them, as the project goes forward." Grossman, 457 N.J. Super. at 433-34. Plaintiffs have no constitutional right to develop their property. Given these circumstances, the court properly rejected the constitutional arguments.

Res judicata clearly applied because plaintiffs' third complaint failed to state a claim which had not already been adjudicated. The Watkins factors were clearly met. Dismissal of the complaint was not an abuse of discretion.

II.

Plaintiffs argue the judge's finding their complaint was frivolous lacked proper findings or a basis in law. They assert fee awards are generally disfavored, and there was no evidence they acted in bad faith because their claims had merit. Furthermore, the fees awarded were excessive.

Rule 1:4-8 and the frivolous litigation statute, N.J.S.A. 2A:15-59.1, authorize sanctions, including reasonable attorney's fees, against any party. The statute states a prevailing party "may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint . . . of the nonprevailing person

was frivolous." N.J.S.A. 2A:15-59.1(a)(1). In order to find a complaint frivolous:

[T]he judge shall find on the basis of the pleadings, discovery, or the evidence presented that either: (1) The complaint . . . was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or (2) The nonprevailing party knew, or should have known, that the complaint . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

[N.J.S.A. 2A:15-59.1(b).]

"[A]n assertion is deemed 'frivolous' when 'no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 389 (App. Div. 2009) (quoting First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007)). The "continued prosecution of a claim or defense may, based on facts coming to be known to the party after the filing of the initial pleading, be sanctionable as baseless or frivolous even if the initial assertion of the claim or defense was not." Iannone v. McHale, 245 N.J. Super. 17, 31 (App. Div. 1990) (applying N.J.S.A. 2A:15-59.1).

"In reviewing the award of sanctions pursuant to Rule 1:4-8, we apply an abuse of discretion standard[.]" Zahabian, 407 N.J. Super. at 390, and will only

reverse an award if it "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error of judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005). We likewise review the denial of reconsideration for an abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996).

We affirm substantially for the reasons expressed in the motion judge's January 8, 2021 opinion. The motion judge's April 28, 2020 opinion clearly adjudicated each substantive argument plaintiffs later raised in the third complaint. The Borough resolutions extending the negotiations with Cornerstone did not materially change the merits of the claims plaintiffs repeated in their successive complaints. For these reasons, counsel fees as a sanction for filing frivolous pleadings were warranted and did not constitute and abuse of discretion.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION