SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1637-21

TOWNSHIP OF GREEN,

Plaintiff-Respondent,

v.

MARC PRAGER,

Defendant-Appellant.

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Submitted March 13, 2023 – Decided March 28, 2023

Before Judges Gooden Brown and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Docket No. DC-001943-21.

George T. Daggett, attorney for appellant.

Laddey, Clark & Ryan, LLP, attorneys for respondent (Janet C. Lucas and Shan H. Kadkoy, on the brief).

PER CURIAM

Defendant Marc Prager appeals from the January 26, 2022 Law Division order denying his motion for reconsideration of a December 28, 2021 order of

ejectment entered in favor of plaintiff, Township of Green. The December 28 order was entered following a bench trial that resulted in the trial judge ordering Prager to remove a split-rail fence that encroached upon the Township's property. We affirm.

The Township and Prager are the owners of adjacent properties in Green Township. Prager owns a split-rail fence that encroaches on the Township's property and encloses an area owned by the Township (the encroachment area). In May 2020, the Township's attorney sent a cease-and-desist notice to Prager advising that his use of the encroachment area had caused damage to the Township's property and demanding the removal of the portion of the fence in the encroachment area. When Prager failed to comply with the notice, as well as with the Township's subsequent written demands for removal of the fence, the Township filed a verified complaint against Prager in the Chancery Division, which was later amended. In the amended complaint, the Township sought damages for trespass and negligence as well as injunctive relief, including the removal of the fence. Prager filed an amended answer and counterclaim, seeking to estop the Township from retaking the encroachment area and compel the Township to convey it to him.

The Chancery judge denied the Township's application for a preliminary injunction and, finding Prager had no colorable claim of title to the encroachment area, transferred the matter to the Special Civil Part for trial as an ejectment action. At the trial, which was conducted on December 20, 2021, Patty DeClesis, the Township's deputy clerk, and Prager were the only witnesses. DeClesis testified for the Township, while Prager testified as a Township witness as well as on his own behalf. The parties also stipulated to the chain of title, which showed that Prager's property was originally created by subdivision and conveyed from the Township to Michael Burger in 1999. After two subsequent transfers of ownership, the property was ultimately conveyed to Prager by deed dated October 2, 2017. The stipulations specified that the description of the property conveyed in each instance did not include the encroachment area.

Because of the stipulations, the testimony of the witnesses was limited. Although there was no testimony as to when the split-rail fence was erected, DeClesis confirmed that in 1999, Burger had been issued a zoning permit to construct the fence. The permit was accompanied by a map that contained an area demarcating the location of the proposed fence entirely within the borders of Burger's then-property. However, the parties stipulated that the fence was

actually erected in the encroachment area contrary to the permit application, and that it remained in place during the subsequent conveyances of the property, including the conveyance to Prager.

DeClesis testified that following the construction of the fence by Burger, the fence would have been inspected by the Township to ensure compliance with the specifications of the permit application, building code regulations, and Township ordinances. However, the inspection would not "include going out with a surveyor to ensure that [the fence] was installed within the parameters of the survey submitted in the application," and the Township's inspectors were not surveyors. DeClesis acknowledged that the Township inspector approved the fence notwithstanding the fact that it was constructed in the encroachment area. DeClesis added that although the Township employed maintenance staff to "care for . . . and mow the property of Green," the staff was not required "to know the exact boundaries of all of the Green Township properties," and were only required to mow "[c]lose enough" to the property lines to maintain the property for public use.

In his testimony for the Township, Prager confirmed that before purchasing the property in 2017, he had received a survey certified to him. Although the survey "clearly ha[d] a solid line delineating the break between

[Prager's] property and the Green Township property" as well as the location of the fence in the encroachment area, Prager refused to acknowledge those facts, stating he was not "a blueprint reader." Prager testified that when he received the survey, he did not question his surveyor about the encroachment area, nor did he address any questions to his attorney about the metes and bounds indicated in the survey. Prager explained that because "[t]he fence was clearly there for quite some time prior to [his] purchase," he operated "under the assumption" that he owned the property that the fence encompassed. However, he conceded that he never paid any taxes on the encroachment area.

Testifying on his own behalf, Prager averred that he had at one point offered to purchase the encroachment area from the Township, an offer which the Township apparently rejected. Prager testified that he currently used the encroachment area as a grazing area for his horses. He confirmed that he had been issued a zoning permit for construction of an open-horse riding arena on September 11, 2019, and the construction had been subsequently approved by the Township on November 20, 2019. Prager stressed that those approvals were given notwithstanding the fact that both applications were submitted with maps showing the fence in the encroachment area, but he did not receive letters from the Township demanding the removal of the fence until the following May.

During his direct testimony, Prager identified his property as well as the location of the fence in various Google Earth satellite images that showed an aerial view of the adjacent properties. Prager pointed to coloration differences in the grass on the adjoining plots to explain why the Township inspector mistakenly approved the original construction of the fence. Over the Township's objection, the judge permitted the testimony and admitted the images, stating:

> The [c]ourt is going to admit these [photos] for the purpose of demonstrating the location of the [Township's] property, as well as . . . to the extent that they . . . visually show the fence. The [c]ourt is not going to take notice of changes in coloration as [an] indication of where the property line is. As I've indicated, I don't believe it would be appropriate without any expert testimony as to why the changes of coloration are there, or how the photographs were taken, and/or whether the views from above, the demarcations above with respect to the various squares would be likewise visible from the ground.
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> So for those reasons I'm going to admit them with those limitations.

On cross-examination, Prager was adamant that he had no notice of the encroachment and insisted that while he had a survey done of his property before purchasing it, the survey was "for a mortgage, not for where th[e] fence was." However, ultimately, Prager conceded that the encroachment appeared on the survey he had received before he purchased the property, that the approvals of

his 2019 zoning and construction applications "had nothing to do with the fence," and that he was "not a party" to any application or approval for the construction of the fence that predated his ownership of the property.

Following the trial, on December 28, 2021, the judge granted the Township a judgment of possession for the encroachment area, entered an order of ejectment in favor of the Township, and entered a warrant of removal requiring Prager to remove the fence in the encroachment area. In his accompanying statement of reasons, the judge found DeClesis's testimony "credible in all material respects," but "did not find certain important aspects of [Prager's] testimony . . . credible." Specifically, the judge rejected Prager's "testimony regarding his lack of awareness" of the encroachment when he purchased the property or "his expressed belief that he owned the [e]ncroachment [a]rea." To support his credibility assessment, the judge relied on Prager's seemingly contradictory testimony, the circumstances of his purchase, particularly the 2017 survey, and Prager's demeanor while testifying. As to the evidentiary issue pertinent to this appeal, the judge reiterated his ruling regarding the admission of the Google Earth satellite images for the limited purpose.

Turning to the substantive issues, based on "the chain of title and the stipulations of fact," the judge found Prager "admitted that the [p]roperty . . . he purchased [did] not include the [e]ncroachment [a]rea." Consequently, the Township satisfied its burden of proof in establishing its case for ejectment. The judge then addressed Prager's estoppel claim at length, ultimately determining that Prager "failed to establish an equitable interest in the [e]ncroachment [a]rea." In that regard, the judge looked to First Union National Bank v. Nelkin, 354 N.J. Super. 557 (App. Div. 2002), for guidance.

In Nelkin, we explained that the doctrine of equitable estoppel

> is only applied in compelling circumstances where the interests of justice, morality and common fairness dictate. Equitable estoppel requires proof of a misrepresentation or concealment of facts (1) known by the party allegedly estopped and unknown to the party asserting estoppel; (2) done with the intention or expectation that it will be acted upon by the other party; and (3) on which the other party relies to its detriment. The reliance by the party asserting estoppel must be reasonable and justifiable.
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> [Id. at 568-69 (citations omitted) (first citing Palatine I v. Planning Bd. of Montville, 133 N.J. 546, 560 (1993); then citing Carlsen v. Masters, Mates & Pilots Pension Plan Tr., 80 N.J. 334, 339 (1979); and then citing Palatine I, 133 N.J. at 563).]

The judge also relied on Gruber v. Mayor of Raritan, 39 N.J. 1 (1962), where our Supreme Court noted that when applying the doctrine of equitable estoppel against a municipality,

> the ultimate objective was fairness to both the public and the individual property owner and that it was necessary to strike a proper balance between the interests of the plaintiff and the right and duty of the municipality to promote the public welfare of the community through proper planning and zoning.
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> [Id. at 15 (citing Tremarco Corp. v. Garzio, 32 N.J. 448, 458 (1960)).]

Applying these principles, the judge found "no facts to support a claim that [the Township] made any misrepresentation or concealed any facts . . . in connection with the erection of the split-rail fence," and nothing "to confirm that [Prager] relied to his detriment on any approval provided by the Township to . . . Burger with respect to the split-rail fence location." In support, the judge pointed out that Prager "was not a party to . . . Burger's fence permit," and, more importantly, Prager "received a survey of [his property] prior to his acquisition that clearly showed the property line . . . and that the split-rail fence encroached onto [the Township's] property." As such, the judge determined that "[Prager] certainly had the means . . . to learn the truth as to the facts in question" and "any assertion by [Prager] that he was unaware, at the time that he purchased

[his property], that the split-rail fence encroached upon [the Township's] property" was "unreasonable and not credible." Further, the judge found that Prager "presented no proofs that the effort or cost to relocate the . . . fence would be difficult, exorbitant or prohibitive," and concluded that Prager failed to establish compelling circumstances to warrant equitable relief. Prager's subsequent motion for reconsideration of the December 28, 2021 order was denied on January 26, 2022, and this appeal followed.

On appeal, Prager argues the judge erred by failing to properly consider the evidence presented at trial, particularly the Google Earth satellite images, and rejecting his equitable estoppel claim. As to the latter, Prager contends the judge failed to properly consider the fact that Prager did not "negligently construct[the] fence," and that a mistake by the Township led "a line of property owners" to erroneously believe they owned the land.[1]

[1] Although Prager's notice of appeal only identified the January 26, 2022 order denying reconsideration, we consider his arguments addressing the merits of the judge's ruling following the trial because "th[e] issues [were] raised in the [Case Information Statement]." Fusco v. Bd. of Educ. of Newark, 349 N.J. Super. 455, 461 (2002). On the other hand, because Prager failed to brief the denial of his motion for reconsideration, the issue "is deemed waived upon appeal." N.J. Dep't of Env't Prot. v. Alloway Township, 438 N.J. Super. 501, 505 n.2 (App. Div. 2015). Additionally, for the first time in his reply brief, Prager challenges as error "[t]he conclusion of the [c]ourt . . . that . . . counsel fees should be awarded." "We generally decline to consider arguments raised for the first time

"A final determination made by a trial court conducting a non-jury case is 'subject to a limited and well-established scope of review.'" In re Township of Bordentown, 471 N.J. Super. 196, 216-17 (App. Div. 2022) (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)). "The [trial] court's findings of fact are 'binding on appeal when supported by adequate, substantial, credible evidence.'" Balducci v. Cige, 456 N.J. Super. 219, 233 (App. Div. 2018) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Township of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (alteration in original) (quoting

in a reply brief." Bacon v. N.J. State Dep't of Educ., 443 N.J. Super. 24, 38 (App. Div. 2015). In any event, Prager was never ordered to pay counsel fees.

Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Regarding evidentiary rulings, we accord deference to the trial court and will not overturn an evidentiary ruling absent "an abuse of discretion." Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 374 (2010). "[A] photograph is a 'writing,' N.J.R.E. 801(e), and, therefore, must be authenticated," but the authentication requirement embodied in N.J.R.E. 901 is "not designed to be onerous." State v. Hockett, 443 N.J. Super. 605, 613 (App. Div. 2016). Indeed, "any person with the requisite knowledge of the facts represented in the photograph . . . may authenticate it." State v. Brown, 463 N.J. Super. 33, 52 (App. Div. 2020) (quoting State v. Wilson, 135 N.J. 4, 14 (1994)). However, an authenticator must be able to "verify that the photograph accurately represents its subject." Wilson, 135 N.J. at 14.

Equitable estoppel applies when a party's "'conduct, either express or implied, . . . reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law.'" D'Agostino v. Maldonado, 216 N.J. 168, 200 (2013) (quoting McDade v. Siazon, 208 N.J. 463, 480 (2011)). To successfully raise a claim of equitable estoppel, the party making the claim must establish "a knowing and intentional misrepresentation

by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ., 221 N.J. 349, 364 (2015) (emphasis omitted) (quoting O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987)). "'[A] misrepresentation of material fact by one party and an unawareness of the true facts by the party seeking an estoppel'" are "'essential to a finding of estoppel.'" In re Johnson, 215 N.J. 366, 379 (2013) (quoting Horsemen's Benevolent & Protective Ass'n v. Atl. City Racing Ass'n, 98 N.J. 445, 456 (1985)). When a party claims estoppel based on the other party's inaction, the claimant party must show that "it was both natural and probable" that the other party's inaction "would induce" the claimant party's actions. Hoelz v. Bowers, 473 N.J. Super. 42, 53 (App. Div. 2022) (quoting Miller v. Miller, 97 N.J. 154, 163 (1984)).

Applying these principles, we affirm substantially for the reasons set forth in the judge's thorough and astute statement of reasons. The judge's factual findings are amply supported by the competent evidence in the record, R. 2:11-3(e)(1)(A), and we discern no abuse of discretion in the judge's evidentiary ruling. The record shows that the judge had a firm grasp on the issues and his legal analysis is fully consistent with the governing law. We conclude that

Prager's arguments are without sufficient merit to warrant further 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