SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3630-20

ANTONIO OLIVEIRA,
CYNTHIA OLIVEIRA,
DAVID MICALLEF, and
STEFANIE MICALLEF,

Plaintiffs-Respondents,

v.

TOWNSHIP OF MAHWAH,
a Municipal Corporation of
the State of New Jersey, THE
PLANNING AND ZONING
BOARD OF THE TOWNSHIP
OF MAHWAH, and MICHAEL
KELLY,

Defendants-Respondents,

and

STEPHAN KEYSER and
LISA KEYSER,

Defendants-Appellants.

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Submitted January 31, 2022 – Decided April 5, 2023

Before Judges Messano and Accurso.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4258-20.

Price, Meese, Shulman & D'Arminio, PC, attorneys for appellants (Gail L. Price and Rick A. Steinberg, on the briefs).

Condon Paxos PLLC, attorneys for respondents Antonio Oliveira, Cynthia Oliveira, David Micallef and Stefanie Micallef (Brian K. Condon, on the brief).

Dorsey & Semrau, attorneys for respondents Township of Mahwah, Planning and Zoning Board of the Township of Mahwah and Michael Kelly (Fred Semrau, of counsel; Jonathan Testa, of counsel and on the brief).

The opinion of the court was delivered by

ACCURSO, J.A.D.

While well-made stone walls may have made good neighbors in Robert Frost's New England a hundred years ago,[1] fences do not appear to always have so salutary effect in twenty-first century New Jersey.[2] In this neighbor dispute over installation of a stockade fence, we granted Stephan and Lisa

[1] See Robert Frost, "Mending Wall," in North of Boston 7, 7-8 (1st World Library 2004) (1914).

[2] See Bubis v. Kassin, 184 N.J. 612, 616 (2005) (noting "[a]s this appeal illustrates, good fences do not always make good neighbors").

Keyser (defendants) leave to appeal the trial court's order enjoining them to either reinstall the fence separating their property from their neighbors, plaintiffs Antonio and Cynthia Oliveira and David and Stefanie Micallef, in conformity with the Mahwah fence ordinance or remove it entirely. Finding no error, we affirm.

With the exception of whether the "unfinished side" of the fence was installed facing plaintiffs' property or defendants', the facts are almost entirely undisputed. Defendants applied by email for a zoning permit on Friday, April 24, 2020, to install a stockade fence behind the existing welded-wire deer fence surrounding their backyard. They attached a drawing of the fence, a copy of their survey depicting its proposed location and a copy of a check for the fee. Within an hour, they had their approval, the Township Engineer taking "no exception to the fencing as proposed."[3]

By Monday morning, plaintiffs were calling the Township's building department to have someone conduct a field inspection of the installation of the fence as it appeared to plaintiffs to exceed the six-foot allowable height in

[3] The actual zoning permit was not issued until May 6. The trial court rejected plaintiffs' claim that defendants needed to wait for the permit to begin installing the fence, finding installation was proper after plaintiffs secured their approval on April 24.

some places, the unfinished side was facing their properties in violation of the Township's fence ordinance, and they were concerned it wouldn't withstand significant winds. Two days later on April 29, plaintiffs lodged a complaint with the Township by email repeating the concerns already expressed to the building department by telephone and attaching photographs of the fence installation documenting their complaints. They noted they were "anxiously awaiting a response" from the building department "so as to avoid further installation of the fence."

The Township Engineer replied by email the same afternoon, copying plaintiffs, advising the fence could not exceed six feet "measured from the ground level at the base of the fence (or grade below the bottom of the fence) to the highest point of the fence." On May 7, defendants emailed the engineer, explaining they'd had to "step" the fence based on the existing topography.

On May 18, the Township Engineer emailed plaintiffs, informing them the Township had "received complaints with respect to the height of the fence installed being greater than six (6') feet in height, unfinished side of fence facing the neighbor's property and a concern with respect to the stability of the fence." Although satisfied the finished side of the fence was facing the neighbors' properties and offering no opinion on its stability as the Township

didn't require a building permit to install a fence, the engineer found the fence violated the six-foot height restriction. Specifically, the engineer noted stepping the fence was not mentioned in the application for the permit. While acknowledging stepping was not prohibited, so long as the total height of the fence did not exceed six feet, the engineer stated an inspection revealed sections of defendants' fence exceeded the height restriction. The engineer advised defendants they needed to bring the fence "into conformance with Township standards within 30 days," or June 17, 2020.

Although the Township Zoning Officer inspected the fence in July, the Township did not determine whether defendants had abated the violation of the ordinance identified by the engineer prior to plaintiffs instituting this action. Defendants attempted to have the Township confirm the fence was in compliance with the ordinance after suit was filed, but the Township refused to do so, advising defendants they should "not assume that your fence is conforming. The issue of compliance will be addressed in the pending Superior Court case, in which you are a co-defendant."

Plaintiffs filed a two-count complaint in lieu of prerogative writs on July 22, 2020, seeking a writ of mandamus against the Township, its engineer and the Planning and Zoning Board to enforce the fence ordinance and to compel

defendants to either comply with the ordinance or remove the fence and to abate the nuisance they'd created.

The Township answered, contending the complaint against it should be dismissed for plaintiffs' failure to exhaust administrative remedies and cross-claimed against defendants, contending to the extent defendants "maintain a fence which is not in compliance with the requirements of the Township Zoning Code, [they] should be compelled to remove such fence or bring it into compliance." Defendants also answered, likewise raising plaintiffs' failure to exhaust their administrative remedies, counterclaimed against plaintiffs for harassment and cross-claimed against the Township, alleging they had relied on the Township's approval in constructing their fence, had "rectified any issues with the height on or before June 17, 2020," and that the Township had refused its several requests to re-inspect the fence and certify it was in compliance with the ordinance.

The trial court, with agreement of the parties, severed plaintiffs' nuisance claim against defendants and their counterclaim to allow the parties to take discovery on those claims, and heard only the prerogative writs and plaintiffs' claim for injunctive relief, which it determined was timely filed within forty-five days of the June 17 deadline the Township Engineer set for defendants to

comply with the fence ordinance. The court decided the case on a stipulated record, which included 161 photographs and a video of the fence. The court did not take testimony.

The court dismissed the mandamus action against the Township, the Planning and Zoning Board and the Township Engineer, based on plaintiffs' failure to exhaust their administrative remedies under Rule 4:69-5 by appealing the Township Engineer's issuance of the fence permit to the Zoning Board in accordance with N.J.S.A. 40:55D-70(a) within the twenty days permitted by N.J.S.A. 40:55D-72(a). See Mullen v. Ippolito Corp., 428 N.J. Super. 85, 103 (App. Div. 2012) (distilling the prerequisites to mandamus relief as requiring: "(1) a showing that there has been a clear violation of a zoning ordinance that has especially affected the plaintiff; (2) a failure of appropriate action despite the matter having been duly and sufficiently brought to the attention of the supervising official charged with the public duty of executing the ordinance; and (3) the unavailability of other adequate and realistic forms of relief"); see also Harz v. Borough of Spring Lake, 234 N.J. 317, 322-23 (2018) (explaining the relief available by "interested party" appeals of a zoning permit). Neither plaintiffs nor defendants have appealed that aspect of the trial court's decision.

Thus, we focus our discussion on the trial court's analysis of plaintiffs' direct action for injunctive relief against defendants for violation of Mahwah's fence ordinance pursuant to N.J.S.A. 40:55D-18. There was no dispute the Township's fence ordinance requires "[a]ll fences erected in the Township must be erected so as to have the finished side facing the neighboring lot." Mahwah, N.J. Rev. Ordinances, ch. 24, § 24-6.11(b)(1) (2020). The ordinance also requires that "[n]o fence . . . be erected higher than six feet in height." Ibid. Finally, the ordinance provides that "[f]ailure to maintain fencing or to replace dead or diseased landscaping or any refuse which may collect therein shall be considered a violation of this chapter." Id. at § 24-6.11(b)(6)(a).

The judge found plaintiffs, having failed to introduce any measurements of the fence, did not prove defendants' fence violated the six-foot restriction, and she accepted defendants brought the fence into conformance following the engineer's May 18 email advising them to do so. The focus of the proofs was on whether "the finished side" of the fence, a term not defined by the ordinance, faced plaintiffs' neighboring lots.

The judge described the fence for the record as a stockade fence having both horizontal and vertical support beams on both sides, although there are more vertical support beams on the plaintiffs' side and they include the

weathered posts holding up the old wire fence, which defendants' have incorporated as additional vertical support for their new stockade fence. The judge found the photographs in evidence "demonstrate plaintiffs' fence side has some uneven horizontal supports, greater in-ground posts to support the fence, the pre-existing attached wire fence, and the unpainted stockade side, while [defendants'] side is painted green."

The judge rejected defendants and the Township's argument that both sides of the fence were "finished" sides, and that the court should defer to the Township Engineer's interpretation of the fence ordinance provided in his approval of the zoning permit and his finding after the fence was installed that the requirement of the finished side facing the neighboring properties had been met. The judge found the plain meaning of the phrase "finished side" to be readily understood as "entirely done" or "completed" and marked by a "higher quality state" as "finished" is defined in the dictionary, and that ascertaining which side of defendants' fence was the "finished side" could be easily and objectively accomplished by a visual inspection employing only common knowledge.

The court further found the diagram submitted by defendants in their application for the zoning permit did "not accurately depict the post placement,

support posts or cross supports, and the unpainted side facing plaintiffs," although it did "show attachment of the wire fence to the side facing the neighbors." The court found the disparity between the two sides of the fence was readily visible in the photographs. "The side which faces neighboring plaintiffs clearly depicts the ground posts, greater uneven and different sized horizontal support rails, an unpainted side, and an attached older wire fence."

The court found it didn't need an expert to see "plaintiffs' side is not the finished side, as it is not entirely done or complete when compared to" defendants' side owing to the uneven and different size support rails, and that "attachment of the older wire fence alone to the stockade fence fails to satisfy the ordinance meaning of a finished side." The court also found it readily apparent "the small space created between the wood fence and wire fence shall trap leaves, debris and refuse," as the photos "demonstrate leaves and twigs already caught between the two" now attached fences, which will not be visible to defendants "to observe and determine when the fence requires maintenance. . . . creating an even less aesthetically pleasing side over time."

The court found the Municipal Land Use Law, specifically N.J.S.A. 40:55D-18, expressly permits "an interested party, in addition to other remedies," to "institute any appropriate action . . . to prevent" erection of a

structure in violation of any ordinance adopted pursuant to the Municipal Land Use Law or "restrain, correct or abate such violation, to prevent the occupancy of said . . . structure . . . or to prevent any illegal act, conduct, business or use in or about such premises." "Interested party" is broadly defined in the context of a civil action to mean "any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action taken" under the Municipal Land Use Law, "or whose rights to use, acquire, or enjoy property under [the MLUL], or under any other law of this State or of the United States have been denied, violated or infringed by an action or a failure to act under [the MLUL]." N.J.S.A. 40:55D-4(b).

The court found plaintiffs' failure to exhaust their administrative remedies by appealing the zoning permit did not bar them from pursuing injunctive relief against defendants to enjoin their continued violation of the fence ordinance under N.J.S.A. 40:55D-18. Finding the "legislative intent" plainly expressed by the language chosen "to have the more aesthetically pleasing, and less maintenance required, fence side face a neighbor" to promote "a better community neighborly environment and more attractive residential views," the judge found defendants were in violation of the

ordinance by having erected a fence with the "finished side" facing their own property and not the neighboring lots.

Defendants appeal, arguing "plaintiffs improperly attempted to use a private action to air their grievances," which should not "be recognized as valid by this court" as there was no "violation" of the ordinance that would allow plaintiffs "to disregard their mandatory obligation to exhaust administrative remedies" by appealing the zoning permit issued by the Township Engineer to the Board of Adjustment. They also contend plaintiffs' action was untimely filed, the trial court should have deferred to the Township Engineer's interpretation of the fence ordinance, that we should employ the same standard of review "the trial court should have used," that being the arbitrary and capricious standard we apply in reviewing a municipal board's action, and, finally, that they were entitled to rely on the zoning permit issued by the Township. We disagree on every point.

As defendants conceded in the trial court and do not dispute on appeal, N.J.S.A. 40:55D-18 provides plaintiffs a clear path to the injunctive relief they sought and obtained in this action. Cox and Koenig explain "'interested parties,' such as nearby property owners . . . have two pathways to cure an alleged zoning violation." Cox & Koenig, New Jersey Zoning and Land Use

Administration § 7-2.2 (2022). They can seek enforcement by the zoning officer "or, if the officer refuses to act or issues permits for the use or construction, may appeal that inaction or determination to the zoning board of adjustment pursuant to N.J.S.A. 40:55D-72(a)." Ibid. "Alternatively they may, pursuant to N.J.S.A. 40:55D-18, directly seek an order to show cause to enjoin the violation . . . against the owner of the property." Ibid. Cox and Koenig explain that N.J.S.A. 40:55D-18 "effectively continues common law actions for nuisances that might be created as a consequence of the land use processes under the MLUL," and thus "is limited to parties who can show that their use, ability to acquire or enjoyment of their property has been harmed by the violation." Ibid. While noting a plaintiff might also bring a mandamus action to compel the Township to enforce its ordinance, see Garrou v. Teaneck Tryon Co., 11 N.J. 294 (1953), they write "the most direct course is to bring an action for injunctive relief pursuant to N.J.S.A. 40:55D-18 against the party actually violating the ordinance." Cox & Koenig, § 7-2.2.

That "most direct course" is the path plaintiffs chose here, which the statute makes clear they are free to do without having to appeal the zoning permit issued to defendants to the Board of Adjustment. See N.J.S.A. 40:55D-18. Thus, defendants' claims of plaintiffs having "improperly" employed

N.J.S.A. 40:55D-18 "to air their grievances," thereby disregarding "their mandatory obligation to exhaust administrative remedies" by appealing the zoning permit issued by the Township Engineer to the Board of Adjustment, are completely off the mark. The trial court was correct to find plaintiffs were under no obligation to "exhaust their administrative remedies" before pursuing their direct claim against defendants under the statute to enjoin defendants' violation of the Township's fence ordinance.

Although defendants assert plaintiffs' claims were not timely under "the rules governing prerogative writs," their merits brief does not explain why, and it is not self-evident to us. An action in lieu of prerogative writs must be filed within forty-five days of the accrual of the right to the relief claimed. R. 4:69-6. The Rule does not define when rights "accrue" but as we've noted, "[i]n most circumstances, 'a cause of action is deemed to accrue when facts exist which authorize one party to maintain an action against another.'" Mullen, 428 N.J. Super. at 105 (quoting Marini v. Borough of Wanaque, 37 N.J. Super. 32, 38 (App. Div. 1955)).

The trial court found plaintiffs timely filed their complaint within forty-five days of the June 17 deadline for defendants to correct the ordinance violation identified by the engineer on inspecting the fence in response to

plaintiffs' complaints. The court found plaintiffs would not have known prior to that date whether defendants would correct the violations identified by the Township and the action the Township would finally take with regard to defendants' fence. See Harz, 234 N.J. at 322 (noting the problem of using issuance of a permit as the trigger for action "because no provision requires the administrative officer to notify a nearby property owner about the issuance of a zoning permit").

The judge's rationale is reasonable, and in no event could we find plaintiffs slept on their rights in filing their action in lieu of prerogative writs, see Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., 204 N.J. 569, 578-85 (2011) (echoing prior caselaw that the time limitation in Rule 4:69-6 was aimed at those who have slumbered on their rights), or that laches barred their claim for injunctive relief against defendants, see Marini, 37 N.J. Super. at 35-36 (affirming dismissal of an action in lieu of prerogative writs "and for incidental injunctive relief," on the basis of "limitations and laches").[4]

[4] In their reply brief, defendants contend the forty-five days should run from the issuance of the zoning permit on May 6, making plaintiffs complaint filed on July 22 untimely. Leaving aside the impropriety of briefing an issue only in one's reply brief, see Bacon v. N.J. State Dep't of Educ., 443 N.J. Super. 24,

We also reject defendants' claims that the trial court should have deferred to the Township Engineer's interpretation of the fence ordinance, employed an arbitrary and capricious standard in reviewing the Township's actions, and that plaintiffs failed to adduce any competent evidence that defendants' fence violated the ordinance.

Defendants fundamentally misapprehend the nature of plaintiffs' action against them and thus the task before the trial judge. The trial judge was not charged with reviewing the Township Engineer's issuance of the zoning permit to them. Plaintiffs filed a direct claim against defendants for injunctive relief pursuant to N.J.S.A. 40:55D-18, necessitating the trial court to determine whether their fence had been erected in violation of Mahwah's fence ordinance.

"As in the case of statutes, the purpose of construction of ordinances and municipal by-laws is the discovery and effectuation of the local legislative intent." DePetro v. Twp. of Wayne Plan. Bd., 367 N.J. Super. 161, 174 (App.

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38 (App. Div. 2015), and the Court's identification of the problem in using the permit date as a trigger, Harz, 234 N.J. at 322, defendants continue to confuse the claims brought by plaintiffs in the trial court. Plaintiffs' prerogative writs claim sounded only against the municipal defendants. As we note in the text, there is no basis to conclude plaintiffs' claim against defendants for injunctive relief could be barred by laches. We address defendants' estoppel argument infra.

Div. 2004) (quoting Wright v. Vogt, 7 N.J. 1, 5 (1951)). "Although a municipality's informal interpretation of an ordinance is entitled to deference, that deference is not limitless." Bubis v. Kassin, 184 N.J. 612, 627 (2005). The trial court's construction of an ordinance is, in the end, a question of law the trial court reviews de novo, Fallone Props., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 561 (App. Div. 2004), as do we, Bubis, 184 N.J. at 627.

The trial court found, and we concur, that there is nothing ambiguous about the phrase "finished side" as used in the ordinance and nothing in the record to suggest the drafters intended to imbue it with any special meaning. "Where statutory language is clear, courts should give it effect unless it is evident that the Legislature did not intend such meaning." Rumson Ests., Inc. v. Mayor & Council of Fair Haven, 177 N.J. 338, 354 (2003). The trial court had no hesitation in concluding the intent of Mahwah's fence ordinance was to have the "less encumbered," "more aesthetically pleasing," "finished side" of a fence face the neighboring lot. We agree. It is impossible to imagine the drafters could have intended anything else.

Because the language of the ordinance is clear and susceptible to only one interpretation, the only real issue is whether the trial court was correct that

defendants' fence violated the ordinance because the unfinished side was facing plaintiffs' neighboring properties. While defendants contend plaintiffs relied on hearsay and internet research in attempting to establish the fence violated the ordinance because the "finished side" faced defendants' property, they ignore the case was tried on a stipulated record consisting of 161 photographs and a video of the fence.[5]

The court's factual findings that the unfinished side of the fence, incorporating the vertical support posts of the old deer fence and encumbered by a greater number of "uneven and different sized horizontal support rails," faced plaintiffs' properties were based on that jointly submitted photographic record and thus are entitled to our deference. See State v. S.S., 229 N.J. 360, 379 (2017) (concluding "a standard of deference to a trial court's factfindings, even factfindings based solely on video or documentary evidence, best advances the interests of justice in a judicial system that assigns different roles to trial courts and appellate courts"). Indeed, because the trial court's findings are supported by substantial, credible evidence in the record, they are binding on this appeal. See Capparelli v. Lopatin, 459 N.J. Super. 584, 605 (App. Div.

[5] The transcript and the court's opinion also make clear the court declined to admit the hearsay evidence and internet research plaintiffs proffered, and it played no part in the court's consideration of the merits.

2019). We accordingly reject defendants' claim that plaintiffs failed to establish defendants' fence violated the ordinance.

Finally, we reject defendants' claim that they were entitled to rely on the Township Engineer's issuance of the zoning permit, estopping plaintiffs "from seeking to have the permit revoked." First, the trial court found the diagram defendants submitted to the Township did not accurately reflect the fence they ultimately built. See Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 47 (App. Div. 2004) (finding builder's failure to disclose correct height of structure because it failed to read the ordinance could not support good faith reliance on municipal permits, precluding application of equitable estoppel). And second, defendants did not wait to install their fence until receiving the zoning permit on May 6. They started construction shortly after they received word on April 24 that the permit would issue, notwithstanding plaintiffs' immediate objections on the commencement of the work. The equities simply do not support estoppel.

We affirm the trial court's June 29, 2021 order entering judgment for plaintiffs on count one of their complaint and directing defendants to reinstall the fence so that the unfinished side with its attached wire fence is facing defendants' property in conformity with the ordinance or remove it in its

entirety, and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

Affirmed and remanded.

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

CLERK OF THE APPELLATE DIVISION