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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3772-21**

PAUL SCHORR,

Plaintiff-Appellant,

v.

**THE PLANNING BOARD OF
THE CITY OF TRENTON and
AJAX HOLDING II, LLC,**

Defendants-Respondents,

Submitted December 5, 2023 – Decided January 18, 2024

Before Judges Whipple and Paganelli.

On appeal from the Superior Court of New Jersey, Law
Division, Mercer County, Docket No. L-0546-22.

Paul Schorr, appellant pro se.

McGill & Hall LLC, attorneys for respondent The
Planning Board of the City of Trenton (George D.
McGill, of counsel and on the brief).

Sills Cummis & Gross, PC, attorneys for respondents
Ajax Holding II, LLC (Mark Evan Duckstein, of
counsel and on the brief).

PER CURIAM

Paul Schorr (Schorr) appeals from the June 27, 2022 order dismissing, as untimely, his challenge of the Planning Board of the City of Trenton's (Board) approval of Ajax Holdings II, LLC, project (Ajax or Ajax Project). We affirm.

I.

We glean the facts and procedural history from the motion records. On April 14, 2021, Ajax filed an application with the Board for variances and final and preliminary site plan approvals.

On August 12, 2021, the Board held a public meeting. Before considering Ajax's application, the Board considered the application of another developer, Vista. Ajax and Vista had the same principals and were represented by the same attorney, but their applications were separate.

After Vista's presentation but before the Board's vote the following interaction transpired on the record:

[Board Member]: . . . there[is] some question in some of the correspondence about right to salvage material from the building before it comes down? Is that a consideration of yours . . . ?

[Vista]: Yeah, absolutely. Yeah. Do you want any bannisters . . . ?

[Board Member]: I might just want that iron fence from in front of the building.

[Vista]: Well, it[is] all yours. . . . We[will] be happy to work with historic preservation. . . .

[Board Attorney]: Okay, we[will] add that condition.

[Board Member]: Thank you.

[Board Chairperson]: Coordinate through either the Historic Commission or the Landmarks folks with that?

[Vista]: Sure.

Thereafter, the Board considered Ajax's application; hearing testimony on behalf of Ajax, public comment, and objection from Schorr. The Board voted to approve the application. On October 28, 2021, the Board adopted a resolution granting Ajax's application. On November 3, 2021, the Times of Trenton published notice of the Board's resolution granting Ajax's application.

On November 12, 2021, nine days after the Board's notice of publication of the Ajax resolution, Schorr filed a "Complaint In Lieu of Prerogative Writs and for Other Relief" (Initial Complaint) against the Board, Ajax, and Vista. The Initial Complaint alleged the Board's approval was arbitrary, capricious and unreasonable and the Board member's request for the historic fence created a conflict of interest. Schorr sought reversal of the approvals and a remand "in view of the potential conflict of interest."

In response to the Initial Complaint, Ajax filed a motion to dismiss arguing, in part, Schorr, "c[ould]not challenge two distinct and unrelated project approvals in a single action." Schorr opposed that part of the motion arguing "that both matters 'involve common questions of law,' and it is in the interest of judicial economy to consider the projects together."

On January 25, 2022, the motion judge heard the parties' oral arguments and, in a written opinion, found "[Schorr's] [c]omplaint improperly join[ed] legal challenges to two separate and distinct claims." He found joinder was not required under Rule 4:28-1, nor permitted under Rule 4:29-1. The motion judge noted Schorr "remain[ed] free to bring an action against each project separately[and he was] not pass[ing] judgment on the merits of . . . [the] [c]omplaint." The motion judge entered an order dismissing Schorr's Initial Complaint without prejudice.¹

¹ Schorr's Notice of Appeal does not include the January 25, 2022 order of dismissal. "Therefore th[e] order[is] not within the scope of his appeal, and we will not address [it]." 30 River Court East Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 474 (App. Div. 2006) (citing R. 2:5-1(f)(3)(i); Fusco v. Bd. of Educ. of Newark, 349 N.J. Super. 455, 460-62 (App. Div. 2002)). However, we note that Rule 4:30 provides "[m]isjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by the court order on motion by any party or its own motion. Any claim against a party may be reserved or severed and proceeded with separately by court order."

On March 24, 2022, Schorr filed a New Complaint against the Board and Ajax.

On May 24, 2022, Ajax filed a motion to dismiss the New Complaint as untimely under Rule 4:69-6(a). Ajax contended "Schorr failed to take any action towards re-filing his claims against Ajax until he initiated this action . . . a period of [fifty-seven] days from the entry of the [motion judge]'s dismissal order." Moreover, "[e]ven if the period of time during which the [Initial] Complaint was pending . . . is ignored, [sixty-six] days expired between the publication of notice and filing of the [New] Complaint."

Schorr opposed the motion arguing, in part: (1) Ajax's calculation of the days for filing was "arbitrary," because as of the motion judge's January 25, 2022 order, the forty-five-day time period had elapsed; and (2) the Board failed to "submit[] any papers in response" to the Initial or New Complaints.

The motion judge heard the parties' oral arguments on June 25, 2022. On June 27, he authored another written opinion. The motion judge found Schorr's:

complaint . . . violat[ed] . . . Rule 4:69-6(a). On November 3, 2021, . . . Ajax's application for land use approvals was publicly noticed in the Times of Trenton. . . . On November 12, 202[1], nine days after public notice, [Schorr] filed his [I]nitial [C]omplaint This [c]ourt dismissed the same on January 25, 2022. The [c]ourt does not factor the pendency of the initial complaint into is calculations. Once this [c]ourt

dismissed [the Initial Complaint, Schorr] retained thirty-six days in which he could timely file a complaint against [d]efendants. [Schorr filed the New Complaint] on March 25, 2022, fifty-seven days after his [I]nitial [C]omplaint was dismissed and twenty-one days beyond the forty-five-day deadline.

The motion judge explained the dismissal of the Initial Complaint "was not an invitation for [Schorr] to take an extended period of time," and despite "maintain[ing] thirty-six days to file [h]is action . . . [Schorr] failed to do so." Finding "Rule 4:69-6 exists to provide 'stability and finality to public actions['] [and] 'to give an essential measure of repose to actions taken against public bodies[,]' (citations omitted), the motion judge dismissed the New Complaint with prejudice because it was untimely.

The motion judge "dismiss[ed] the [New C]omplaint in its entirety, notwithstanding the failure of the [Board] to file a responsive pleading." The judge reasoned

[a] filing out of time is out of time as to all [d]efendants and to leave the [New C]omplaint open against the public body [Board], or to permit the entry of default against it, would merely require the . . . Board to seek to vacate default and then file a successful motion to dismiss the [New C]omplaint. That is not a wise use of judicial or public resources.

Here, Schorr argues the motion judge erred: (1) "in determining that [he] did not comply with Rule 4:69-6 when the action commenced on November 12,

2021, nine . . . days after the notice of decision published on November 3, 2021"; (2) "in dismissing the conflict of interest . . . after sworn statements by [a] board member, 'I might just want that iron fence from in front of the building' and by [Vista], 'Well it[is] yours'"; and (3) "by dismissing the request to permit the entry of default against the . . . Board after stating on the record that they had not filed responsive pleadings." We conclude Schorr's arguments are unavailing.

II.

This appeal presents issues regarding the application of Rule 4:69-6. "Appellate review of the meaning of the New Jersey Court Rules is de novo." State v. Dickerson, 232 N.J. 2, 17 (2018).

A.

"The immediate issue before us is whether [Schorr] filed a timely action in lieu of prerogative writs[, Rule 4:69-6,] challenging the validity" of the Board's approval of the Ajax Project. In re Ordinance 2354-12 of W. Orange, 223 N.J. 589, 596 (2015). Rule 4:69-6(b)(3) provides:

[n]o action in lieu of prerogative writs shall be commenced . . . to review a determination of a planning board . . . after [forty-five] days from publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality

Schorr argues that he complied with the Rule because he "commenced [an action] within nine days after publication of the notice of decision." In effect, he avers the timely filing of his Initial Complaint satisfied the Rule's timing requirement, and, thereafter, he was free to file the New Complaint regardless of the timeframe required by the Rule. We disagree.

The Rule is "designed to give an essential measure of repose to actions taken against public bodies." Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 423 (App. Div. 2002) (quoting Washington Twp. Zoning Bd. of Adj. v. Washington Twp. Planning Bd., 217 N.J. Super. 215, 225 (App. Div. 1987)).

The Initial Complaint was timely filed, nine days after public notice of the Ajax project. However, the Initial Complaint was dismissed on January 27, 2022. Thereafter, allowing for the tolling of the time between the date of filing of the Initial Complaint and the date of dismissal, Schorr had thirty-six days remaining to file the New Complaint. He failed to do so.

We conclude Schorr's delayed filing violated Rule 4:69-6(b)(3). To conclude otherwise would frustrate the design of the Rule, "to give an essential measure of repose to actions taken against public bodies." Tri-State Ship, 349 N.J. Super. at 423. Therefore, his complaint is barred.

B.

Schorr argues the Board member's question regarding the salvage of iron fencing rises to the level of a conflict of interest. This argument is misguided.

A claim alleging a conflict of interest on the part of a board member is an important public interest that may warrant enlargement under Rule 4:69-6(c). See Haggerty v. Red Bank Borough, 385 N.J. Super. 501, 511 (App. Div. 2006). However, Schorr explains that he "raises the issue of a [c]onflict of [i]nterest[,] not to ask for an enlargement[of the forty-five-day period under Rule 4:69-6(c)], but to seek reversal of the [Board's] decision."

Therefore, Schorr's conflict of interest argument goes to the merits of the Board's approval. In challenging the merits Schorr must comply with Rule 4:69-6(a)(3). Since we conclude Schorr failed to comply with Rule 4:69-6(a)(3), his conflict of interest argument is barred. See Matter of Borough of Englewood Cliffs, 473 N.J. Super. 189, 205 (App. Div. 2022) (holding the Borough was time barred by Rule 4:69-6 from asserting a conflict of interest in challenging its own action in approving settlements).

C.

Schorr argues the motion judge erred in "dismissing the request to permit the entry of default against the . . . Board after stating on the record that they had not filed responsive pleadings." We disagree.

Our conclusion that Schorr's New Complaint was filed untimely applies equally to Ajax and the Board. We agree with the motion judge that to allow a futile entry of default would be a waste of judicial and public resources.

Rule 1:1-2 provides:

The rules . . . shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. . . . [A]ny rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. In the absence of rule, the court may proceed in any manner compatible with these purposes and, in civil cases, consistent with case management/trial management guidelines set forth in Appendix XX of these rules.

Here, Schorr was provided with a full and complete opportunity to argue the merits of the timeliness of his filing. Therefore, we conclude the dismissal as to all defendants, including the Board, was appropriate.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION