BEZERRA v. DELORENZO

Docket No. A-1149-10T4.

WILSON X. BEZERRA, Plaintiff-Appellant, v. FRANK DELORENZO, Defendant-Respondent.

Superior Court of New Jersey, Appellate Division.

Decided August 7, 2012.

Wilson X. Bezerra, appellant, argued the cause pro se.

Robert V. Fodera argued the cause for respondent (Gebhardt & Kiefer, P.C., attorneys; Mr. Fodera, of counsel and on the brief).

Before Judges Axelrad, Sapp-Peterson and Ostrer.

NOT FOR PUBLICATION

PER CURIAM.

Plaintiff, Wilson X. Bezerra, appeals from the trial court's grant of summary judgment, dismissing with prejudice his complaint against defendant, Frank DeLorenzo, the Belleville Township's zoning officer and construction code official. Bezerra alleged that DeLorenzo wrongfully interfered with his effort to construct a two-family home. Among other things, Bezerra alleged DeLorenzo wrongfully issued a stop-work order before the structure was weather-tight, resulting in significant water damage. DeLorenzo asserted Bezerra's building violated the local zoning ordinance that limited building height to two-and-a-half stories and thirty-five feet. Bezerra argued DeLorenzo was on notice of his plans all along, approved them, but then wrongfully blocked his project to cause him harm, and made various false statements to defend his action before other local governmental bodies. Bezerra challenges the court's finding that the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to 12-3, shielded DeLorenzo from liability for Bezerra's claims. We affirm.

I.

We discern the following material facts from the record, granting Bezerra all reasonable inferences.

Bezerra purchased the lot for the two-family home in 2002 for $75,000. The lot was located in the R-B two-family zoning district, where structures were limited to a height of two-and-half stories or thirty-five feet. Bezerra had never constructed a residential, or pre-fabricated structure before.

He filed his request for a building permit in November 2002. It described plans to build a two-story prefabricated structure. The various drawings of the house depicted a residence with two floor-through apartments, and a main front entrance door at ground level that was five steps below the floor and entrance of the lower apartment, and five steps above the below-grade basement. A handwritten note indicated the foundation level would rise four feet above grade. Another drawing depicted a deck off

the first floor apartment that was almost at ground level, with no visible foundation. Other drawings indicated that the grade would vary.

The plans also included a notation, "SEE ORDER VERIFICATION FORM FOR FINAL ELEVATION SPECIFICATIONS[.]" This and other notes, Bezerra asserted, notified DeLorenzo that the grading depicted in the drawings did not necessarily indicate how the structure's foundation would appear as built by Bezerra.

On November 26, DeLorenzo wrote to Bezerra that his request was incomplete, in part because it lacked plans in compliance with the Belleville Planning Board's 1988 resolution authorizing the subdivision of Bezerra's property. In January 2003, Bezerra filed a January 10, 2003 plot plan signed by Matarazzo Engineering, LLC, Bezerra's professional engineer that depicted a "PROPOSED 2 STORY TWO FAMILY DWELLING." The plan indicated the surrounding land at 100 feet elevation, the entrance to the garage at 101 feet, and "F.F.," which apparently means finished floor, at 110 feet. Bezerra maintained that this plan notified DeLorenzo that there would be two living floors atop an above-grade foundation level that included a garage.

After the Township Engineer's review, DeLorenzo signed the permit on February 11, 2003, but did not issue it until March 12, 2003. There are two versions of the construction permit in the record. One version reflects permission to perform foundation work. A box marked "other" is checked off and the handwritten word "foundation" is inserted, and the words "Pre-Fab as per prints" are written in the space for "description of work." The boxes for approval of building, electrical, plumbing and fire protection are not checked. However, payments of $280, $100, $125 and $50, are reflected for those permits in the payment section of the form, which lists those categories. The form also indicates receipt of a check for the total of $705. The $280 building fee in particular was equal to two percent of the estimated $14,000 cost of the foundation work. Subcode permits for electrical, plumbing and fire protection work were issued in December 2002 and January 2003. The electrical and plumbing permits indicate they authorized work connecting the pre-fab building to electrical and plumbing systems.

In June 2003, Bezerra obtained a revised version of the permit from the Township. On this second version, boxes for building, electrical, plumbing and fire protection were checked, and the word "Foundation" was added in front of the words "Pre-Fab as per prints." Bezerra asserts that DeLorenzo altered the permit to support an allegedly false statement he made to a county agency that he approved only the foundation and not construction of the entire building.

After receipt of the March 12, 2003 permit, Bezerra began work on the footings for a pre-cast foundation. DeLorenzo inspected the footings on March 17, but refused to permit further construction until Bezerra presented a foundation drawing with the signature and seal of his licensed engineer. Bezerra asserted that he had previously provided those drawings before DeLorenzo issued the permit, and that DeLorenzo had requested the sealed drawing again to delay his work.

According to Bezerra, DeLorenzo then solicited a bribe, but Bezerra points to no oral or written communication from DeLorenzo. Instead, Bezerra points only to a "feeling" he had, when DeLorenzo

silently leaned against his car at the construction site. "I had the feeling this guy was looking for a bribe." When asked what gave him that feeling, he responded:

The way he leaned up against the car. He had all the documentation with him. He had the prefab drawing. He had the plot plan and he had the foundation drawing and the way he just stated I am not gonna let this project go on. And he just leaned up against the car and he made no motion whatsoever. Other than to wait for me to say I got the feeling, you know, ["]Frank, can you help me[?"]

Bezerra submitted a signed drawing for a pre-cast foundation soon thereafter and DeLorenzo advised Bezerra he could proceed with construction. The drawings did not expressly state the extent to which the foundation would rise above grade. However, Bezerra maintained that the drawings indicated the foundation would be ten feet above grade because one detailed plan indicated that the foundation would consist of ten-foot-high panels, that is, "10' Panels Totaling 154'-8"."

The foundation was installed virtually at ground level between March 17 and 20, 2003. On March 27, 2003, Bezerra's construction workers, with the use of a crane, lifted the two modular units into place on top of the foundation, creating a three-story structure. As depicted in photographs of the partially completed structure, the foundation level included two large openings for garages that were slightly above grade, and an opening to accommodate a full front door. A cut-out opening on the bottom part of the first modular residential floor — that apparently had been intended for the top of the front door — was covered with what appeared to be a piece of plastic.

DeLorenzo asserted that he was prompted to visit the site by neighbors who called the Township offices to complain as soon as the building was erected. One resident testified that the building was assembled in a single day; when he returned home from work, he was concerned about its height; and he called to complain the next morning. Bezerra's workers maintained that DeLorenzo monitored the construction from his car as it proceeded, and intervened once the units were in place on the foundation. Bezerra argued DeLorenzo was therefore not prompted by neighbors, but by his own animus toward him.

DeLorenzo determined that Bezerra's still-unfinished structure was three stories, and over thirty-five feet high — in both respects in violation of the zoning ordinance. However, it was later established that even with the roof installed, the height from the foundation floor to the peak of the roof was a few inches under the thirty-five foot limit. As the zoning ordinance prescribed that height measurements be taken from the mid-point of a roof, Bezerra's building was even shorter than that.

DeLorenzo ordered the construction to cease. The workers had not yet raised the roof; it was "laying down with the hinges collapsed." As a result, although the upper apartment was generally enclosed by a ceiling, there was a hole in the center of the building. Another worker testified that he asked DeLorenzo for permission to raise the roof, to protect the building from rain and other elements. DeLorenzo refused. He told the workers that further construction would be illegal and that they would be arrested if they continued.

Another worker asked if the crew could remain for an hour to install a tarp to shield the house from the rain, which could void the building's warranty. DeLorenzo allowed the crew a half hour, and a tarp was installed.

One construction crew member testified that when the site was shut down, the workers had not yet bolted together the structure's two major units. He claimed that as a result, the buildings could have collapsed. "[I]f we didn't bolt it together, the buildings could have collapsed. They should have been bolted together and should have had the posts set up in the middle to keep the two buildings together and keep them from sagging." He testified that when the workers returned to the site about five to ten days after, he detected some "sagging."

DeLorenzo then issued a written Stop Construction Order that reflected a "date issued" of March 28, 2003, and a "Date of Notice" of March 31, 2003.[1] The order stated that Bezerra had violated N.J.A.C. 5:23-2.16, as the work was "NOT IN COMPLIANCE WITH APPROVED PLANS VARIANCE REQUIRED[.]" It stated that construction could continue if fines were paid in full and the violation were eliminated. On April 4, 2003, DeLorenzo informed Bezerra by letter that he had issued the stop construction notice for the following reasons:

The structure that has been erected on the property has not been approved and is in violation as followed.The approval was based on a two (2) story structure, the Township Regulations 230-3 states that maximum stories are two and half (2 1/2) which is allowed in the R-B Two Family Zoning District in which the property is located. Also, the maximum height in this zone is 35' feet. Owner shall submit a certification on the height from a licensed Architect or Engineer.It appears that the building may not be structural[ly] secured and unsafe.You are hereby order[ed] to eliminate the violation immediately. Failure to eliminate the violation immediately will result in a fine of $500.00 dollars a day each day [the] violation exist[s].The applicant may apply for a variance. However, the structure shall be removed until such approvals are granted, or conform to the Zoning District.

Bezerra maintained that notwithstanding this notice, based on what DeLorenzo orally told his employees on the site the day of the inspection, he believed he faced arrest if he returned to the site to remediate the condition. Bezerra met with DeLorenzo after the stop work order to complain that DeLorenzo had issued a permit, to allow construction of the building he had just stopped. Bezerra said DeLorenzo answered, "I am God. I giveth and I taketh." Bezerra also maintained that DeLorenzo alleged his building was thirty-eight feet high.

Although Bezerra did seek a variance, as we discuss below, he did not remove the structure pending his application. But, before applying for a variance, Bezerra challenged the stop work order in an appeal filed April 9, 2003 with the Essex County Construction Board of Appeals ("County Board").

Prior to the County Board hearing, DeLorenzo began issuing tickets charging Bezerra with ordinance violations. Between April 22 and early May, DeLorenzo issued forty-seven violation notices. On April 22, 23 and 24, he issued a ticket charging that Bezerra had violated the zoning ordinance because of the building's height. On April 25, and on each of ten days thereafter, DeLorenzo issued four summonses a day. In addition to a summons charging the zoning ordinance violation, DeLorenzo issued summonses

charging violations of the Township's Property Maintenance Code. Bezerra construed the summonses as retaliatory. As potential fines accrued for each day the violation persisted, the repeated summonses were apparently redundant, although Bezerra maintained they threatened him with multiplied fines. An expert on behalf of DeLorenzo, a former code enforcement official, testified the issuance of daily violations over a two-week period was "absolutely appropriate" and in compliance with the advice of the municipal prosecutor.

Also, pending the County Board's decision, Bezerra filed a complaint with the Department of Community Affairs ("DCA") alleging harassment by DeLorenzo. In the meantime, however, Bezerra's crew returned to the building three or four times to change or adjust the tarp.

The County Board upheld DeLorenzo's stop-work order in a decision issued after a hearing April 29, 2003. Minutes of the meeting reflected that the County Board chairman had the March 12, 2003 Construction Permit. As the minutes state, "The Chairman asked Mr. DeLorenzo if he issued a permit for the foundation only on March 12, 2003. Mr. DeLorenzo stated this was correct." Bezerra claims this was a misrepresentation, because plumbing, electric, and fire protection permits had also been approved, as DeLorenzo later admitted in a certification.

According to the minutes, DeLorenzo advised the County Board that he was unaware Bezerra intended to build a foundation completely above grade. Bezerra argued the foundation plans and the engineer's plot plan put DeLorenzo on notice that the two-story dwelling would be situated on top of a fully above-grade foundation level. The minutes stated, "Mr. Bezerra said he wanted the Board to be aware Mr. DeLorenzo knew what he approved and had ample time to reject or accept everything appellant gave him." "Appellant [Bezerra] asked Mr. DeLorenzo when he received the plot plan, why he didn't stop appellant at this point."

The chairman also stated that a three-story building required one-hour minimum fire ratings between floors, which a two-story building did not, and required two exits. The minutes do not reflect that either Bezerra or DeLorenzo advised the board that, according to the architectural plans, the building did have one-hour fire ratings for walls and floors.

The County Board made preliminary findings, noting DeLorenzo's position that he was unaware the foundation would be above grade, and Bezerra's position that he put DeLorenzo on notice that it would be:

1. The Belleville Construction Official issued a permit for the foundation only of the subject premises, a two-family prefabricated structure, on March 12, 2003 at which time he did not know the foundation was to be above grade. According to the Construction Official, the plans he received were for a two-story structure while the building erected is a three-story structure, such that the plans do not reflect the building as it stands. As such he ordered all work stopped, pursuant to N.J.A.C. 5:23-2.16, which directive was complied with. The Official stated that this matter involves a zoning violation which is to be addressed by the Planning Board on April 30, 2003.2. Appellant filed this appeal to lift the stop work order and secure the building by raising the roof as the roof trusses have not been installed, alleging that there is substantial damage every time it rains.3. Appellant stated the foundation drawing was

given to the Construction Official four times and the plot plan twice, contending the latter shows the garage starts 1 foot above sea level and the first floor 10 feet above.4. Individual Board members observed that two exits and 5A construction are required on a three story building and that each floor must be protected with a one hour minimum fire rating.

The County Board concluded that the structure exceeded the Township's two-and-a-half story limit for the zone. However, it permitted Bezerra to put the roof on to prevent further weather-related damage.

WHEREAS, the Board finds that, based on the testimony and representations made by the parties, the structure at issue is a three (3) story building while the permit issued was for a 2 to 2 and one-half story building;NOW, THEREFORE, BE IT RESOLVED by the Essex County Construction Board of Appeals that the Stop Work Order issued by the Township of Belleville is hereby upheld; and it is furtherRESOLVED, that the stop work order is hereby lifted for a period of fifteen (15) days to enable appellant to install the roof truss system, after which the stop work order will again take effect.

By the time the roof was installed, Bezerra alleged, "the property had suffered from severe damage." A worker explained the tarps were not water-tight, they eventually ripped, and before being replaced, allowed water to enter the structure, causing mold and other damage. Bezerra testified he had to pay a remodeling contractor over $50,000 to repair water damage, including damage to walls and cabinets.

In the summer, after installing the roof, Bezerra applied to the Belleville Township Zoning Board of Adjustment ("Zoning Board") for relief; he asked the Zoning Board to interpret its zoning ordinance so as to deem his house a two-and-a-half story building; or alternatively, to grant a bulk variance.

The Zoning Board addressed the request for interpretation at a hearing on July 15, 2003. The ordinance stated in part that a story included a level whose ceiling was more than three feet above curb level. Bezerra proposed that if the Zoning Board measured the three feet from the average level of grade, then he would move soil to cover the foundation wall around part of the house, so that even with the garage entrances at street level, the garage and foundation level would be partly submerged and would not be deemed a separate story. In the course of the debate, members of the public expressed concern about Bezerra's position.

During the discussion, DeLorenzo repeated the point the County Board chair had made about fire protection requirements.

[I]f it does stay a three-story, it has to be constructed by the one-hour fire-rated, it has to have two exits, so he has a lot of other things that he'd have to do to meet that requirement of the building code, he has to show me, which he hasn't. As a two story, he wouldn't have to meet that, but on a three-story, he would.[(Emphasis added).]

Neither Bezerra nor his professional engineer who was present, corrected DeLorenzo that the plans for the modular structure called for one-hour fire-rated walls and floors. By a four-to-two vote, the Zoning Board deemed Bezerra's structure a three-story building.

At an August 5, 2003 hearing, the Zoning Board addressed Bezerra's variance request. Bezerra asserted that based on his submissions, he believed DeLorenzo had approved his plan to install two living floors on top of a fully-above-grade foundation. One member asserted, consistent with Bezerra's position, that DeLorenzo had received the foundation plan before he issued the building permit on March 12, 2003. During the hearing, it was also noted that municipal court action on the summonses had been postponed pending Zoning Board action.

DeLorenzo stated that he approved the structure as a two-story building. The Zoning Board's engineer provided a written report stating the building "is inconsistent with the submitted architectural plans. The plans indicate that the basement floor level is substantially beneath the surface of the ground, whereas, photos of the property show the basement floor at ground surface elevation." Members of the public opposed the variance and opined that the house was out of keeping with other homes in the neighborhood.

The Zoning Board members voted unanimously to deny the variance. In its resolution, the Zoning Board determined:

Based on the testimony, the plans submitted and the input from the public the Board has determined that the Applicant failed to prove the need for a three-story structure on said property by either the C-1 (hardship standard) or the C-2 standard that the benefits from the deviation of the height restriction outweigh any detriment.The Board further concluded that the structure would not blend in with the type of residential structures in the area and would be somewhat of an aberration in its appearance and as a result the Applicant failed to meet the negative criteria in that this Application cannot be granted without substantial detriment to the public good and without impairing the intent and purpose of the zoning ordinance.

Bezerra blamed the result on "false and misleading testimony" by DeLorenzo. Bezerra did not appeal the Zoning Board's decision.

Instead, he disassembled the three-story structure, and completed a two-story structure on the site. He asserted that DeLorenzo continued to delay approvals and interfered in his completion of the modified structure. Bezerra sold the property on December 6, 2004 for $516,000, and closed the next month. He estimated total losses from the project, as a result of delays, water damages, and reconstruction with a lowered foundation, were "in excess of maybe [$]250,[000] $350,000.00[.]"

All the summonses were ultimately dismissed by the municipal court. DCA, after investigating Bezerra's complaint, concluded DeLorenzo had "act[ed] accordingly when he issued" the stop-work order. Bezerra maintains DCA's investigation was cursory and relied excessively on communications with DeLorenzo himself.

In addition to complaining about DeLorenzo's actions affecting his two-family home project, Bezerra asserted that DeLorenzo's misconduct included the manner in which he processed a permit application submitted to construct an addition to Bezerra's personal residence. He alleged DeLorenzo did not issue permits or perform inspections timely. He also alleged that DeLorenzo failed to inspect the addition

project to determine the presence of a potential structural problem. However, Bezerra concedes he was aware of the problem, as a contractor working on the project alerted him to it. He claimed DeLorenzo was obliged to perform an inspection to ensure that construction conformed to the architectural plans and did not present a safety issue.

II.

Bezerra filed his initial complaint in March 2005, and an amended complaint in August, alleging the Township and DeLorenzo had engaged in actions that were "malicious, intentional, willful and discriminatory; [s]elective enforcement." In October, the trial court granted DeLorenzo's motion to dismiss, finding the municipality and DeLorenzo were immune under the Tort Claims Act. The court held that regardless of DeLorenzo's intent and whether he harbored actual malice, he and the municipality were immune because "all of the acts were within the scope of his employment and approved and confirmed" by the County Board. We affirmed as to the Township, but reversed as to DeLorenzo in an unpublished opinion, Bezerra v. Township of Belleville, No. A-1751-05 (App. Div. July 17, 2006).

We agree that the immunity provisions of the Act related to the issuance or denial of a certificate and the enforcement of laws provide absolute immunity to the Township. N.J.S.A. 59:2-4; 59:2-5. We do not agree, however, that the allegations as pled against DeLorenzo are entitled to similar protections at this stage in the litigation simply because "it appears that all of the acts were within the scope of his employment and approved and confirmed by the board, which has never been overturned."[Slip op. at 7-8.]

We observed the Act did not shield DeLorenzo from liability for actions, even if within the scope of employment, that "constitute[] a crime, actual fraud, actual malice or willful misconduct." Id. at 8 (quoting N.J.S.A. 59:3-14a, b).

After remand, Bezerra filed a second amended complaint in November 2007, and added claims under 42 U.S.C.A. § 1983. DeLorenzo removed the case to the United States District Court for the District Court of New Jersey on November 27, 2007. Bezerra then filed a third amended complaint in July 3, 2008 adding malpractice claims against Frank Matarazzo, Matarazzo Engineering, L.L.C. and Matarazzo & D'Onofrio Engineering, L.L.C. The firm subsequently settled with Bezerra in June 2009. During discovery, the parties exchanged reports of competing experts who approved, or criticized DeLorenzo's actions.

In June 2010, Judge Jose L. Linares granted DeLorenzo's motion to dismiss with prejudice the section 1983 claims, finding the record was insufficient to meet the requisites of a constitutional deprivation. Bezerra v. DeLorenzo, Civil Action No. 07-5670 (D.N.J. June 23, 2010) (slip op. at 35). The court remanded the State law tort claims and the related immunity defenses to State court, dismissing as moot Bezerra's motion for summary judgment on DeLorenzo's claim of immunity under the TCA.

After the case was returned to State court, Bezerra filed a motion on July 29, 2010, for partial summary judgment "as to whether ... DeLorenzo ... is entitled to immunity from liability under the New Jersey Tort Claims Act." DeLorenzo filed a cross-motion[2] for summary judgment.

Judge Claude Coleman granted DeLorenzo's motion on September 16, 2010. Judge Coleman concluded the evidence was insufficient to show DeLorenzo "acted with willful misconduct, malice, etc., in his dealings with Plaintiff." He held that finding was supported by the findings of the County Board, the Zoning Board, and DCA. Although the court addressed whether Judge Linares's conclusions were entitled to collateral estoppel effect, Judge Coleman did not rest his decision on that ground.

Even if the court is not inclined to follow the doctrine of collateral estoppel, Plaintiff has still failed to show this [c]ourt that Defendant exhibited any willful misconduct in his dealings with Plaintiff's construction projects. Speculation and conjecture are not enough. Defendant may not have been diplomatic, and may even have appeared over zealous, but the facts do not indicate that Defendant ever acted outside of his authority as the [c]onstruction [o]fficial for the Township. Defendant has shown that his decision to issue the [s]top[-w]ork [o]rder was objectively reasonable, thereby vaulting his burden to prove his entitlement to immunity. There is no factual evidence that Defendant knowingly provided false statements to either the Construction Board, or the Zoning Board, or that he caused any delays in either of Plaintiff's construction projects. The [D]efendant's alleged misstatements as to why he issued the stop order were immaterial to the board's ultimate findings that the building erected was a three (3) story structure, rather than the approved two (2) story structure and was, therefore, in violation. In addition, any delays that may have been triggered by Defendant's decisions as construction official could very well be the result of some mis[]step taken by Plaintiff in the construction or permit process and the malpractice of his engineer.Regarding the water damage claim, there is no evidence that Defendant deliberately intended to cause damage to Plaintiff's building. Defendant did not preclude Plaintiff from placing a tarp over the building to prevent potential water/weather damage to the property. What Defendant did not allow, was for Plaintiff to raise the roof — which seems to make sense since the [s]top[-w]ork [o]rder was issued because the building was too tall for the zone in which it was situated, and the only way to cure the violation was to lower the height. The Township Property Maintenance Code only required action to be taken by the [c]onstruction [o]fficial in an emergency situation, in which temporary safeguards were needed to prevent imminent danger from a dangerous situation.Lastly, regarding the forty-seven summonses issued to Plaintiff, exposing him to substantial fines, the summonses were issued in Defendant's official capacity as a strategy to motivate Plaintiff to quick action. In addition, there is some evidence that Defendant consulted with the prosecutor, who apparently endorsed the strategy and approved the dismissal of the summonses without cost to Plaintiff.

Bezerra appeals. Aside from addressing the standard of review, he presents the following points for our review:

POINT IITHE SUPERIOR COURT ERRED IN GRANTING DeLORENZO SUMMARY JUDGMENT ON BEZERRA'S WILLFUL OR RECKLESS MISCONDUCT CLAIM.A. DeLorenzo Improperly Delayed Completion of the Projects and Improperly Changed the Basis for the Stop Work Order.B. DeLorenzo Made False Statements to the Construction Board and the Zoning Board.C. DeLorenzo Deliberately Caused the Inside of the House to be Exposed to Water Damage.D. DeLorenzo Forced Bezerra to Choose Between Arrest and the Possibility of Millions of Dollars in fines.E. DeLorenzo Issued the Forty-Seven Summonses to Harass and/or Intimidate Bezerra.POINT IIITHE SUPERIOR COURT ERRED IN NOT FINDING

DeLORENZO'S CONDUCT WAS RECKLESS.POINT IVTHE FEDERAL COURT'S DECISION ON BEZERRA'S 42 U.S.C.[A.] § 1983 CLAIM DOES NOT SERVE AS COLLATERAL ESTOPPEL ON THE ISSUE OF MISCONDUCT.

III.

We review the trial court's grant of summary judgment de novo. Lapidoth v. Telcordia Tech., Inc., 420 N.J.Super. 411, 417 (App. Div.), certif. denied, 208 N.J. 600 (2011). We apply the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J.Super. 162, 167, (App. Div.), certif. denied, 154 N.J. 608 (1998). Pursuant to Rule 4:46, we "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "[W]hen the evidence `is so one-sided that one party must prevail as a matter of law,'... the trial court should not hesitate to grant summary judgment." Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). See also Liberty Surplus Ins. Co. v. Nowell Amoroso, P.A. 189 N.J. 436, 444-46 (2007); Brae Asset Fund, L.P. v. Newman, 327 N.J.Super. 129, 134 (App. Div. 1999).

Issues of law are also subject to our plenary de novo review. Regarding "the review of legal conclusions reached on summary judgment ... `[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference[.]'" Estate of Hanges v. Metropolitan Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

We have also encouraged resort to summary judgment proceedings to resolve claims against public employees who assert an immunity defense under the TCA. B.F. v. Div. of Youth & Fam. Servs., 296 N.J.Super. 372, 386-87 (App. Div. 1997) (affirming summary judgment dismissing tort claim against DYFS employees and deputy attorney general who unsuccessfully prosecuted termination of parental rights case); Brayshaw v. Gelber, 232 N.J.Super. 99, 115 (App. Div. 1989) (granting summary judgment dismissing tort claim against deputy attorney general for allegedly defamatory statement). The mere fact that a public employee's state of mind may be in issue does not preclude summary judgment. Fielder v. Stonack, 141 N.J. 101, 129 (1995).

We review legal principles governing public employee immunity from tort claims. The TCA extends immunity to public employees for various activities including: good faith execution or enforcement of law, N.J.S.A. 59:3-3; the failure to enforce any law, N.J.S.A. 59:3-5; the issuance, denial, suspension or revocation of permits or orders, or the failure to do so, N.J.S.A. 59:3-6; the failure to inspect, or negligent inspection of property, N.J.S.A. 59:3-7; the institution or prosecution of any judicial or administrative proceeding within the scope of employment, N.J.S.A. 59:3-8; and misrepresentation made within the scope of employment, N.J.S.A. 59:3-10. These and other specific grants of immunity are subject to a general exception that withholds immunity when the public employee's conduct "was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct." N.J.S.A. 59:3-14.

The critical issue before us is whether DeLorenzo's immunity defense is defeated by Bezerra's claim that DeLorenzo engaged in willful misconduct. Bezerra does not assert that DeLorenzo acted outside the scope of employment, or that his actions constituted "a crime, actual fraud, [or] actual malice." Ibid.

We think it plain that DeLorenzo would be covered by several of the specific grants of immunity. In particular, DeLorenzo's delays in issuing permits, and his issuance of the stop-work order would be immune, because "[a] public employee is not liable for any injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend or revoke, any permit ... approval, order, or similar authorization" when he acts within his authority. N.J.S.A. 59:3-6. In Malloy v. State, 76 N.J. 515, 521 (1978), the Court construed N.J.S.A. 59:2-5, which grants public entities permitting immunity like that granted public employees by N.J.S.A. 59:3-6. The Court noted permitting is "a vital exercise of governmental authority," "there are literally millions of licenses, certificates, permits and the like applied for, issued, renewed or denied," and "mistakes, both judgment and ministerial" were "inevitable." Ibid. "The purpose of the immunity is to protect the licensing function and permit it to operate free from possible harassment and the threat of tort liability." Ibid. In granting this immunity, the Legislature was also mindful that persons aggrieved by arbitrary, capricious, or wrongful permitting decisions have access to judicial review. Id. at 20-21 (citing Comment for N.J.S.A. 59:2-5, Report of the Attorney General's Task Force on Sovereign Immunity — May 1972).

DeLorenzo's delays in inspecting Bezerra's home addition project, and his delays in inspecting the foundation footing of the two-family home would also be immune, because "[a] public employee is not liable for injury caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property[.]" N.J.S.A. 59:3-7. DeLorenzo's issuance of numerous summonses for building and zoning code violations would be immune, because "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment." N.J.S.A. 59:3-8. His false statements to the County Board and Zoning Board would also be immune, because "[a] public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation." N.J.S.A. 59:3-10.

Bezerra argues that DeLorenzo could not avail himself of immunity under N.J.S.A. 59:3-3, "good faith ... execution or enforcement of any law," because he engaged in reckless behavior. We agree reckless behavior may be inconsistent with good faith. See Canico v. Hurtado, 144 N.J. 361, 365 (1996) (stating that recklessness usually denied good faith under N.J.S.A. 59:3-3); Dunlea v. Twp. of Belleville, 349 N.J.Super. 506, 512 (App. Div. 2002) ("in order to defeat a claim of good-faith immunity ... it is sufficient that plaintiff shows defendant acted recklessly" in action against police officer whose auto collided with plaintiff). In contrast to recklessness, negligent behavior may coexist with good faith. Fielder, supra, 141 N.J. at 138 ("[T]o avoid the immunity afford to the `good faith' actions of the public employee, the complaint must allege a cause of action based on conduct more culpable than simple negligence.").

Ultimately, we need not decide whether DeLorenzo is entitled to good faith immunity under N.J.S.A. 59:3-3 because, as we note, his actions fall within the other specific immunity grants that do not require a good faith showing. See Fielder, supra, 141 N.J. at 131-33 (where good faith immunity under N.J.S.A. 59:3-3 and more extensive immunity under N.J.S.A. 59:5-2 both apply, Court applies more extensive

immunity); Bombace v. Newark, 125 N.J. 361, 367-68 (1991) (distinguishing between immunity under N.J.S.A. 59:3-3, which requires showing of good faith, and N.J.S.A. 59:3-5, which does not). On one hand, "[p]roof of lack of good faith ... does not equate with willful misconduct," Fielder, supra, 141 N.J. at 126 (emphasis added); however, the presence of good faith does not necessarily preclude a finding of willful misconduct. Ibid. "[W]illful misconduct is not affected by the good faith of the public employee who believes he or she somehow had a right to knowingly and willfully disobey." Ibid.

We therefore turn to Bezerra's claim that DeLorenzo engaged in willful misconduct which would defeat DeLorenzo's immunity under N.J.S.A. 59:3-6,-7,-8 and-10. The TCA does not define "willful misconduct." Our Court has cautioned against simply importing definitions of the term applied in contexts not involving sovereign immunity and the TCA. "Like many legal characterizations, willful misconduct is not immutably defined but takes its meaning from the context and purpose of its use." Fielder, supra, 141 N.J. at 124. Even within the context of the TCA, the concept may vary, depending on nature of the public employee's activity.

[W]ithin a statute like the Tort Claims Act, the precise definition might differ where the role of willful misconduct is to impose liability in numerous situations where it would otherwise not exist, for the reasons and purposes of imposing liability may differ in those situations and call for differences in the definition and application of willful misconduct.[Id. at 125.]

Consequently, although the Court adopted a definition of "willful misconduct" in Fielder, it limited it to cases of "police vehicular pursuit." Ibid. The Court cited with approval a formulation that equated willful misconduct with "the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden." Id. at 124 (internal quotation and citation omitted). In the context of a police pursuit case, the Court defined the term to mean that is, "1) disobeying either a specific lawful command ... or a specific lawful standing order and 2) knowing of the command or standing order, knowing that it is being violated, and, intending to violate it." Id. at 126.

In another police pursuit case, we held that there is no willful misconduct if an officer did not knowingly violate an unequivocal order. Kollar v. Lozier, 286 N.J.Super. 462, 472 (App. Div.), certif. denied, 145 N.J. 373 (1996). The Court later approved a jury instruction that defined "willful misconduct" in a police action case as something "above" gross negligence or reckless behavior. Alston v. City of Camden, 168 N.J. 170, 184-85 (2001). On the other hand, willful misconduct need not rise to the level of "intentional infliction of harm." Id. at 185 ("[W]illful misconduct will fall somewhere on the continuum between simple negligence and the intentional infliction of harm.").

We have addressed the claim that a public employee was motivated by a vendetta that allegedly vitiated his immunity defense. Van Engelen v. O'Leary, 323 N.J.Super. 141 (App. Div.), certif. denied, 162 N.J. 486 (1999). The plaintiffs, police officers, claimed that a prosecutor and his chief of detectives maliciously prosecuted them in retaliation for their previous efforts to prosecute a person whom the prosecutor had represented when in private practice. The plaintiffs alleged that immunity under N.J.S.A. 59:3-8 was trumped by the "actual malice and willful misconduct" exception of N.J.S.A. 59:3-14. We directed entry of summary judgment noting that "carelessness, unreasonable conduct or even noncompliance with

substantive law" was not enough to establish malice or willful misconduct. Id. at 154. The plaintiffs' allegation of willful misconduct and actual malice lacked sufficient evidential support, and were grounded in speculation. Id. at 151-53.

We also construe the statute to require, as proof of willful misconduct, more than proof of the actions covered by the specific grant of immunity. In other words, mere proof of misrepresentation, which is immunized under N.J.S.A. 39:3-10, should not suffice to establish willful misconduct that vitiates the immunity. The plaintiff must prove something more.

Bezerra alleges DeLorenzo is not entitled to immunity because he engaged in various acts of willful misconduct, consisting of: delaying inspections and project completion; changing the basis of the stop work order from the height of the building to the number of stories; making false statements to the Construction Board and the Zoning Board; deliberately exposing the two-family home to water damage; barring Bezerra from putting up the roof; and issuing multiple summonses. In essence, Bezerra claims DeLorenzo embarked upon a course of action intended to sabotage his project and to cause him unnecessary expense. The record is insufficient to support that claim.

Granting plaintiff reasonable inferences, DeLorenzo negligently reviewed Bezerra's plans for the two-family home, and should have realized that Bezerra intended to build a three-story structure consisting of a full-above ground foundation level, plus two floor-through residential apartments. The engineer's plot plan, which we assume DeLorenzo received before issuing the permits, with its elevation notations of 101 feet for the garage level, and 110 feet for "F.F." arguably put DeLorenzo on notice that Bezerra intended to build a structure with two apartment floors on top of a full above-ground foundation level. The foundation drawing indicated that it would consist of ten-foot-high panels. Arguably, this should have alerted DeLorenzo as well, although the drawings do not indicate whether the foundation would be submerged or not.

On the other hand, the engineer's plot plan was ambiguous, because it also expressly stated that it depicted a "PROPOSED 2 STORY" dwelling. The architectural drawings depicted a residence with a substantially submerged foundation, although it included a notation, "SEE ORDER FOR VERIFICATION FORM FOR FINAL ELEVATION SPECIFICATIONS." However, these proofs do not suffice to show that DeLorenzo knowingly authorized a three-story building with the intention of pulling the rug out of from under Bezerra, as soon as the building was erected.

Even crediting Bezerra's claim that DeLorenzo did not timely process his permits or conduct inspections, those delays are not actionable absent proof of willful misconduct. That proof must consist of more than evidence that DeLorenzo was late, and that he knew he was late. Consistent with the Court's cautionary warning, we do not blindly import into this case, in which plaintiff asserts damages from regulatory delays, the standard of willful misconduct applied to police pursuits, that is, "1) disobeying either a specific lawful command ... or a specific lawful standing order and 2) knowing of the command or standing order, knowing that it is being violated, and, intending to violate it." Fielder, supra, 141 N.J. at 126. A bureaucrat may process paperwork more slowly than prescribed by a timeliness standard, knowing of the standard, knowing he or she is violating it, and intending to violate it (because, for

example, the bureaucrat has too much to do, has decided to handle something more pressing first, or because the bureaucrat is simply slow). Such tardiness is no doubt irritating, exasperating and costly to the regulated party. However, deeming it willful misconduct would subject regulators to extensive liability that the drafters, we believe, did not intend. See Malloy, supra, 76 N.J. at 521 (discussing the intention to immunize public employees from liability for the inevitable mistakes, both judgmental and ministerial, in processing of permits).

We note Bezerra's assertion that DeLorenzo was seeking a bribe. That obviously would constitute both a crime and willful misconduct vitiating any immunity. N.J.S.A. 59:3-14. It would also provide a different explanation for DeLorenzo's actions. If DeLorenzo were seeking a bribe, he might have delayed Bezerra's permitting to entice him to "pay" for prompt service. DeLorenzo might have closed down Bezerra's project, and refused to allow him to erect a roof, in retaliation for Bezerra's refusal to pay a bribe, or as a last ditch effort to obtain a bribe. However, he lacks sufficient evidence that DeLorenzo solicited a bribe. At most, Bezerra refers to a feeling he got when DeLorenzo leaned silently against his car for a few moments. That is not enough.

DeLorenzo's decision to order the work to stop upon erection of the building, including prohibiting the erection of the roof, is not by itself, willful misconduct. Based on the subsequent decisions of the County Board and the Zoning Board, the evidence demonstrates that DeLorenzo correctly adjudged the structure in violation of the local ordinance. While DeLorenzo's prior approval was, arguably, negligent, his subsequent withdrawal of permission to proceed was immune, N.J.S.A. 59:3-6, and consistent with his authority. N.J.A.C. 5:23-2.30 (stating a construction official "shall issue a notice of violation and orders to terminate directing the discontinuance of the illegal action or condition and the correction of the violation"); N.J.A.C. 5:23-2.31 (authorizing issuance of stop construction order). It is hardly misconduct, let alone willful misconduct, to take legally authorized enforcement action, absent additional proof.

DeLorenzo unquestionably was authorized to permit Bezerra's workers to install the roof if he deemed it necessary to abate a dangerous condition, but he was not obliged to do so. N.J.A.C. 5:23-2.31(d)(3) ("No person shall continue, or cause to allow to be continued the construction of a building or structure in violation of a stop construction order, except with the permission of the enforcing agency to abate a dangerous condition or remove a violation, or except by court order."). DeLorenzo did permit the workers to install a tarp, although that ultimately proved ineffective over the several week period that followed. The fact that the County Board permitted Bezerra to install the roof, at his own risk, is not proof that DeLorenzo engaged in willful misconduct by withholding that relief.

Bezerra himself could have prevented the risk of water damage by correcting the violation. Although he claims DeLorenzo threatened arrest if the construction crew continued work, the threat was made on the scene, to deter completion of the project. The terms of the order issued a few days later made clear that Bezerra would have been authorized to remediate the violation by disassembling the modular units. This is what he ultimately did. Unlike regular construction, the disassembly of the modular units, which had been put in place in a few hours, could have been accomplished without irreparable harm. At his

own risk, Bezerra chose to leave the units in place while he sought relief — ultimately unsuccessfully — from the County Board and Zoning Board.

Nor do we find that issuance of the multiple summonses was willful misconduct. Although one might characterize the issuance of redundant violations as over-kill, the actions were authorized by law, N.J.A.C. 5:23-2.31(b)(5) ("The construction official may separately serve a notice of penalty assessment and order to pay a penalty."). DeLorenzo may have concluded that the impact of multiple summonses might have prompted Bezerra to comply, rather than resist. See N.J.A.C. 5:23-2.31(c) ("The construction official may assess a monetary penalty whenever such shall be likely to assist in bringing about compliance."). There is insufficient evidence to support a claim that DeLorenzo issued the summonses purely to harass Bezerra. Indeed, although the summonses were ultimately dismissed, the decisions of the County Board and Zoning Board suggest that the summonses were well-founded.

We also find insufficient evidence to support Bezerra's claim that DeLorenzo committed willful misconduct by making false statements to the County Board and Zoning Board and altering the construction permit. In response to a question from the County Board chairman, DeLorenzo agreed he issued a permit for the foundation only on March 12, 2003. Bezerra asserts this was a false statement because plumbing, electrical and fire protection permits had already been issued. However, this falls short of willful misconduct. The exchange between the chairman and DeLorenzo is not recorded verbatim. At most, this was an incomplete response. Indeed, reflected on the March 12 permit itself was evidence those other permits were issued; the permit recorded receipt of the respective fees. It is clear from the minutes that DeLorenzo did not deny that he had authorized construction of the complete structure; he only denied that he was aware it would be three stories. In any event, the statement about the nature of the March 12 permit had no impact on the County Board's decision, as reflected in its resolution.

DeLorenzo's alleged statement to the Zoning Board appears at most to be a mistake. DeLorenzo stated that if Bezerra received a bulk variance that permitted him to build a three-story structure, he would need to comply with the code requirements for one-hour fire walls and floors that did not apply to a two-story structure; that was something the County Board chairman had mentioned in the earlier hearing. Both at the County Board hearing, and the Zoning Board hearing, neither Bezerra nor his engineer (who was present at the Zoning Board hearing) noted that the architectural plans for the modular home specified one-hour fire walls and floors. Apparently, Bezerra and DeLorenzo committed the same oversight. Moreover, there is no indication that the Zoning Board denied the variance because of DeLorenzo's mistaken statement that if the variance were granted, Bezerra would need to take additional steps to comply with fire-protection-related building codes.

Finally, we attach no significance to the alleged alteration of the building permit. Bezerra asserts the additional marks he discovered in June 2003 reflect an effort by DeLorenzo to "cover his tracks" and make the permit look like it was only for the foundation, as DeLorenzo stated before the County Board. However, the essence of the two documents is the same. Although the second version includes check marks by the boxes for electrical, plumbing, and fire protection, it was evident in the earlier document that these permits were issued, because the fee payments were already reflected. The insertion of the

word "Foundation" was duplicative, because the word "foundation" already appeared, next to the "other" box. While the alteration of an issued permit is not authorized, there was no compelling evidence that DeLorenzo was responsible for the alteration, and, in any event, it did not cause any harm, nor does it support Bezerra's theory that DeLorenzo had intentionally misused his authority to sabotage Bezerra's project.

Given our determination of the foregoing issues, we need not address the collateral estoppel effect of Judge Linares's decision.

Affirmed.

FootNotes

1. The stop work order indicated a "date of inspection" of March 26, 2003, although Bezerra and other witnesses asserted the inspection occurred on March 27.

2. DeLorenzo's cross-motion is not part of the appellate record.