

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3640-12T4

CALM DEVELOPMENT, INC.,

Plaintiff-Appellant,

v.

BOROUGH OF ALLENDALE, ALBERT
KLOMBURG, VINCENT BARRA, PAULA
FAVATA, and STILES THOMAS,
Individually and as an Allendale
Official,

Defendants-Respondents,

and

JACK D. LEVIN, J.D. LEVIN
ASSOCIATES, INC., a New Jersey
Corporation, and J.S. HEATHER
COURT ALLENDALE PROPERTY, INC.,
a New Jersey Corporation,

Defendants.

Argued April 8, 2014 – Decided April 25, 2014

Before Judges Reisner, Ostrer and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-
8660-10.

Mark S. Carter argued the cause for
appellant.

Mary C. McDonnell argued the cause for respondents on compensatory damages (Pfund McDonnell, attorneys; David T. Pfund and Ms. McDonnell, on the brief).

Winne, Dooley & Bole, P.C., attorneys for respondents on non-compensatory damages, join in the brief of Pfund McDonnell.

PER CURIAM

Plaintiff Calm Development, Inc. appeals from an October 26, 2012 Law Division order granting summary judgment to defendants Borough of Allendale, Albert Klomburg, Vincent Barra, and Paula Favata (collectively the "Allendale defendants") dismissing counts two through ten of plaintiff's amended complaint. Count one, alleging tortious interference with plaintiff's economic advantage by Allendale's Marsh Warden, defendant Stiles Thomas, was previously dismissed on November 29, 2011. Plaintiff subsequently moved, pursuant to Rule 4:50-1, for relief from both dismissal orders, which the court denied on January 16, 2013. We affirm, substantially for the reasons set forth in the written opinion of Judge Robert C. Wilson that accompanied the October 26, 2012 order.

I.

Plaintiff owns property in the Borough of Allendale, on which it sought to construct a housing development, but was unsuccessful because it was unable to obtain the necessary governmental approvals. As a result, on June 10, 2009,

plaintiff filed an eight-count complaint in the Law Division seeking damages against the Allendale defendants, Thomas, and the former owners of an adjacent property, Jack D. Levin, J.D. Levin Associates, Inc., and J.S. Heather Court Allendale Property, Inc. (collectively the "Levin defendants"). The trial court dismissed this complaint because it failed to comply with prior court orders requiring that plaintiff not include claims that had already been litigated in any new complaint, and that a copy of any new complaint be sent to the Assignment Judge when filed.

Plaintiff moved for the trial court's permission to file a revised complaint, but the court entered an order on March 8, 2010, denying plaintiff's motion because that complaint also included previously litigated claims. The trial court thereafter granted plaintiff permission to redraft its complaint "consistent with prior court orders" and "at plaintiff's peril."

On September 10, 2010, plaintiff filed a ten-count complaint against the Allendale defendants, the Levin defendants,¹ and Thomas, followed by an amended ten-count complaint on September 20, 2010. In the amended complaint,

¹ The Levin defendants did not file any responsive pleading. On March 21, 2013, following a proof hearing, the court entered a default judgment of \$5,928,680 against them on plaintiff's water infiltration claims.

plaintiff set out claims in four areas, alleging: (1) Thomas's tortious interference with plaintiff's economic advantage; (2) water infiltration damages to plaintiff's property caused by the Allendale defendants and the Levin defendants, (3) lost-rent damages to plaintiff's property caused by the Allendale defendants, and (4) damages resulting from Allendale's accounting and finance practices.

Thomas moved to dismiss the complaint on the basis that it failed to state a claim against him. On November 29, 2011, the court granted the motion, finding that the applicable limitations period had expired, and that the allegations in the complaint failed to support any claim of liability against Thomas for tortious interference with plaintiff's economic advantage.²

² Neither plaintiff's Notice of Appeal or Amended Notice of Appeal reference the November 29, 2011 order. While plaintiff in its appellate brief contends that the trial court erred in dismissing the single claim against Thomas, its failure to appeal that order precludes consideration of such contention. "It is a fundamental of appellate practice that we only have jurisdiction to review orders that have been appealed to us." State v. Rambo, 401 N.J. Super. 506, 520 (App. Div.), certif. denied, 197 N.J. 258 (2008), cert. denied, 556 U.S. 1225, 129 S. Ct. 2165, 173 L. Ed. 2d 1162 (2009); see also 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004) ("[O]nly the judgment or orders designated in the notice of appeal . . . are subject to the appeal process and review.").

On August 15, 2012, the Allendale defendants moved for summary judgment on the claims against them. Plaintiff filed a brief in opposition, supported by a letter from its counsel, an accounting expert's report, and an auditor's report. The motion was then adjourned on several occasions due to the sudden death of plaintiff's counsel. Eventually, the motion judge determined that he would decide the motion on the papers and the fully briefed argument that had already been submitted. On October 26, 2012, Judge Wilson issued a comprehensive written decision, granting summary judgment to the Allendale defendants and dismissing all claims and cross-claims against them. We briefly review the evidence and the judge's findings pertinent to each of plaintiff's claims.

Claims Relating to Water Infiltration

Plaintiff's property consists of 3.23 acres. Situated on the property is a "low area" or "pond," as shown on an aerial survey map from April 1964, a survey of the property dated January 11, 1966, and a "Water Surface Profile" map dated March 21, 1975. Plaintiff's owner/director, Michael D'Antonio, testified that the level of water in the pond varied seasonally, depending upon the amount of rainfall.

Situated south of plaintiff's property are lands designated on Allendale's tax map as Block 701, Lot 19; Block 1902, Lot 13;

and Block 1906, Lots 17 and 18. This property was formerly owned by North American Realty Corp. ("North").

On January 24, 1979, Allendale's board of adjustment approved North's application to subdivide and build residential housing on its property. On December 20, 1984, Allendale's planning board approved North's application for the development of a sixty-three home subdivision on the property. In 1984, the Levin defendants became the owners and controllers of North's development project.

Construction began thereafter on the first phase of the development, which comprised thirteen homes that were to be built on the "upland areas" of the Levin property. Construction stopped, however, because "it included the filling of wetlands which was a prohibited act" under federal law. On August 20, 1986, the United States Army Corps of Engineers ("USACOE") sent a letter to the Levin defendants, stating that the thirteen homes then under construction on the "upland property" were acceptable because of the limited fill activity that might be required, but that it was doubtful that the remaining fifty homes could be built in the "wetland areas."

On September 18, 1986, Allendale's planning board granted the Levin defendants' application for final subdivision approval for the thirteen-home part of the development, noting that they

had agreed to comply with any requirements or restrictions imposed by the USACOE on any further phases of the proposed development. On August 20, 1987, the Levin defendants and Allendale entered into a developer's agreement that provided for the completion of construction of the thirteen-home subdivision. The agreement specified that the developer would install improvements and deliver drainage easements in conformance with the earlier approved construction plans, that it would indemnify the borough against "the accumulation of the deposit of silt or dirt from surface waters or other damage or injury occurring in the prosecution of said development," and that it would "rectify" any exceptional or unforeseen problems affecting the borough's residents due to "drainage" or the "silting or erosion of adjacent properties."

In or around 1990, the Levin defendants completed the thirteen-home development, including the drainage system, which had "two (2) discharge pipes located on the east side of Yeomans Lane. The two (2) discharge pipes terminate east of Yeomans Lane and discharged into the existing wetland area." One of those discharge pipes proved to be problematic in that it extended only about twenty feet beyond Yeomans Lane, while the construction plans approved by Allendale called for it to extend more than one-hundred feet farther to a nearby waterway.

Moreover, the "wetland area" to which the pipe discharged was adjacent to and behind the property that D'Antonio purchased about six years later in 1996.³

D'Antonio testified at his deposition that, on April 8, 2008, there was a severe rainstorm, following which he noticed that the water level in the pond on plaintiff's property rose rapidly. He traced the water source to a "disconnected 24-inch concrete storm water pipe" at Yeomans Lane and contacted Levin, who told him to take the problem to the borough. Plaintiff then commenced this action against both the Levin and Allendale defendants.

On July 25, 2008, D'Antonio procured a one-page expert report from an engineer, who opined that, while the approved plans for the Levin defendants' thirteen-home project "provide for stormwater management improvements such that no stormwater is discharged" to plaintiff's property, the improvements were never completed and "it appears that there is a significant stormwater discharge" from the Levin defendants' property to plaintiff's property.

On November 20, 2009, D'Antonio procured an expert report from Lisa V. Mahle-Greco, an engineer with Johnson Soils

³ D'Antonio subsequently conveyed the property to his sons in February 1997. In October, 1997, D'Antonio's sons incorporated plaintiff and transferred the property to plaintiff corporation.

Company. She opined that the "continual influx of water" and drainage from the pipe at Yeomans Lane had deposited silt, damaged soils, and rendered plaintiff's property unsuitable for building. She also opined that the "onsite pond" on plaintiff's property would not have been created if the pipe from Yeomans Lane had been built and extended as required under the approved construction plans.

In his deposition, D'Antonio asserted that Allendale should have made certain that the Levin defendants completed the drainage system at Yeomans Lane in accordance with the approved plans. He recognized, though, that the Levin defendants were responsible for completing the pipeline.

In her deposition, Mahle-Greco retreated from her report's opinion that the pond on plaintiff's property would not have been created if the pipe from Yeomans Lane had been completed, conceding that the pond had preexisted the Levin defendants' development by many years. Instead, she asserted that if the pipeline had been completed there would not be any water flowing into the pond from the pipe at Yeomans Lane, and the New Jersey Department of Environmental Protection (NJDEP) would not have declared the pond's southern edge to be an exceptional resource

value.⁴ However, she was unable to explain how she arrived at that conclusion and admitted that she did not know either the definition of the term "exceptional resource value" or what an NJDEP letter of interpretation was.

Mahle-Greco also testified both that it was the Levin defendants who had not complied with the construction plans that had been approved by Allendale, and that she was not offering an expert opinion that was in any way critical of actions taken or not taken by the Allendale defendants.

Presented with these facts, Judge Wilson granted summary judgment to the Allendale defendants dismissing plaintiff's claims against them for damages attributable to the water infiltration on plaintiff's property. The judge concluded:

With respect to surface run off, [d]efendants, Borough of Allendale, Klomburg and Barra had no role in the development of the Levin site, the suspected origination point of the run off. Plaintiff's own expert has offered no opinion critical of the Borough of Allendale or the Borough [d]efendants, and has opined that surface run off became an issue on the Calm Development property due to the developer not complying with plans in the Levin

⁴ On January 29, 2004, the NJDEP issued a Letter of Interpretation/Line Verification, declaring the area along the southern edge of the pond an "Exceptional Resource Value," thus subjecting it to a 150-foot buffer zone requirement. According to D'Antonio, this reclassification by the NJDEP had resulted in there being much less developable land on plaintiff's property.

subdivision, not due to any negligence on the part of the [Allendale d]efendants.

Claims Relating to Lost Rent

When D'Antonio originally purchased his property in 1996, located on it were two single-family homes (the "front" house and "rear" house, respectively) and a shed. In 1997, D'Antonio built a second shed on the property and, around 2004, he added a three-car garage. At all times, the property has been located in Allendale's "AA Residence Zone District." Permitted uses in the AA zoning district include single-family residential use and limited agricultural uses. Additionally, the zoning regulations permit a landowner in the AA district to rent to "[n]o more than two roomers or boarders" in a "principal dwelling."

On January 23, and August 2, 2002, in prior litigation, the trial court entered orders designating the front house on plaintiff's property to be the "principal" dwelling and the rear house or "Carriage House" to be an "accessory" building under Allendale's zoning code. The orders explicitly limited the persons who could occupy the rear house to members of D'Antonio's "'nuclear'" family.

Despite those orders, D'Antonio rented the rear house to tenants unrelated to him for two years in 2004 and 2005. From 2006 to 2009, one of D'Antonio's sons occupied the rear house and, in November 2008, D'Antonio moved from the front house and

began living in the rear house. D'Antonio's move meant that the principal-dwelling front house was vacant and that it could be rented to persons who were not members of his nuclear family, pursuant to the zoning regulations. D'Antonio testified that plaintiff rented the front house to unrelated tenants for eighteen months from August 2009 to December 2010, and to other unrelated tenants from March 1, 2011, through February 28, 2013.

However, according to D'Antonio, when he moved from the front house in November 2008, and wanted to rent it immediately to unrelated tenants, he was thwarted in that endeavor by Allendale's construction code official, who denied him a permit in 2008 to put a sign saying "[h]ouse for rent" on the lawn of the front house. D'Antonio testified that when he had a realtor apply for a permit "two years later," the official issued it without any problem. D'Antonio testified both that the front house was empty and unrented from November 2008 until August 2010 because the official refused to issue the sign permit, and that the sole basis for plaintiff's claim for lost rents was the official's denial of the permit over a two-year period.

In his comprehensive written opinion, Judge Wilson found:

Plaintiff asserts [d]efendants have impeded and hindered its ability to rent a portion of the premises, which is zoned for single family residential units as well as limited agricultural use. There is no evidence that the Borough of Allendale or any of the

Borough [d]efendants have taken any action affecting [p]laintiff's ability to legally rent the property. Further, the Borough of Allendale, former Mayor Albert Klomburg, current Mayor Vincent Barra and Chief Financial Officer Pau[]la Favata are immune from suit for enforcing the laws under the New Jersey Torts Claim Act, N.J.S.A. 59:1-1 [to :12-3]. Specifically, N.J.S.A. 59:2-5, provides,

A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or public employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked.

Plaintiff has attempted to rent the property, and is indeed currently renting the larger front structure on the property. Thus, not only have [d]efendants not taken any action affecting [p]laintiff's rental income, but also the Borough of Allendale and the Borough [d]efendants are immune from suit for enforcing the laws under the Tort Claims Act.

Claims Relating to Financing and Accounting Practices

Plaintiff's claims concerning the financial and accounting practices of the Allendale defendants are grounded in the expert reports of Howard Komendant, CPA, and in a document referred to as the "Tomkins report." In his main report, Komendant opined that it appeared that the Allendale defendants had intentionally

withheld critical accounting documents, that there appeared to be a secret "MBIA" bank account into which the borough had deposited a large amount of money, that the borough collected more tax monies than were necessary to meet the needs of its budget, and that the borough's "accounting practices are deficient as established by the documents supplied to me."

At his deposition, however, Komendant testified that he reviewed only those materials provided to him by D'Antonio and that he did not review D'Antonio's discovery demands upon the Allendale defendants to ascertain what D'Antonio had requested. He also admitted that he had no factual basis to substantiate his opinions that the Allendale defendants had intentionally failed to provide documents to D'Antonio, that there was any "wrongdoing with regard to the Borough of Allendale's financing," or that "there was an intent to hide or misappropriate funds."

Komendant also testified that he had been told by D'Antonio that Allendale's annual budgets for 2005 through 2007 were in the range of \$32,000,000 to \$35,000,000, and he was unaware that the actual budgets for those years ranged between \$10,000,000 and \$11,600,000. He admitted that, although the actual annual municipal budgets were published public information, he had made no effort to procure them. He also admitted that, if he had

been provided that information, then "probably this entire report would be revised."

Concerning the purportedly secret "MBIA" bank account, at his deposition, Komendant was shown a letter from Bank of America that had not been provided to him by D'Antonio. The letter explained that the account was established as a means for numerous New Jersey municipalities to pool and earn interest on monies that were not immediately needed for operational purposes. Komendant effectively conceded that the account was not a secret one, though he still opined that Allendale's records concerning the account should have been made more clear.

For its part, the Allendale defendants countered Komendant's opinion with reports of its independent municipal auditor for the years 2006 through 2010, the report of its accounting expert, and the certification of its chief financial officer, all of which opined that the borough's accounting practices were sound and that they fairly depicted the financial actions taken by the borough.

Plaintiff also relied on the Tomkins report as support for its claim that the Allendale defendants acted improperly concerning the borough's finances. Dated October 10, 2008, the report had been commissioned by Allendale as a "performance audit of the financial operations of the Borough" when its long-

term chief financial officer (Favata) retired. A review of the Tomkins report reveals that, while it recommended technological and staffing improvements to increase efficiency and a segregation of duties among employees, it offered no criticism related to the fairness, propriety, honesty, or soundness of the accounting and financial operations conducted by the Allendale defendants.

In dismissing plaintiff's claims on summary judgment, Judge Wilson wrote:

Plaintiff further alleges a litany of financial and accounting malfeasance, misrepresentation and fraud against the [d]efendants. The Borough of Allendale is subject to New Jersey Budgetary Laws for Municipalities, and its annual budgets are reviewed by an auditor from the Division of Local Government Services, Department of Community Affairs of the State of New Jersey. No malfeasance or weaknesses have been cited by this independent body. Further, the Borough of Allendale employs a Registered Municipal Accountant to prepare its annual audit and has appointed a Chief Financial Officer, pursuant to state statute, who is responsible for the financial administration of the town. Paula Favata, one of the named [d]efendants, is employed by the Borough of Allendale as its Chief Financial Officer. There has been no evidence of malfeasance or impropriety in regards to financing or accounting practices. Defendants have demonstrated that the Borough of Allendale is governed by various State statutes that ensure transparency at the municipal level, and [p]laintiff has failed to demonstrate any financial wrongdoing by the [d]efendants.

Plaintiff obtained new counsel and, on December 5, 2012, filed a motion, pursuant to Rule 4:50-1, for relief from the October 26, 2012 order granting summary judgment to the Allendale defendants, and from the November 19, 2011 order that dismissed the claim against Thomas. On January 16, 2013, Judge Wilson entered an order and written decision denying the motion based on plaintiff's failure to show any exceptional circumstances that would render enforcement of the judgments unjust or inequitable. This appeal followed.

II.

We review summary judgment decisions de novo and apply the same standard utilized by the trial court, namely, whether the evidence, when viewed in a light most favorable to the non-moving party, raises genuinely disputed issues of fact sufficient to warrant resolution by the trier of fact or whether the evidence is so one-sided that one party must prevail as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

On appeal, plaintiff challenges the award of summary judgment in favor of the Allendale defendants. It also argues, among other things, that the court erred in denying plaintiff's

request to adjourn the summary judgment motion, ultimately resulting in the motion being decided without the benefit of oral argument or a full record. We disagree, as plaintiff's subsequent motion for relief from the October 26, 2012 order afforded plaintiff the opportunity to more fully develop its arguments that summary judgment was inappropriate. Moreover, in his written decision denying relief under Rule 4:50-1, Judge Wilson did not state that he had refused to grant an adjournment. Instead, the judge reasoned:

While Plaintiff's counsel, [], passed away just prior to the hearing of the [d]efendants' motion for summary judgment, [p]laintiff's counsel had already filed a legal brief responsive to the motion. At the hearing for oral argument, [d]efendants did not offer any oral argument, thus [p]laintiff was not unduly prejudiced. Further, where there are no genuine issues of material fact, a trial court may decide a motion for summary judgment on the papers . . . There were no substantive issues that could have been presented at the time of oral argument in support of [p]laintiff's opposition to summary judgment as all arguments had been fully briefed in the paperwork previously submitted to the [c]ourt. Plaintiff has failed to present any exceptional circumstances warranting relief, and the motion seeking relief from the [c]ourt's October 26, 2012 [o]rder is without merit.

Notwithstanding that plaintiff did not appeal from the January 16, 2013 order,⁵ it argues that the court also erred in failing to find that exceptional circumstances existed under Rule 4:50-1(f) to vacate the prior orders dismissing its claims against both Thomas and the Allendale defendants.

"A motion under Rule 4:50-1 is addressed to the sound discretion of the trial court, which should be guided by equitable principles in determining whether relief should be granted or denied." Housing Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). The decision granting or denying an application to open a judgment will be left undisturbed unless it represents a clear abuse of discretion. Ibid.

In the present case, plaintiff sought relief pursuant to Rule 4:50-1(f) which provides that "[o]n motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: . . . (f) any other reason justifying relief from the operation of the judgment or order."

"Because of the importance that we attach to the finality

⁵ On April 13, 2013, plaintiff filed a Notice of Appeal from the October 26, 2012 summary judgment order, and from an order purportedly entered on January 26, 2013. While plaintiff presumably meant to appeal from the January 16, 2013 order denying its motion for relief from judgment, in any event, on April 24, 2013, it filed an Amended Notice of Appeal, limited solely to the October 26, 2012 order.

of judgments, relief under Rule 4:50-1(f) is available only when 'truly exceptional circumstances are present.'" Id. at 286 (quoting Baumann v. Marinaro, 95 N.J. 380, 395 (1984)). Thus, the "rule is limited to 'situations in which, were it not applied, a grave injustice would occur.'" US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 484 (2012) (quoting Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)).

Guided by these standards, and based upon our review of the record, we conclude that the trial court did not clearly abuse its discretion when it determined that there were no exceptional circumstances that necessitated the vacation of either order.

Plaintiff also argues, for the first time on appeal, that plaintiff was deprived of its ability to collect on its judgment against the Levin defendants due to the actions of the Allendale defendants. Specifically, plaintiff contends that its inability to collect results from the borough's seizure of all of the Levin defendants' property for failure to pay taxes, thus leaving no tangible assets that plaintiff could attach to satisfy its judgment. However, because plaintiff failed to raise this argument below, we need not decide it on appeal. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); Monek v. Borough of S. River, 354 N.J. Super. 442, 456 (App. Div. 2002).

Plaintiff's additional appellate contentions are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). As previously noted, we affirm for the reasons stated in Judge Wilson's opinion, which are amply supported by the record. R. 2:11-3(e)(1)(A).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION