SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1433-15T1

AVALONBAY COMMUNITIES, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF ROSELAND, MAYOR AND COUNCIL OF THE BOROUGH OF ROSELAND, KEVIN ESPOSITO, in his official capacity as Tax Assessor of the Borough of Roseland, TOM JACOBSEN, in his official capacity as Tax Assessor of the Borough of Roseland, TOM JACOBSEN, in his official capacity as Construction Official of the Borough of Roseland,

Defendants-Appellants,

and

55 LOCUST AVENUE, LLC,

Defendant.

Argued February 8, 2017 - Decided March 2, 2017

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4801-14.

Ryan P. Mulvaney argued the cause for appellants (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Mr. Mulvaney, of counsel and on the briefs; Andrew Gimigliano, on the briefs).

Robert A. Kasuba argued the cause for respondent (Bisgaier Hoff, LLC, attorneys; Mr. Kasuba and Michael W. O'Hara, on the brief).

PER CURIAM

Defendants Borough of Roseland, Mayor and Council of the Borough of Roseland, Kevin Esposito, and Tom Jacobsen (collectively the Borough) appeal from a series of Law Division orders that, taken together, granted summary judgment to plaintiff AvalonBay Communities, Inc. (AvalonBay) on its complaint in lieu of prerogative writs. The trial court ruled that AvalonBay is entitled to a $250,000 credit for a development fee paid by the prior developer, 55 Locust Avenue, LLC (55 Locust), which was to be used by the Borough for the sole purpose of providing affordable housing. For the reasons that follow, we affirm.

I.

55 Locust is the prior owner of real property in the Borough known as Block 13, Lot 32 (the Property). On July 17, 2006, the Borough Planning Board (Board) granted 55 Locust preliminary and final site plan approval to construct eighty-two units of age-restricted townhouse and multi-family residential dwellings on the

Property. The Board memorialized its approval in an August 21, 2006 resolution.

During the approval process, 55 Locust's representative, David Marom, sent a letter to the Borough dated May 15, 2006, in which Marom acknowledged his understanding of the Borough's requirements associated with the proposed development of the Property. Marom stated, in relevant part:

> It is our understanding that the Borough expects the developer to make payment of an impact fee in an amount equal to one per cent (1%) of the initial sale price of the property in satisfaction of the project's obligation to contribute to the Borough's low and moderate income housing goals. It is further understood that such fee is payable in two installments: [fifty percent] of the estimated amount payable within [thirty] days after receipt of final site plan approval; and the remainder payable at the time of the closing of the initial sale of each unit, with the amount payable at that time to be equal to one per cent (1%) of the sale price, minus the allocable share of the estimated amount paid after site plan approval.
>
> Based on our current estimates of the sales prices of the units in this project, we believe that the total amount of the impact fee that will be payable will be approximately $500,000[]. We are therefore prepared to make an initial estimated payment of $250,000[] upon receipt of final site plan approval by the Roseland Planning Board.
>
> This correspondence may be considered as our formal acceptance of our obligation to make such payments, subject to the approval of the project as submitted for planning board

> approval, in lieu of any other obligation to provide low and moderate income units as a part of this project.
>
> [(Emphasis added).]

Marom sent a second letter to the Borough on June 7, 2006, acknowledging 55 Locust's obligation to pay the Borough's one per cent development fee. The June 7, 2006 letter, although similar to the earlier letter, made no mention of the fee's purpose to provide affordable housing.

In accordance with Holmdel Builder's Association v. Township of Holmdel, 121 N.J. 550, 566-73 (1990), the Borough exercised its authority under the Fair Housing Act of 1985, N.J.S.A. 52:27D-301 to -329, to adopt Ordinance #5-2005 on April 26, 2005 (the 2005 Ordinance). The Ordinance required developers of residential units to pay affordable housing development fees in accordance with the New Jersey Council on Affordable Housing (COAH) regulations. Specifically, Section 3.a of the 2005 Ordinance obligated residential developers to "pay a development fee of one (1%) percent of the equalized assessed value for each residential unit constructed or expanded[.]"

The 2005 ordinance required that "[f]ees collected pursuant to this Ordinance shall be used for the sole purpose of providing low and moderate income housing opportunities and assistance." It also mandated the creation of a housing trust fund, into which all

development fees paid by developers were to be deposited, and that "[n]o money shall be expended from the housing trust fund unless the expenditure conforms to a spending plan approved by COAH." Pursuant to the Ordinance, "[d]evelopers shall pay [fifty percent] of the calculated development fee to the Borough . . . at the time of the issuance of a building permit," and the balance "prior to the issuance of a certificate of occupancy."

On September 12, 2006, the Borough introduced a revised development fee ordinance (the 2006 Ordinance), which it submitted to COAH the following day. In seeking COAH's approval, the Borough certified in a letter dated September 1, 2006 that it had not allocated any COAH payments pursuant to the 2006 Ordinance as of that date. On October 3, 2006, COAH adopted a resolution approving the Borough's 2006 Ordinance, thus allowing the Borough to begin collecting development fees upon its formal adoption of the Ordinance. On October 11, 2006, the Borough adopted the 2006 Ordinance and repealed the 2005 Ordinance. The 2006 Ordinance made no relevant substantive changes to the 2005 Ordinance, and both ordinances provided for the one per cent development fee for affordable housing purposes.

The Planning Board's August 21, 2006 resolution approving 55 Locust's development application contained the following provision:

> The Applicant shall pay the Borough [an] amount equal to one percent (1%) of the sale price of the property as set forth in a letter agreement dated June 7, 2006. It is further understood that such is payable in installments with [fifty percent] of the estimated amount payable within [thirty] days after the receipt of the final site plan approval; and remainder payable at the time of the closing of each unit, with the amount payable at that time to be equal to [one percent] of the sales price, minus the allocable share of the estimated amount paid after site plan approval. This condition shall be included in a Developer's Agreement between the Applicant and the Borough.

On December 21, 2006, the Borough acknowledged receipt of 55 Locust's $250,000 payment, which the Borough noted was for "Developer[']s Agreement." Marom later certified that he "always understood that these funds were to be used by the Borough for affordable housing purposes as set forth in the municipal ordinances." The Borough deposited the $250,000 payment into its general fund and included it in its 2007 budget as a special item of general revenue, rather than depositing it in the affordable housing trust fund.

Throughout 2007 and 2008, 55 Locust and the Borough negotiated and exchanged draft versions of the Developer's Agreement required by the Board's August 21, 2006 resolution. On October 21, 2008, the Borough adopted Resolution #381-2008 (the 2008 Resolution)

approving the final form of Developer's Agreement. In pertinent part, the Developer's Agreement provided:

> 2. **Contribution**. [55 Locust] shall pay to [the Borough] a sum equal to one (1%) percent of the sale price of the property (the "Contribution") to be used for low and moderate housing goal purposes, as determined by [the Borough]. The Contribution shall be paid in the following manner:
>
> (A) $250,000[] at or before the execution of this Agreement, receipt of which is hereby acknowledged; and
>
> (B) an amount equal to one (1%) percent of the initial sales price, less the sum of $3,049[], upon the application for each [c]ertificate of [o]ccupancy for each residential unit. Not less than twenty days prior to the issuance of a [c]ertificate of [o]ccupancy, [55 Locust] shall submit to [the Borough], a worksheet showing the sales price of the unit and the calculation of the proposed payment[.]
>
> [(Emphasis added).]

55 Locust did not proceed with its approved development or execute the Developer's Agreement. Instead, on November 16, 2010, 55 Locust entered into a contract to sell the Property to AvalonBay. The contract twice referenced "the affordable housing fee." First, it provided that in addition to the purchase price, "[AvalonBay] shall also reimburse [55 Locust] at 'Closing' . . . for the payment of the affordable housing fee in the amount of [$250,000]." Second, 55 Locust warranted and represented to

AvalonBay that "[55 Locust] has previously paid the Borough of Roseland [$250,000] as partial payment for an affordable housing fee related to the prior land use approvals for the Property. Exhibit 7.1(o) reflects evidence of such payment by [55 Locust]."

On December 17, 2012, the Planning Board adopted a resolution memorializing its November 19, 2012 approval of AvalonBay's application to construct 136 residential units on the Property. Among its other conditions, the resolution required AvalonBay to "execute a Developer's Agreement to be prepared by the Borough of Roseland." On December 13, 2013, AvalonBay closed on the property and reimbursed 55 Locust the $250,000 development fee it previously paid to the Borough.

AvalonBay and the Borough executed a Developer's Agreement on February 27, 2014. The 2014 Developer's Agreement provided, among other things, that AvalonBay comply with all state and local laws, regulations, and ordinances, including COAH.

When AvalonBay applied for building permits in connection with its development of the Property, it claimed a $250,000 credit for the affordable housing assessment. However, the Borough denied that the $250,000 paid by 55 Locust was for affordable housing purposes, and consequently it refused to issue building permits for the development. On April 24, 2014, the parties entered into an interim Agreement, pursuant to which the Borough agreed to

issue building permits and AvalonBay agreed that final certificates of occupancy "shall not be issued until the [d]ispute is resolved either by the courts or the agreement[] of the parties and [AvalonBay] pays the entire proper development fee it is obligated to pay, if any."

Continued discussions between the parties in May and June failed to yield a final agreement. AvalonBay commenced this action on July 8, 2014, seeking a declaration that it was entitled to a credit for the $250,000 development fee that 55 Locust had paid the Borough. Shortly thereafter, and before discovery commenced, AvalonBay moved for summary judgment. The Borough opposed the motion, arguing that a material factual dispute existed regarding whether 55 Locust's prior payment was for affordable housing purposes. The Borough also cross-moved for summary judgment, contending it was entitled to retain 55 Locust's entire $250,000 payment and that AvalonBay remained obligated to pay its affordable housing fee in full, with no credit.

Following oral argument on December 19, 2014, the court found that the $250,000 payment "was directly for affordable housing by 55 Locust." After supplemental briefing, the court entered an order on February 6, 2015, in which it noted that the Borough "is not entitled to retain [the] $250,000 paid by 55 Locust." The court further found that 55 Locust had standing to sue the Borough

for the $250,000, but that 55 Locust's standing had not transferred to AvalonBay.

On May 27, 2015, the Borough filed a motion for reconsideration, arguing that the court should have dismissed AvalonBay's complaint upon finding that it lacked standing to claim the credit. AvalonBay opposed the motion and cross-moved for reconsideration. During oral argument on June 26, 2015, the court reiterated its earlier finding that 55 Locust paid the $250,000 for affordable housing purposes and that "the [B]orough had no right to retain it." However, relying on White Birch Realty Corporation v. Gloucester Township Municipal Utilities Authority, 80 N.J. 165 (1979), the court found that the provisions of the sales contract between 55 Locust and AvalonBay sufficed to confer standing on AvalonBay as assignee to seek credit for the $250,000 it had reimbursed 55 Locust at closing. The court entered a memorializing order granting in part AvalonBay's cross-motion, and denying the Borough's reconsideration motion.

AvalonBay filed a second summary judgment motion on September 24, 2015. The Borough opposed the motion, arguing that summary judgment was inappropriate because the purpose of 55 Locust's $250,000 payment was in dispute, and the parties had yet to conduct any discovery. On October 23, 2015, the court granted AvalonBay's motion, ruling that AvalonBay was entitled to the $250,000 credit

based on 55 Locust's prior development fee payment, thus leaving a remaining balance of $2491 owed by AvalonBay to fully satisfy its obligation under the Borough's affordable housing development fee ordinance. Although AvalonBay subsequently tendered the $2491 payment, the Borough refused to accept it. The Borough now appeals the trial court's February 6, 2015, June 26, 2015, and October 23, 2015 orders.

II.

On appeal, the Borough argues that the trial court erred in entering summary judgment in favor of AvalonBay. Specifically, the Borough argues that the court (1) improperly decided a disputed issue of material fact by determining that 55 Locust's $250,000 payment was a development fee intended for affordable housing purposes; (2) improperly shifted the burden to the Borough to explain what lawful purpose the $250,000 payment was for, if not affordable housing; (3) erroneously ordered relief outside the scope of the pleadings; (4) failed to address the Borough's defenses; (5) failed to order discovery; and (6) failed to issue findings of fact and conclusions of law to support its decisions. We do not find these arguments persuasive.

The summary judgment standard is well-established. A trial court must grant a summary judgment motion if "the pleadings, depositions, answers to interrogatories and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529-30 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). If the evidence submitted on the motion "'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 214 (1986)).

When a party appeals from a trial court order granting or denying a summary judgment motion, we "employ the same standard [of review] that governs the trial court." Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (quoting Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004)). Thus, we must determine whether there was a genuine issue of material fact, and if not, whether the trial court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J.

Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We review legal conclusions de novo. Henry, supra, 204 N.J. at 330.

Applying these standards, we conclude that AvalonBay was entitled to summary judgment as a matter of law. In support of its motions, AvalonBay presented Marom's May 15, 2006 letter, his certification, the 2008 Developer's Agreement approved by the Borough, and the 55 Locust/AvalonBay contract of sale. Viewed as a whole, this evidence amply and persuasively established that 55 Locust paid the $250,000 development fee to the Borough for the purpose of providing affordable housing. In contrast, the Borough presented no competent evidence, or even a suggestion, of any other purpose, lawful or unlawful, for which the payment was made. Nor did the Borough identify any law, regulation, or ordinance, distinct from its 2006 Ordinance, which would permit it to collect a $250,000 payment from a real estate developer. We conclude that the record fully supports the court's finding that 55 Locust paid the $250,000 for affordable housing purposes and that "the [B]orough had no right to retain it." Indeed, the Borough's own ordinance expressly provides that all such development fees be deposited into a housing trust fund, and not be expended absent COAH approval. The Borough's willful or negligent failure to segregate the funds for affordable housing purposes provides no

support for its contention that the $250,000 development fee was not intended for such purposes.

While summary judgment is often inappropriate when discovery has not been completed and "critical facts are peculiarly within the moving party's knowledge," Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988) (quoting Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981)), the Borough has not shown that further discovery would have changed the relevant facts. See Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977). In fact, the Borough was uniquely positioned to provide evidence of the purpose for which it received $250,000 from 55 Locust, yet it completely failed to do so. Accordingly, the Borough will not be heard to complain about the granting of summary judgment because of incomplete discovery.

The Borough's argument that AvalonBay's action was time-barred merits little discussion. The Borough first contends that AvalonBay violated Rule 4:69-6(a) by filing its complaint more than forty-five days after the right to review accrued and, consequently, the trial court should have denied AvalonBay's motions and dismissed its complaint. Pursuant to Rule 4:69-6(a), generally an action in lieu of prerogative writs must be filed

within forty-five days "after the accrual of the right to the review, hearing or relief claimed."[1] "The Rule does not define by its terms when rights 'accrue' to trigger the forty-five-day period, but instead leaves the question of accrual to substantive law." Harrison Redev. Agency v. DeRose, 398 N.J. Super. 361, 401 (App. Div. 2008) (citations omitted).

Here, the parties continued to negotiate their differences in May and June 2014. It was not until a June 16, 2014 telephone conversation between counsel that AvalonBay concluded that further discussions would be futile. AvalonBay filed its complaint on July 8, 2014, clearly well within the forty-five-day limitation period prescribed by Rule 4:69-6(a).

The Borough alternatively argues that AvalonBay's action is barred by the six-year statute of limitations that applies to contract actions. N.J.S.A. 2A:14-1. Specifically, the Borough contends the six-year limitations period began to run on December 21, 2006, the date 55 Locust paid its development fee to the Borough, and thus expired well before AvalonBay filed its complaint in July 2014. However, the present action does not assert a claim for breach of contract. Rather, it is an action in lieu of

[1] The time for filing the complaint may, however, be enlarged pursuant to Rule 4:69-6(c) "where it is manifest that the interest of justice so requires."

prerogative writs, which is governed by the forty-five-day time limit embodied in Rule 4:69-6. See Mason v. City of Hoboken, 196 N.J. 51, 68-69 (2008).

The Borough further argues that (1) the doctrines of waiver, laches, and estoppel preclude AvalonBay's entitlement to an affordable housing credit, and (2) on reconsideration, the trial court abused its discretion in concluding that AvalonBay had standing to claim the credit. We find insufficient merit in these arguments to warrant additional discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.