SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3531-15T4

LEMAD CORPORATION,

Plaintiff-Respondent/
Cross-Appellant,

v.

IRENE HONACHEFSKY, JIMMY AGUIRRE and AUDREY BETH AGUIRRE,

Defendants,

and

WILLIAM B. HONACHEFSKY and BONITA E. HONACHEFSKY,

Defendants-Appellants/
Cross-Respondents.

IRENE HONACHEFSKY,

Third-Party Plaintiffs,

and

WILLIAM B. HONACHEFSKY and BONITA E. HONACHEFSKY,

Third-Party Plaintiffs-
Appellants/Cross-Respondents,

v.

CHARLES M. URBAN in his individual capacity, and DANIEL W. SOLES,

Third-Party Defendants.

Submitted October 17, 2017 — Decided November 14, 2017

Before Judges Leone and Mawla.

On appeal from State of New Jersey, Chancery Division, Morris County, Docket No. C-000030-08.

William B. Honachefsky and Bonita E. Honachefsky, appellants/cross-respondents pro se.

Martin & Tune, LLC, attorneys for respondent/cross-appellant (Daniel B. Tune, of counsel and on the brief; William E. Reutelhuber, on the briefs).

PER CURIAM

This matter concerns a dispute over an easement between the plaintiff Lemad Corporation (Lemad) and defendants William and Bonita Honachefsky (the Honachefskys), which the parties have been disputing since 2004. In 2012, after numerous pretrial motions and lengthy discovery the parties settled their dispute. Thereafter, the Honachefskys appealed from the order denying their motion to vacate the settlement agreement, which we affirmed in Lemad Corp. v. Honachesfky, No. A-5582-12 (App. Div. October 24, 2014). The terms of the settlement required the Honachefskys to establish the new easement. When they failed to do so, Lemad

filed a motion to enforce litigant's rights pursuant to Rule 1:10-3. The Honachefskys filed a cross-motion to declare the settlement agreement null and void. Both parties also sought counsel fees.

The trial court issued orders on March 11, 2016 and May 10, 2016, holding the Honachefskys in violation of litigant's rights and awarding Lemad counsel fees, respectively. The Honachefskys appeal from both orders, and Lemad cross-appeals from the order granting counsel fees. We affirm.

I.

The following facts are taken from the record. Lemad purchased lot 6 on block 68 in Clinton Township in 2004. At that time, Irene Honachefsky owned a single-family home on lot 4; the Honachefskys owned a single-family home on lot 4.01; and Jimmy and Audrey Beth Aguirre owned a single-family home on lot 5. The Honachefskys' and Aguirres' properties are only accessible by way of a ten foot wide easement, bearing a road called Echo Lane, which runs from those properties through lot 6 to the public street. The easement was deeded to Irene Honachefsky and her late husband in 1956. Lemad purchased lot 6 subject to the easement by lots 3, 4, 4.01, and 5 for ingress and egress.

After purchasing lot 6, Lemad obtained a survey of the property and discovered Echo Lane had branched out beyond the original deeded description. As a result, Lemad suggested an

agreement between it and the Honachefskys regarding the maintenance of Echo Lane. The Honachefskys claimed adverse possession over any portion of Echo Lane not described in the original deeded easement.

From August 2007 until April 2012, Lemad and the Honachefskys engaged in litigation, and following discovery each filed summary judgment motions. Before oral argument of their motions, the parties engaged in settlement discussions and reached an agreement. The terms of the settlement agreement placed on the record were as follows:

> Lemad Corporation which owns the property that is encumbered by an existing ten-foot recorded easement, [] will consent to draft a new easement. That easement will be 14-foot in width. The 14-foot width will run from the northerly property line of Lemad and will extend out 14 feet from that property line for the entire length of the Lemad property. Lemad will flag that new easement area. It will draw the draft easement and the metes and bounds descriptions for the same. The easement . . . will be a nonexclusive access easement. It will inure to the benefit, and run with the land of both Mrs. Honachefsky's track, Mr. and Mrs. Honachefsky's track; and the successors in interest to the Aguirre property who is Mrs. Fernandez and one other person. . . . So the ten-foot easement will be expanded to 14 feet. It will be delineated, it will be described by metes and bounds in an easement that will be recorded . . . in the Hunterdon County Clerk's office. And it will have the nonexclusive right of all parties who are beneficiaries to the easement to maintain the roadway within the easement area,

> including the grading, putting down the stone, and trimming brush, grass and weeds as necessary to maintain the adequate width of the easement . . . [and t]he integrity of the easement area. . . . The 14-foot easement will include the disputed 4.59 feet that is basically between both Honachefskys' properties and the current Echo Lane; there was a gore or a disputed area there. That will now be granted as part of an easement. Which, they can do with the entire length of the easement whatever maintenance, putting down of stone, berming as necessary to maintain the integrity of the roadway for all parties' benefits.
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> [Lemad Corp., supra, slip op. at 3-5]

Thereafter, the Honachefskys agreed to inform the prosecutor they no longer wished to pursue criminal charges they had filed against Lemad's principal shareholder, and agreed they would pay up to $2000 towards establishing the new easement. Finally, the parties agreed to have the easement marked, recorded, and improved within eight months.

The Honachefskys moved to vacate the settlement agreement. The trial court denied the Honachefskys' motion, finding they were fully aware of the binding nature of the settlement agreement and had not indicated any hesitancy or lack of understanding surrounding the agreement. As we noted above, the Honachefskys appealed from the order denying their motion and sought to invalidate their settlement.

We affirmed the court's order, and held the trial court "painstakingly questioned all parties to ensure that they understood and agreed to the terms as stated on the record, and that they wanted to place the settlement on the record that day." Id. at 5. We noted all essential terms of the settlement agreement were present, there was "no fraud, misrepresentation or other misdeeds that warrant vacating the settlement agreement," and merely because "William and Bonita [Honachefsky] have now second guessed their entry into the settlement agreement does not warrant its reversal." Id. at 11.

After our affirmance, Lemad recorded the settlement agreement on January 8, 2015. Lemad then sent the Honachefskys a notice on April 27, 2015, regarding their obligation to make the improvements to Echo Lane. Lemad issued a second notice on June 3, 2015. A final notice was sent on July 7, 2015, by certified and first class mail, which was returned unclaimed on August 7, 2015.

Because the Honachefskys failed to complete any work on Echo Lane, Lemad filed a motion to enforce litigant's rights pursuant to Rule 1:10-3. The Honachefskys filed a cross-motion to declare the settlement null and void, have it removed from their chain of title, and requested counsel fees. The trial court entered a March 11, 2016 order finding the Honachefskys in violation of the settlement agreement. The court gave Lemad limited power of

attorney to begin the work on the easement. The court ordered the Honachefskys to pay for the bid/estimate from the contractor hired by Lemad, pay $1000 for the cost of any applications and permits, and reimburse Lemad any additional necessary funds within two days of notice. The trial court also ordered the Honachefskys to pay counsel fees.

II.

We begin with our standard of review. We review a trial court's enforcement of litigant's rights pursuant to Rule 1:10-3 under an abuse of discretion standard. Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011). Generally, Rule 1:10-3 is "a civil proceeding to coerce the defendant into compliance with the court's order." Pasqua v. Council, 186 N.J. 127, 140 (2006) (quoting Essex Cty. Welfare Bd. v. Perkins, 133 N.J. Super. 189, 195 (App. Div.), certif. denied, 68 N.J. 161 (1975)). As such, a trial judge's exercise of discretion will not be disturbed absent a demonstration of abuse of discretion resulting in injustice. Cunningham v. Rummel, 223 N.J. Super. 15, 19 (App. Div. 1988). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-

Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

Additionally, the imposition of counsel fees in connection with a Rule 1:10-3 motion also is reviewed under an abuse of discretion standard. See Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (holding a counsel fee award "will not be reversed except upon a showing of an abuse of discretion."). "An allowance for counsel fees is permitted to any party accorded relief following the filing of a motion in aid of litigant's rights, R[ule] 1:10-3." Barr, supra, 418 N.J. Super. at 46.

III.

The Honachefskys argue the trial judge erred by granting Lemad's motion because: (1) Lemad was attempting to enforce an agreement which was not the original intent of the parties; (2) the agreement did not contemplate obtaining permits or applications for the construction of the easement; and (3) the Honachefskys had only agreed to pay for repairs to the easement in the amount of $2000. We conclude these arguments lack merit and are contradicted by the record, settlement agreement, and our previous determination in this matter.

Indeed, the trial court found "[t]he easement is fourteen feet, the easement is the duration of the Plaintiff's property, and the Defendant pays for it[.]" This finding was based on the

trial court's review of the record of the original settlement proceedings and a review of our first decision. In our decision, we noted "[a]s to the cost of the establishment of the new easement, the settlement specifically provided that all parties who are beneficiaries to the easement have the nonexclusive responsibility to maintain the roadway." Lemad, supra, slip op. at 11. We explained that the parties' settlement required the Honachefskys to bear both the cost and the responsibility to establish the new easement. Id. at 11-12.

The Honachefskys' obligation to establish the new fourteen foot wide easement was defined in the settlement agreement based on William Honachefsky's representation he could create the easement himself, given his skill and expertise as a surveyor. Id. at 5. At the time of the settlement, the trial court specifically addressed his role in establishing the easement:

> Mrs. B. Honachefsky: Are we going to take the whole financial burden then?
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> The Court: Well, Mr. Honachefsky said that he thought he could do it for $2,000, which is, you know a small amount to pay for what you are getting in return which is the 4.59 feet. The extra footage in the easement, as well as your ability to grade the property so it doesn't flow on your property or your mother's property or anybody else's property anymore. And Mr. Honachefsky I think knows how to do this.

> Mrs. B. Honachefsky: Is that what you want, Bill?
>
> Mr. W. Honachefsky: That is fine.
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> [Id. at 11-12.]

Since the Honachefskys agreed to do the work and bear the costs of establishing the easement, the trial court correctly concluded their failure to do so was a violation of litigant's rights.

Additionally, the trial judge's decision to grant Lemad limited power of attorney to establish the new easement on the Honachefskys' behalf, and reimburse Lemad for the costs of doing so, including the permits, was not an abuse of discretion. The Supreme Court has stated "[t]he scope of relief in a motion in aid of litigants' rights is limited to remediation of the violation of a court order." Abbott v. Burke, 206 N.J. 332, 371 (2011). The remedy fashioned by the trial court here was precisely what was necessary to achieve the goals of the parties' settlement.

IV.

The Honachefskys also argue Rule 4:50-1 applies, which they assert "provides relief from judgments in situations in which, were it not applied, a grave injustice would occur." They claim the trial court's orders are "extremely contrary to the unanimously acknowledged real intentions of the April 13, 2012 settlement, which if allowed to stand, would result in an unjust, one-sided

unconscionable contract totally in favor of the [r]espondent." We disagree.

The record demonstrates the Honachefskys' cross-motion in the trial court did not seek relief from the settlement agreement under Rule 4:50-1. Instead, they raise this argument for the first time on appeal. Relief under Rule 4:50-1 must first be sought in the trial court. It does not constitute a basis for relief on appeal where it was not sought in trial court. Indeed,

> It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest."
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> [Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960)).]

For these reasons, we decline to address this claim.

V.

Lastly, we address both parties' arguments challenging the trial court's counsel fee determination. The Honachefskys claim the trial judge's orders awarding counsel fees were unwarranted. Lemad claims the award was too little and the trial court should have made it whole by granting all counsel fees and costs incurred, which totaled $11,113. We disagree on both accounts.

Rule 1:10-3 provides "[t]he court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule." "[T]his rule provision allowing for attorney's fees recognized that as a matter of fundamental fairness, a party who willfully fails to comply with an order or judgment entitling his adversary to litigant's rights is properly chargeable with his adversary's enforcement expenses." Pressler & Verniero, Current N.J. Court Rules, cmt. 4.4.5 on R. 1:10-3 (2018). Therefore, a counsel fee award "will not be reversed except upon a showing of an abuse of discretion." Packard-Bamberger, supra, 167 N.J. at 444.

The trial court found an award of counsel fees appropriate. The judge stated "I will grant counsel fees because I think the issues were appropriately raise[d] by the [p]laintiff. The [d]efendants have an obligation to honor it. Coming here to . . . me to modify something that's been affirmed by the Appellate Division is not appropriate." Thereafter, in the May 10, 2016 order, the trial court fixed the amount of counsel fees due at $2000, and provided further reasoning for doing so. The court stated:

> Fees are awarded not due to any bad faith. The estimate of $2000 – was not set forth as the cap on the costs of relocating the easement. The reasonable inference from the settlement is that defendants would at their

> cost relocate the easement. That they resisted causes this award of counsel fees. (Per R[.] 1:10-3)[.] The hourly rate and services rendered are reasonable and appropriate. Given the facts presented by both parties, the court concludes $2000 is the appropriate amount.

These findings clearly demonstrate the judge's careful consideration of the relevant factors in fashioning the counsel fee award. We can discern no abuse of discretion.

Affirmed.