SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1531-16T3

MARGIT C. NOVAK,

Plaintiff-Appellant,

v.

COUNTY OF WARREN, a duly organized County in the State of New Jersey,

Defendant-Respondent.

Submitted February 12, 2018 – Decided March 13, 2018

Before Judges Ostrer and Rose.

On appeal from Superior Court of New Jersey, Law Division, Warren County, Docket No. L-0079-14.

Benbrook & Benbrook, LLC, attorneys for appellant (Kevin P. Benbrook, on the brief).

Bell & Shivas, P.C., attorneys for respondent (Joseph J. Bell, of counsel and on the brief; Paula Ortega and Brian C. Laskiewicz, on the brief).

PER CURIAM

Plaintiff Margit C. Novak appeals from the trial court's November 7, 2016 order denying reconsideration of a June 28, 2016

order granting defendant County of Warren's motion for summary judgment and denying plaintiff's cross-motion for summary judgment. In so ruling, the trial court found an indemnity agreement between the parties barred plaintiff's complaint for inverse condemnation. Having considered defendant's arguments in light of the record and controlling law, we affirm.

I.

The essential facts are undisputed. In 1983, plaintiff and her husband, Raymond Novak,[1] sought approval from the Hope Planning Board and the Warren County Planning Board for subdivision of a sixty-nine acre[2] tract of land in Hope Township. Approval by the Warren County Planning Board ("Board") was required because the property fronted County Route 609 ("CR 609"). Plaintiff sought to subdivide the lot into twelve[3] residential building lots, including Lot 705, which plaintiff retained and currently owns.

Plaintiff sought driveway access from Lot 705 to CR 609. Prior to granting subdivision approval, the Board suggested

[1] Because Raymond Novak is now deceased, and the action was filed solely by Margit C. Novak, we refer to plaintiff in the singular.

[2] The record contains variations in the size of the property, ranging from sixty-two acres to sixty-nine acres.

[3] The record contains references to subdivision of the property into fourteen lots, but plaintiff maintains the property was subdivided into twelve lots.

plaintiff consider access from a nearby municipal street instead of CR 609. Plaintiff rejected that suggestion. Thus, the lot's only road frontage is CR 609. However, driveway access from Lot 705 to CR 609 necessitates access through neighboring Lot 1000 in order to comply with sightline standards. The Board required that plaintiff obtain an easement from the owner of Lot 1000, but plaintiff's then-counsel argued an easement was unnecessary.

Concerned with the potential for future litigation, as a condition precedent to subdivision approval, defendant required plaintiff to execute an indemnity agreement. Executed on February 24, 1989, the indemnity agreement states, in pertinent part:

> WHEREAS, proposed Lot 705 . . . will necessitate the crossing of a small portion of Lot 1000 . . . which lands are not in the name or title of [plaintiff] and which lands must be crossed in order to afford driveway access or ingress and egress to and from . . . [CR] 609 to the said proposed Lot 705 . . . and
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> WHEREAS, . . . the Warren County Planning Board . . . will grant its approval to [plaintiff] and in particular will interpose no objections to [plaintiff] having access to . . . [CR] 609 from proposed Lot 705 . . . upon provision that [plaintiff] is willing to defend, indemnify and hold harmless [defendant] from any and all claims of whatever nature arising out of the approval of the proposed access over the said Lot 1000 . . . and
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> WHEREAS, [plaintiff] wishes to express . . . agreement to defend and indemnify [defendant]

> as a condition of obtaining Warren County Planning Board approval;
>
> NOW, THEREFORE, it is hereby agreed as follows:
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> 1. [Plaintiff] hereby agrees [to] save, indemnify and hold [defendant] harmless from any claim for action whether in law or equity for loss, liability, expense or damage made by any party against [defendant], its employees and agents, arising out of or from driveway access over and across . . . Lot 1000 to [CR] 609. . . .

At the time of the subdivision approval, defendant's Development Review Regulations required a minimum sight distance of three hundred feet for a driveway opening permit on CR 609. Driveway access applications were also required to comply with other design specifications for driveway grade, storm water runoff, and vehicle turnaround. Following approval, several standards changed, including: driveway sight distance standards in 1999 and 2007; storm water management standards in 2004; and septic design standards in 2012 ("subsequent standards"). The subsequent standards reflected new safety data and "recommendations for protection of the public health, safety and welfare."

In 2004, fifteen years after defendant approved the subdivision, plaintiff retained Mace Consulting Engineers ("MCE") and filed an application for a driveway access permit with the

Board. MCE's proposed plans for the driveway substantially altered the 1989 approval, and were inconsistent with defendant's subsequent standards and the 1989 requirements. Specifically, MCE's plan proposed a fifteen percent slope for the driveway.

Defendant's engineering department did not immediately reject plaintiff's application. Rather, in correspondence and telephone calls during the following three years, the engineering department repeatedly requested information it deemed necessary to approve plaintiff's proposed 2004 plan. On several occasions, the engineering department advised MCE that plaintiff's application was insufficient. Following a meeting with defendant's engineering department, MCE advised plaintiff, by correspondence dated May 24, 2006, that defendant's representative stated, "because of the [i]ndemnity [a]greement that was part of the subdivision of this lot, [defendant] had no obligation to relax [its] design standards." MCE also advised plaintiff of the option to purchase a portion of Lot 1000 to meet defendant's sightline requirements. It is unclear from the record whether plaintiff specifically approached the owner of Lot 1000, or assumed he would not grant an easement voluntarily. Defendant's investigation revealed, however, that in March 2016 the owner of Lot 1000 was willing to "entertain selling a piece of the property or a lot line adjustment."

By correspondence dated October 31, 2006, plaintiff's then-counsel notified MCE of the potential for legal action against defendant or the owner of Lot 1000 in order to gain access to CR 609. By correspondence dated January 23, 2007, defendant's engineering department notified plaintiff's attorney that the sight distance issue could be resolved if the proposed driveway were moved approximately eight feet easterly.

For the following six years, plaintiff had no contact with defendant. In 2013, plaintiff retained new legal and engineering professionals to resubmit her application for driveway access to Lot 705. However, on October 25, 2013, defendant rejected plaintiff's request for a site visit, and indicated it would not issue plaintiff a driveway permit.

In March 2014, plaintiff filed the present complaint for inverse condemnation against defendant, alleging defendant's failure to approve a driveway permit for Lot 705 created a complete lack of access, thereby eliminating all economic utility and constituted a regulatory taking of plaintiff's property without just compensation. In its answer, defendant asserted various defenses including, plaintiff's failure to exhaust administrative remedies and failure to commence her claim within the appropriate statute of limitations period.

Following discovery, the parties filed cross-motions for summary judgment. In a cogent statement of reasons, the motion judge found

> [t]he plain language of the agreement contemplates the potential necessity of obtaining an easement over and across Lot 1000 to provide driveway access to Lot 705. Though it may not have been certain at the time that such an easement would be necessary, and the parties may have even believed it would not, that is exactly the purpose of such an agreement, to replace uncertainty with assurances. Plaintiff agreed to hold [defendant] harmless for any action "arising out of or from driveway access over and across premises known as . . . Lot 1000 to [CR] 609." This is precisely the way in which plaintiff's claim arises. Plaintiff cannot achieve the necessary sight distance to obtain a driveway permit given the limited direct access that her property has to [CR] 609. If plaintiff were able to obtain an easement from the current owner of Lot 1000, allowing the driveway to run over and across Lot 1000 and utilizing part of the frontage on [CR] 609 from that neighboring lot, then plaintiff could achieve the requisite sight distance, obtain her driveway permit, and have driveway access to Lot 705, eliminating her claim for inverse condemnation. Therefore, the [c]ourt finds that the [indemnity a]greement applies to relieve defendant of liability.

Plaintiff filed a motion for reconsideration of the court's order, pursuant to Rule 4:49-2. In support of her motion, plaintiff filed a certification of Norton B. Rodman, including five letters exchanged between the parties in mid to late 1988.

At the time of his certification, Rodman was an engineer with the Township of Hope and the Township's planning board for forty-one years, and had reviewed plaintiff's subdivision application.

It is undisputed that the documents submitted to support her motion for reconsideration were available to plaintiff prior to the court's decision regarding the cross-motions for summary judgment. During oral argument before the motion judge, plaintiff's counsel explained that, after the court's decision on the underlying motions, he met with Rodman, "reviewed his files, [and] submit[ted] the additional documentation for the [c]ourt [because he] . . . thought it was important that [the court] see the entire chain of correspondence." Plaintiff's counsel stated further he had not thought initially "it . . . had any particular application or relevance to the issue, but given . . . [the court's] decision . . . [it was] incumbent upon [him] to give it that context." Accordingly, he "just did [not] see the actual need to address [the summary judgment argument] beyond the documents [he] had submitted."

The trial judge denied the reconsideration motion, finding the documents submitted in support of plaintiff's motion were available at the time of his decision on the cross-motions for summary judgment. The judge found further the additional evidence

did not persuade him that he would have reached a different conclusion had he considered it.

Plaintiff appeals, contending the court misconstrued the indemnity agreement by requiring her to obtain an easement to construct a driveway from Lot 705 to CR 609. Specifically, plaintiff argues the plain language of the indemnity agreement, and the correspondence supporting her motion for reconsideration, indicate clearly that an easement is not required to obtain a driveway permit.

II.

A.

A trial court's order on a motion for reconsideration will not be set aside unless shown to be a mistaken exercise of discretion. Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016) (citing Fusco v. Bd. of Educ., 349 N.J. Super. 455, 462 (App. Div. 2002)). Reconsideration should only be granted in those cases in which the court had based its decision "upon a palpably incorrect or irrational basis," or did not "consider, or failed to appreciate the significance of probative, competent evidence." Ibid. (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

A motion for "[r]econsideration cannot be used to expand the record and reargue a motion." Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008). It "is designed to seek review of an order based on the evidence before the court on the initial motion, not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Ibid. (citation omitted); Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (finding that a motion for reconsideration "is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion"). A court may "in the interest of justice" consider new evidence on a motion for reconsideration only when the evidence was not available prior to the decision by the court on the order that is the subject of the reconsideration motion. D'Atria, 242 N.J. Super. at 401; see also Palombi, 414 N.J. Super. at 289 (finding that facts known to party prior to entry of an original order did not provide an appropriate basis for reconsideration); Fusco, 349 N.J. Super. at 462 (finding the party not entitled to reconsideration where evidence was available but not submitted to the court on the motion for the original order).

Plaintiff failed to make such a showing here. Dissatisfied with the trial court's decision, and at least three months after discovery ended, plaintiff's counsel met with Rodman. Having

reviewed plaintiff's subdivision application, Rodman was known to plaintiff since the 1980s. Further, the correspondence submitted in support of plaintiff's reconsideration motion was not "new evidence" having been exchanged between the parties during 1988 and 1989, and available to plaintiff prior to the court's decision regarding the cross-motions for summary judgment. Conceding he believed he had addressed the summary judgment cross-motions with the documents submitted, plaintiff's counsel seeks to "cure" what he now perceives to be "an inadequacy in the motion record." Asterbadi, 398 N.J. Super. at 310. Clearly, the identity of Rodman, and the correspondence submitted in support of plaintiff's reconsideration motion, were available prior to the close of discovery and the court's decision regarding the cross-motions for summary judgment. D'Atria, 242 N.J. Super. at 401.

B.

Moreover, when reviewing the grant of summary judgment, we analyze the decision applying the "same standard as the motion judge" pursuant to Rule 4:46-2(c). Globe Motor Co. v. Iqdalev, 225 N.J. 469, 479 (2016) (quoting Bhaqat v. Bhaqat, 217 N.J. 22, 38 (2014)).

> That standard mandates that summary judgment be granted "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."
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> [Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)).]

"To defeat a motion for summary judgment, the opponent must 'come forward with evidence' that creates a genuine issue of material fact." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012)). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted). "When no issue of fact exists, and only a question of law remains, [we] [afford] no special deference to the legal determinations of the trial court." Templo Fuente, 224 N.J. at 199 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

An indemnity agreement is interpreted in accordance with general rules of contract construction. Ramos v. Browning Ferris Indus., Inc., 103 N.J. 177, 191 (1986). "The interpretation of a contract is subject to de novo review by an appellate court." Kieffer v. Best Buy, 205 N.J. 213, 222 (2011). No special deference is afforded to the "trial court's interpretation of the

law and the legal consequences that flow from established facts." Manalapan Realty, 140 N.J. at 378.

In determining the meaning of an indemnity provision, the clause "is to be strictly construed and not extended to things other than those therein expressed." Longi v. Raymond-Commerce Corp., 34 N.J. Super. 593, 603 (App. Div. 1955) (citing George M. Brewster & Son, Inc. v. Catalytic Constr. Co., 17 N.J. 20, 27-28 (1954)). "If the meaning of an indemnity provision is ambiguous, the provision is 'strictly construed against the indemnitee.'" Keiffer, 205 N.J. at 223 (quoting Mantilla v. NC Mall Assocs., 167 N.J. 262, 272 (2001)). An ambiguity exists where "the terms of the contract are susceptible to at least two reasonable alternative interpretations." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008) (citing Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997)). If, however, "the intent of the parties is evident from an examination of the instrument, and the language is unambiguous, the terms of the instrument govern." Rosen v. Keeler, 411 N.J. Super. 439, 451 (App. Div. 2010) (citation omitted).

Here, plaintiff contends the trial court erred in its interpretation of the indemnity agreement because its plain language, and the contemporaneous correspondence surrounding its execution, do not require her to obtain an easement from the owner

of Lot 1000 in order to be entitled to a driveway permit from defendant. She maintains that was not the purpose of the indemnity agreement. In its decision, the trial court specifically found that, although the parties may not have believed an easement was necessary, the plain terms of the agreement protect defendant from "any action 'arising out of or from driveway access over and across premises known as . . . Lot 1000 to [CR] 609.'"

An easement is defined as "a nonpossessory incorporeal interest in another's possessory estate in land, entitling the holder . . . to make some use of the other's property." Leach v. Anderl, 218 N.J. Super. 18, 24 (App. Div. 1987); see also Mandia v. Applegate, 310 N.J. Super. 435, 442-43 (App. Div. 1998); Kline v. Bernardsville Ass'n, Inc., 267 N.J. Super. 473, 478 (App. Div. 1993). Put simply, an easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land . . . for a specific limited purpose (such as to cross it for access to a public road)." Black's Law Dictionary 585-86 (9th ed. 2009) (emphasis added).

Here, the indemnity agreement provides, "proposed Lot 705 . . . will necessitate the crossing of a small portion of Lot 1000" which plaintiff does not own. Further, Lot 1000 "must be crossed in order to afford driveway access or ingress and egress to and from . . . [CR] 609 to the said proposed Lot 705." Clearly,

driveway access from Lot 705, across Lot 1000, to CR 609 would require plaintiff to "make some use of [another's] property." Leach, 218 N.J. Super. at 24. While the motion judge recognized, "[alt]hough it may not have been certain that such an easement would be necessary, and the parties may have even believed it would not, that is exactly the purpose of such an agreement, to replace uncertainty with assurances." In fact, the plain terms of the agreement require plaintiff to hold defendant harmless for any action "arising out of or from driveway access over and across . . . Lot 1000." As the trial court observed, "[t]his is precisely the way in which plaintiff's claim arises." Thus, the plain language of the indemnity agreement protects defendant from actions, including the present inverse condemnation action, involving access from Lot 705 to CR 609, in exchange for approval of plaintiff's subdivision application.

Moreover, although plaintiff executed the indemnity agreement in 1989, she did not seek a driveway permit until 2004 via an application that did not satisfy defendant's subsequent standards nor its 1989 requirements. When plaintiff failed to correct the 2004 plan, she took no further action until 2013, but again failed to conform to present standards or correct the deficiencies from her 2004 plan. We are not persuaded that these actions give rise to an action for inverse condemnation.

"In an inverse condemnation action, a landowner is seeking compensation for a de facto taking of his or her property." Greenway Dev. Co. v. Borough of Paramus, 163 N.J. 546, 553 (2000) (citation omitted). A property owner must be "deprived of all or substantially all of the beneficial use of the totality of his property" in order to bring a claim for inverse condemnation. Ibid. (citation and internal quotation marks omitted). Where the government "seizes property without first bringing a condemnation proceeding, the burden shifts to the individual to bring an action to compel condemnation, known as 'inverse condemnation.'" Klumpp v. Borough of Avalon, 202 N.J. 390, 406 (2010). It is well settled, however, that not every impairment in value establishes a taking. Karam v. Dep't of Envtl. Prot., 308 N.J. Super. 225, 235 (App. Div. l998). In an inverse condemnation action, plaintiff has the burden of demonstrating that the adoption of more stringent land use requirements and the denial of variance relief has effectively zoned the property "into inutility," see Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, 607 (1980), and deprived the property of all productive or beneficial use.

Here, prior to executing the indemnity agreement plaintiff was well aware of the issue in accessing CR 609 from Lot 705. That the Board suggested plaintiff consider access from a nearby municipal street, at least at the time of plaintiff's subdivision

application, militates against plaintiff's argument that Lot 705 is "landlocked" without access to CR 609. Further, it is unclear from the record whether plaintiff sought an easement from the owner of Lot 1000. At least in March 2016, the owner of Lot 1000 was willing to sell a portion of his property to plaintiff to effectuate access to CR 609. With at least two viable access alternatives, plaintiff has not demonstrated defendant's more stringent site requirements have effectively zoned her property "into inutility." Ibid.

C.

Although the trial court did not reach defendant's remaining arguments, we agree with defendant that the well-established doctrine of exhaustion of administrative remedies is appropriate here. See Curzi v. Raub, 415 N.J. Super. 1, 20-21 (App. Div. 2010); Borough of Haledon v. Borough of N. Haledon, 358 N.J. Super. 289, 301-02 (App. Div. 2003). Our Supreme Court has recognized the doctrine in the context of an inverse condemnation action. Griepenburg v. Twp. of Ocean, 220 N.J. 239, 260-61 (2015). Further, Rule 4:69-5 imposes a duty to exhaust administrative remedies before initiating actions at law "[e]xcept where it is manifest that the interest of justice requires otherwise." This requirement is "a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner

without preliminary interference from the courts." Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975). Hence, there is "a strong presumption favoring the requirement of exhaustion of remedies." Griepenburg, 220 N.J. at 261 (citations and internal quotation marks omitted).

Here, plaintiff has not submitted plans for the driveway permit since 2004. As such, defendant is unaware whether she has satisfied the sight distance requirement. Because she has not resubmitted a plan to the Board, plaintiff has not exhausted her administrative remedies.

We also conclude plaintiff's claim is precluded by the six-year statute of limitations period governing inverse condemnation claims. Klumpp, 202 N.J. at 409-10 (citing N.J.S.A. 2A:14-1). A cause of action for inverse condemnation claims "begins to accrue on 'the date the landowner becomes aware or, through the exercise of reasonable diligence, should have become aware, that he or she had been deprived of all reasonably beneficial use." Ibid. Here, plaintiff filed her complaint on March 10, 2014. Plaintiff was aware of her claim no later than 2004, when her proposed plan was deemed insufficient, through January 2007 when the final correspondence was sent from defendant's engineer to plaintiff's then-counsel regarding defendant's standards and permit procedures. At best, plaintiff's claim accrued in January 2007,

nearly seven years and two months before her complaint was filed. Therefore, her action is barred by the statute of limitations. N.J.S.A. 2A:14-1.

To the extent not specifically addressed herein, the parties' respective additional appellate arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.