SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5198-15T1

STATE OF NEW JERSEY, by the
COMMISSIONER OF TRANSPORTATION,

Plaintiff-Respondent,

v.

CHERRY HILL MITSUBISHI, INC.,
a New Jersey Corporation;
CHERRY HILL DODGE, INC.,
a New Jersey Corporation,

Defendants/Third-Party
Plaintiffs,

and

FOULKE MANAGEMENT CORPORATION,
a New Jersey Corporation,
d/b/a CHERRY HILL TRIPLEX,
CHERRY HILL DODGE, CHERRY HILL
KIA and CHERRY HILL MITSUBISHI,

Defendant/Third-Party
Plaintiff-Appellant,

v.

VICTOR AKPU, THE COMMISSIONER OF
THE DEPARTMENT OF TRANSPORTATION,

Third-Party Defendant.

Argued February 7, 2018 – Decided April 12, 2018

Before Judges Alvarez, Nugent, and Currier.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-3489-13.

Laura D. Ruccolo argued the cause for appellant (Capehart & Scatchard, attorneys; Laura D. Ruccolo, on the briefs).

Fredric R. Cohen and Nonee Lee Wagner, Deputy Attorneys General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Fredric R. Cohen and Nonee Lee Wagner, on the brief).

PER CURIAM

Defendant Foulke Management Corporation (FMC)[1] appeals from the July 27, 2016 final judgment ordering it to cease encroaching on the State's right-of-way (ROW) along certain portions of Route 70. The judgment also permitted the State, on notice to defendant,[2] to enter the property and mark out or set property lines per the State maps and surveys, and enjoined FMC "from

[1] On September 20, 2013, the trial court dismissed the named defendants with the exception of FMC. FMC's counterclaim against the State and State employees was dismissed on interlocutory appeal. State v. Cherry Hill Mitsubishi, 439 N.J. Super. 462, 466 (App. Div. 2015).

[2] In its complaint, the State sought as relief the ability to mark out and delineate the ROW as necessary. Apparently, initial efforts at staking out the property prior to the filing of this suit resulted in survey equipment being destroyed and the stake out being vandalized.

destroying, concealing or tampering with [the State's] equipment used to establish and demonstrate the property lines." After our review of the record and relevant legal principles, we affirm.

We glean the following facts from the transcripts of the several-day bench trial and documents in evidence. The initial inquiry regarding FMC's encroachment onto the State's ROWs——which consisted of parked cars and signage——was initiated by a call from a neighbor who was concerned about potential hazards to drivers on the roadway. FMC is the entity that operates the other three defendants: Cherry Hill Dodge, Cherry Hill Kia, and Cherry Hill Mitsubishi. The State's complaint was filed after the Department of Transportation's (DOT) investigation.

The ROWs in dispute are: .082 acres acquired from Charles W. Foulke, Jr. (Foulke) and Marcia Foulke, by deed dated November 22, 1989 (Parcel 89); .028 acres acquired from the Monday Night Corporation, whose corporate officers included the Foulkes, and Charles W. Foulke, III, on August 24, 1989 (Parcel 90); .061 acres and two slope easements acquired from the Estate of William G. Rohrer and William Sikora t/a Mardel Company, by deed dated July 20, 1992 (Parcel 87); and .014 acres and a slope easement acquired through condemnation proceedings, the declaration of taking being dated April 13, 1989 (Parcel 91). Parcels 89 and 91 are on the north side of Route 70, adjacent to the westbound lane. Parcels

87 and 90 are on the south side of Route 70, adjacent to the eastbound lane. Foulke is the current owner and lessor of the adjoining properties and a principal in FMC, the lessee.

The State introduced in evidence the deeds and the declaration of condemnation, which do not include metes and bounds descriptions. The documents instead refer back to general property maps (GPPM) depicting all the ROWs along the relevant sections of Route 70. The State also introduced the DOT's construction plans for the roadway and presented several witnesses, including John Rossi, a surveyor.

Rossi was qualified as an expert in transportation work and roadway design. He has worked for the DOT, the Port Authority, and the New Jersey Turnpike Authority. Rossi testified that the ROW line is ten feet from the curb in front of the three car dealerships; he plotted and cross-checked the legal descriptions using the GPPM and a baseline, centered in the roadway. He stressed the importance of carefully tracking the baseline, as the last Route 70 expansion widened the roadway. In the process of verifying the outline of each ROW parcel, Rossi's field crew located monuments from the original baseline dating back to the 1930s in the center of the roadway. Rossi checked his acreage calculations against the GPPM employing a computer program and using specified points and monuments. He was able to plot the

legal description in the transfer documents onto the GPPM. Rossi relied upon the transfer documents and GPPM confirmation process in order to draw the survey of the ROWs.

Victor Akpu, the DOT Commissioner, testified that the revised GPPM, the only one that the DOT could locate, is always a replica of the original updated with revisions, as every revision does not trigger the creation of a new map. The 1985 GPPM was not filed with Camden County.

FMC also presented the testimony of an expert licensed land surveyor. That witness testified that the original 1985 GPPM, which could not be located, was necessary in order to be able to accurately plot the ROWs. He agreed, however, that any revisions to the GPPM concerned only parcel 87 and that the size of even that ROW——.061 acres——is identical to that recited in the deed.

FMC also relied upon the plans and drawings of a professional engineer it had engaged five years earlier when constructing a sidewalk on Parcel 89. It is undisputed that the State issued the sidewalk permit for the work, even though the boundaries in those plans conflicted with the State ROW boundaries. Rossi opined that the sidewalk permit survey incorrectly depicted the 1985 ROW line because it used the 1931 map baseline calculations without taking into account the road expansion.

The DOT presented the testimony of the employee who issued the sidewalk permit. He relied upon the applicant's professional engineering plan and did not independently verify the accuracy of the survey submitted with it. The application was not more closely reviewed because it contained neither signage that might have impact on traffic visibility nor structures that would affect drainage.

At the beginning of the trial, FMC unsuccessfully moved to dismiss the complaint because the State had not named the owner of the land——Foulke——as a defendant, claiming that he was an indispensable party. See R. 4:28-1. The trial court deemed the proceeding to be "an enforcement action" against the tenant, not an action to quiet title against the owner. Although he would have to determine the ROW boundaries in order to decide whether encroachments existed within those boundaries, the only relief sought by the State was their removal.

The judge granted FMC's pretrial motion to exclude the GPPMs and construction maps as hearsay. He nonetheless admitted them during the trial, under the business record exception, N.J.R.E. 803(c)(6), and under N.J.R.E. 902(a), as "New Jersey public documents."

The judge also admitted Rossi's map delineating the ROWs based on the various underlying documents, the field surveying

work, and review of the transfer documents. The judge then found that FMC was indeed encroaching and granted the relief from which this appeal is now taken.

The judge described Rossi's credentials as "very strong," and found him "very credible." He accepted Rossi's ROW maps, relying upon his detailed description of the survey process and concluding that he was "one of the top people in the State of New Jersey in terms of highways," had great expertise in this area, and was "generally a credible witness." The judge also observed that the survey FMC submitted with the sidewalk application was simply "clearly wrong," and that the person who issued the sidewalk permit assumed the accuracy of the applicant's drawings, which was not unreasonable, but ultimately had no impact on the final decision in this case.

The judge viewed FMC's expert as lacking the "wealth and depth of experience" of the State's expert. Since the accuracy of the maps went essentially unchallenged, and Foulke's expert was less experienced than the State's, and his testimony unconvincing, the judge held that the State's ROW line was correct and accurate by a preponderance of the evidence. He enjoined FMC from encroachment, directed that the State place mark-outs as per Rossi's drawings, and instructed that any monuments be neither removed nor concealed.

Now on appeal, FMC raises the following points:

> I. THE COURT ERRED BY DETERMINING THE OWNERSHIP RIGHTS TO PROPERTY WITHOUT THE OWNER OF THE PROPERTIES, AN IND[I]SPENS[A]BLE PARTY, IN THE LITIGATION.
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> II. THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE P34b, P34c, P34d P-39, P-40, P41a, P41b, P41c WHICH CONSTITUTED INADMISSIBLE HE[AR]SAY.
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> III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT THE STATE OWNS THE PROPERTY AREA AT ISSUE AND THAT FMC WAS ENCROACHING.

I.

The State's authority to remove encroachments from its lands is found in N.J.S.A. 27:7-44.1, which states:

> [N]or shall any person enter upon or construct any works in or upon any State highway, except under such conditions and regulations as the commissioner may prescribe . . . . Whenever any encroachment may exist without warrant of law in any road when taken over as a State highway, the commissioner shall notify the Attorney General, who shall proceed to cause the same to be removed as by law provided.
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> Any such violation may be removed from any State highway as a trespass by a civil action brought by the commissioner in the Superior Court.

The exercise of that authority does not require Foulke's participation in the litigation as an indispensable party.

Rule 4:28-1 provides, in relevant part, that a person is an indispensable party if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest.

"There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not." Garnick v. Serewitch, 39 N.J. Super. 486, 496 (Ch. Div. 1956) (quoting Niles-Bement-Pond Co. v. Iron Moulders' Union, 254 U.S. 77 (1920).

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience" are indispensable parties.
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> [Garnick, 39 N.J. Super. at 496-97 (quoting Shields v. Barrow, 58 U.S. 129 (1855)).]

The DOT sought relief, as alleged in the complaint, solely with regard to trespass, not with regard to ownership. The trial judge framed his decision to mirror the causes of action in the complaint,

requiring property lines be established only for that purpose. It is self-evident that in order to determine an encroachment, boundaries must be established. Foulke was not the trespasser, however, although he has an interest in the company that was——FMC——and was no doubt fully aware of the litigation.

Foulke's absence from the litigation did not prevent full relief from being accorded to the State, and the relief the State obtained did not impact upon his property interest. The final judgment specifies that the decision was rendered "[w]ithout prejudice to the rights of non-party [Foulke]" with regard to fee ownership. Thus, Foulke's ownership interest was not implicated in this removal action.

The court did not err by, at the eleventh hour, refusing to dismiss the proceeding because Foulke had not been joined. In Foulke's absence, "complete relief" could be granted to the affected parties. See R. 4:28-1. And his ownership rights were specifically exempted from the effect of the judgment. See ibid.

II.

"A trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion." State v. Nantambu, 221 N.J. 390, 402 (2015) (quoting State v. Harris, 209 N.J. 431, 439 (2012)). Hearsay is simply an out-of-court statement offered for the truth of the matter it asserts. State v. Gore, 205 N.J. 363, 375 (2011) ("Our hearsay rules of evidence clearly provide that 'a

statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" (citation omitted)). N.J.R.E. 802 makes hearsay inadmissible, subject to exceptions as outlined in N.J.R.E. 803 and 804. A trial court's evidentiary rulings, such as whether the proponent of evidence has established that an item falls within the range of a hearsay exception, will be affirmed unless it was an abuse of discretion.

N.J.R.E. 803(c)(6), regarding records of regularly conducted business activities provides:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

FMC's argument that admission of the documents at issue violated the hearsay rule lacks merit. The judge admitted the GPPMs and constructions plans under the business records exception to the hearsay rule, and the expert's drawings as incidental to his testimony

pursuant to N.J.R.E. 703.[3] The judge also admitted the GPPMs and the construction plan maps as public documents under N.J.R.E. 902.

FMC's argument that the State failed to establish an adequate foundation for admission of the maps as business records warrants little discussion. The State presented four witnesses regarding the creation, recovery, storage, and use of the documents. The judge determined they were admissible under N.J.R.E. 803(c)(6) and admitted them under that rule; there is nothing unreasonable in the judge's exercise of discretion. That there may have been some question as to the identity of the creator of the GPPMs, and whether an original was available, is not relevant to the fact that these were business records maintained by the State. The judge admitted the construction plan maps on the same basis as the GPPMs——that they were business records maintained by the State. That too was a reasonable exercise of discretion.

The admission of Rossi's surveys was also proper. He prepared a report, survey, and drawings after extensive study of other documents as well as the actual Route 70 area. Since the judge found

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[3] N.J.R.E. 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

him to be a well-qualified and credible expert, they too are admissible.

It has been frequently said that an appellate court must uphold the factual findings and credibility determinations of the trial court so long as they are based upon "sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007). Further, the court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Johnson, 42 N.J. 146, 161 (1964). The judge's factual findings and credibility determinations are supported by the record, and his rulings based on his feel for the case.

Lastly, FMC asserts that under New Jersey's map filing law, the DOT failed to file the GPPM with the Camden County Clerk's Office. First, even assuming there was a failure to file, that failure to file did not make the documents hearsay or render Rossi's reliance upon them improper. Furthermore, the definition of maps was not expanded by N.J.S.A. 46:26B-1 until 1998. At the time these maps were first generated, the State was not obligated to file them.

The trial court's findings should only be disturbed if they are so clearly mistaken "that the interests of justice demand intervention and correction." Id. at 162. The court "is not obliged to defer to clearly mistaken findings——findings that are not supported by sufficient credible evidence in the record." State v.

Gibson, 218 N.J. 277, 294 (2014). The judge's evidentiary rulings in this case were unobjectionable, falling well within the boundaries of the exceptions to the hearsay rules and well supported by the record.

III.

Finally, FMC argues that the final judgment was not supported by the evidence, and urges us to exercise original jurisdiction and decide the matter in its favor. We repeat, our standard of review of a trial court's fact-finding is deferential. Given the substantial support in the record for the judgment the court issued, and evidentiary rulings that were reasonable, the exercise of original jurisdiction is not warranted.

Affirmed.