SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1175-19

PATERSON HOUSING AUTHORITY,

Plaintiff-Respondent,

v.

SUNSHINE LEARNING CENTER and PARADISE BEVERAGE, LLC,

Defendants-Appellants.

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Submitted May 31, 2022 – Decided June 15, 2022

Before Judges Sumners and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. DC-007940-19.

De Marco & De Marco, attorneys for appellant (Michael P. De Marco, on the briefs).

Rogut McCarthy, LLC, attorneys for respondent (Patrice E. Hobbs, on the brief).

PER CURIAM

Defendants Sunshine Learning Center (Sunshine) and Paradise Beverage, LLC (Paradise) (collectively defendants) appeal from the October 7, 2019 Special Civil Part order, ejecting them from using parking spaces for their patrons on property owned by plaintiff Paterson Housing Authority. The judge invoked jurisdiction under Rule 6:1-2(a)(4) over plaintiff's summary action for the possession of its real property and determined defendants have no colorable claim of title or possession pursuant to N.J.S.A. 2A:35-1 and 39-1. For the reasons that follow, we affirm.

I.

We derive the following facts from the record. Plaintiff is the undisputed record owner of real property known as Riverside Terrace Development, 416-452 5th Avenue, located in the City of Paterson (City). The property is designated as block 2507, lot 13 on the City's tax maps. Paradise is the undisputed record owner of the real property known as 410-414 5th Avenue in the City and designated on the tax maps as block C0423, lot 2. Sunshine has the same ownership as Paradise, is a tenant at defendants' property, and operates a daycare center. The parties' properties abut one another.

Plaintiff has been a public housing agency since 1951, and provides more than 300 units of public housing to residents of the City. On October 26, 1951,

plaintiff and the Department of Housing and Urban Development (HUD) entered into a Declaration of Trust, which was subsequently amended on December 7, 1951. The Amended Declaration states in relevant part that plaintiff "will develop and operate low[-]income housing on Riverside Terrace and [plaintiff] will maintain unencumbered ownership of the property." Due to age and environmental related issues, plaintiff's property now requires redevelopment. Consequently, plaintiff sought and obtained approval from HUD for the demolition and redevelopment of its property to create more low-income and senior housing for residents of the City. Plaintiff wants to redevelop the entirety of its property, including the land known as Plesinger Place—a small street situated on its property—which defendants, and members of the public, have used for parking and drop-off purposes for a period of time.

Nadar Ghatas and Mamdoh A. Hana have owned defendants' property for over fifteen years. They acquired the property on June 24, 2004, from the Dye Workers Home, Inc., which previously utilized the property as a union hall. Ghatas was a member of the union and was familiar with the use of the property and the surrounding areas prior to obtaining ownership in 2004. On December 1, 2005, Ghatas and Hana conveyed title of their property to Paradise, an entity they had formed.

The present dispute in the matter under review arises from the use of five parking spaces located on Plesinger Place. Defendants regularly used and provided parking spaces on Plesinger Place throughout their entire time as owners of their property for their patrons. On November 10, 2005, the City's Board of Adjustment recognized defendants' use of these parking spaces:

> There are also [seven] spaces on-site to be used as the drop[-]off of the children and customers of the laundromat.[1] There are also [five] head-on spaces on [Plesinger] Place and [two] parallel spaces along 5th Avenue. There is no restriction in the parking along [Plesinger] Place and no designation that it belongs or [is] connected to the housing development.

Defendants allege the dye workers had used the parking spaces on Plesinger Place during their ownership, which preceded defendants' and plaintiff's ownership.

On May 9, 2019, plaintiff's counsel sent a cease-and-desist letter to defendants demanding they discontinue their use of Plesinger Place. On June 11, 2019, plaintiff's counsel sent a second letter to Ghatas again demanding defendants cease their use of Plesinger Place. In the June 11 letter, plaintiff's counsel noted if defendants did not respond by June 13, 2019, a fence would be

[1] An entity known as Best Wash Laundromat, LLC, which is under the same ownership as Paradise and Sunshine, operates a laundromat at defendants' property.

installed encircling the property to allow plaintiff to begin its redevelopment. Finally, on June 25, 2019, plaintiff's counsel sent an email to defendants' counsel summarizing the efforts previously made to contact defendants about Plesinger Place. However, defendants refused to vacate and cease their use of Plesinger Place.

On August 9, 2019, plaintiff commenced a summary action by way of an order to show cause and a verified complaint seeking a writ of possession against defendants. The application was supported by the cease-and-desist letter and other documented communications between the parties. On September 6, 2019, defendants filed an answer to plaintiff's verified complaint, a brief, and a certification of Ghatas, their managing member.

On October 7, 2019, the trial court conducted oral argument on the matter. Following arguments, the court rendered an oral decision that day granting the relief sought by plaintiff and ordering defendants to vacate Plesinger Place.

The trial court determined:

> Plaintiff is a public entity who uses its property for [a] public purpose, and there is no dispute that [p]laintiff has title to the property at issue. Plaintiff is seeking to eject [d]efendants from the premises pursuant to [N.J.S.A.] 2A:35-1. Defendants seek to dismiss the action on the ground that it cannot be heard in the Special Civil Part. Rule 6:1-2A(4) states, quote, "The following matters shall be cognizable in the

Special Civil Part, Subsection [four], summary actions for the possession of real property pursuant to [N.J.S.A.] 2A:35-1 et [seq.] where the defendant has no colorable claim of title or possession pursuant to [N.J.S.A.] 2A:39-1," et seq.

Defendants cite to Marder v. Realty Construction [Co.], 43 N.J. 508 (1964) in which a plaintiff brought an action under [N.J.S.A.] 2A:35-1 after the defendant quote, "Caused snow to be shoveled from its driveway onto [p]laintiff's strip, caused automobiles to be parked on it, and placed [tr]ash cans on the sidewalk in front of the strip[.]" Id. The Marder Court found that, quote, "The obvious purpose of the suit is not to recover possession or to establish title, but rather to obtain damages. The real issue is the measure of damages if [d]efendant is liable[.]" [I]bid.

The instant case, however, is clearly distinguishable because it deals exclusively with an attempt to eject . . . defendants from the premises and not a claim for any sort of money damages, [p]laintiff's verified complaint states that it is seeking an ejectment as well as the vague catchall, quote, "Any other relief the [c]ourt deems appropriate and necessary," end quote.

This is not a distinct claim for money damages, however, but simply an attempt to leave the relief, which may be provided by the [c]ourt, open-ended. Additionally, . . . plaintiff, in its papers, correctly notes the theories of easement by prescription and adverse possession are not applicable to publicly owned land, see Patton v. North Jersey District Water Supply Commission, 93 N.J. 180 at 190 (1983). Quote, "It is well-established that adverse possession does not run against the State. Similarly, there can be no adverse possession against subdivisions of this [S]tate, at least

with respect to property dedicated to public use," end quote.

And that the [B]oard of [A]djustment lacks the power to create an easement or title to the property, [N.J.S.A.] 40:55D-70. Thus there is no, quote, "colorable claim of title or possession," end quote, which would take this case out of the jurisdiction of the Special Civil Court, see . . . Rule [6:1-2(a)(4)].

Accordingly, the instant claim is properly before the Special Civil Part pursuant to Rule [6:1-2(a)(4)]. Defendants have shown no colorable claim of title or possession.

[Plaintiff] is entitled to full possession of the land known as . . . .

. . . .

. . . Plesinger Place, [in the City], [b]lock 2507, [l]ot 13. Defendant[s] must remove any vehicles parked on the premises as such parking has prevented the enclosure of Riverside Terrace and has interfered with [plaintiff's] possession and use of the premises for demolition and reconstruction of the land for the public's use.

The judgment of possession will be entered.

A memorializing order was entered. This appeal followed.

Defendants submit the following sole argument for our consideration:

[THE TRIAL COURT] ERRED IN GRANTING . . . PLAINTIFF THE RELIEF SET FORTH IN THE ORDER DATED OCTOBER 7, 2019 BECAUSE PLAINTIFF WAS NOT ENTITLED TO PROCEED UNDER R[ULE] 6:1-2(4).

II.

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). The trial court's interpretation of court rules is also subject to de novo review. See Myron Corp. v. Atl. Mut. Ins. Corp., 407 N.J. Super. 302, 309 (App. Div. 2009). Therefore, we review de novo the trial court's orders, inasmuch as they were based on the application of legal principles.

A trial judge's factual findings made following a bench trial are accorded deference and will be left undisturbed so long as they are supported by substantial credible evidence. Reilly v. Weiss, 406 N.J. Super. 71, 77 (App. Div. 2009) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)); see also Mountain Hill, L.L.C. v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (noting appellate courts "do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence").

Defendants argue plaintiff should not have been able to proceed with its cause of action under Rule 6:1-2(a)(4), because the Special Civil Part did not have jurisdiction over the claim. In relevant part, Rule 6:1-2 provides:

> (a) Matters Cognizable in the Special Civil Part. The following matters shall be cognizable in the Special

> Civil Part, except as otherwise specifically provided in [Rule] 4:31(a)(4):
>
> > . . . .
> >
> > (4) Summary actions for the possession of real property pursuant to N.J.S.A. 2A:35-1 et seq., where the defendant has no colorable claim of title or possession, or pursuant to N.J.S.A. 2A:39-1 et seq. . . .

Defendants assert neither N.J.S.A. 2A:35-1 nor N.J.S.A. 2A:39-1 apply here and that they have a colorable claim of possession to the disputed property. Therefore, defendants contend the trial court below erred in allowing plaintiff to proceed and ultimately in granting their requested relief. Rule 6:1-2(a)(4) essentially provides two ways for a plaintiff to sustain a cause of action for possession: (1) filing a claim pursuant to N.J.S.A. 2A:35-1 where defendant has no colorable claim of title or possession; or (2) filing a claim for unlawful entry pursuant to N.J.S.A. 2A:39-1.

A. N.J.S.A. 2A:35-1 Is Inapplicable to the Matter Under Review

Defendants first argue that N.J.S.A. 2A:35-1 does not apply to this action and therefore cannot serve as a basis for plaintiff's filing pursuant to Rule 6:1-2(a)(4). See R. 6:1-2(a)(4) ("Summary actions for the possession of real property pursuant to N.J.S.A. 2A:35-1 et seq., where the defendant has no colorable claim of title or possession . . . ."). N.J.S.A. 2A:35-1 provides "[a]ny

person claiming the right of possession of real property in the possession of another, or claiming title to such real property, shall be entitled to have his [or her] rights determined in an action in the Superior Court." Defendants here concede that plaintiff is the title owner of Plesinger Place. They argue that in order for N.J.S.A. 2A:35-1 to serve as a basis for plaintiff's cause of action, it must seek possession of the subject property.

Defendants rely on our Court's holding in Marder and assert their actions in the matter under review are insufficient to constitute possession, and therefore, plaintiff already has possession and cannot proceed under N.J.S.A. 2A:35-1. 43 N.J. at 511. However, defendants' analysis of the Court's decision in Marder is misguided. Defendants contend that in Marder, our Court found N.J.S.A. 2A:35-1 is an improper avenue for relief in a situation where a non-owner causes vehicles to be parked on another's property. But this reading of Marder is inaccurate.

In Marder, the defendant owned a narrow strip of property (eight feet by two hundred twelve feet) abutting the plaintiff's residential property. Id. at 510. The defendant's small strip of property was insufficient to be independently built upon due to its minimal width. Ibid. The defendant subsequently attempted to force the plaintiff to purchase the property by placing trash cans on the sidewalk

in front of his strip, removed snow from his strip onto plaintiff's property, and caused vehicles to be parked there. Ibid. The plaintiff in turn sued the defendant pursuant to N.J.S.A. 2A:35-1. Ibid. The Court noted that "[t]he obvious purpose of the suit is not to recover possession or to establish title, but rather to obtain damages." Ibid. Ultimately, the plaintiff was successful, but not under N.J.S.A. 2A:35-1. Id. at 510-11. Importantly, the Court in Marder made no findings as to whether the defendant ever was in possession of the plaintiff's property. See ibid.

Here, defendants misconstrue Marder to stand for the premise that parking vehicles on another's property (Plesinger Place) is insufficient to constitute possession, and therefore, plaintiff cannot demand that which they already have. However, as noted, our Court made no findings as to whether the defendant in Marder ever had possession of the disputed property. But here, plaintiff seeks possession of its property so that redevelopment can commence. The remedy sought by plaintiff is the essential element distinguishing the present matter from Marder.

Notably, plaintiff is neither seeking damages for defendants' use of Plesinger Place nor is plaintiff asserting a trespass occurred upon its property. Instead, plaintiff is simply requesting possession of land it undisputedly owns

and to compel defendants to cease their use of Plesinger Place to further redevelopment of affordable housing. Accordingly, N.J.S.A. 2A:35-1 is applicable because plaintiff sought possession of its premises and nothing more. Therefore, we conclude plaintiff was properly permitted to seek and obtain relief pursuant to Rule 6:1-2(a)(4).

B. Defendants Do Not Have a Colorable Claim of Title or Possession

Defendants initially argue that N.J.S.A. 2A:35-1 does not apply to this matter. In the alternative, defendants argue that even if N.J.S.A. 2A:35-1 is applicable, pursuant to Rule 6:1-2(a)(4), a plaintiff may only proceed with a summary action for possession under N.J.S.A. 2A:35-1 where the defendant does not have a colorable claim of title or possession. Here, since defendants concede they have no colorable claim of title to Plesinger Place, they must prove a colorable claim of possession. See R. 6:1-2(a)(4). Accordingly, because defendants failed to prove they have a colorable claim of possession, the trial court properly allowed plaintiff to proceed with a summary action for possession under N.J.S.A. 2A:35-1. See R. 6:1-2(a)(4) (permitting "[s]ummary actions for the possession of real property pursuant to N.J.S.A. 2A:35-1 et seq., where the defendant has no colorable claim of title or possession").

Defendants raise constructive theories of possession in an attempt to make a colorable claim of possession. Specifically, defendants argue they have a claim to possession by way of: (1) adverse possession; or (2) an easement by prescription; or (3) that the City of Paterson's Board of Adjustment granted them possession of Plesinger Place. We reject defendants' arguments.

Defendants reference the case of Yellen v. Kassin in which we discussed the requirements to obtain an easement by prescription. 416 N.J. Super. 113, 119-20 (App. Div. 2010). According to defendants, they have acted in a manner sufficient to obtain an easement by prescription as to Plesinger Place. Defendants acknowledge that claims of adverse possession and relatedly, easements by prescription, generally fail where the property owner is the government. However, defendants insist a line of cases leading to our Court's decision in Devins v. Borough of Bogota, creates an exception that is applicable in the present matter. 124 N.J. 570 (1991).

The exception defendants incorrectly argue should apply appears in Devins, where our Court held "municipally-owned property neither dedicated to nor used for a public purpose is subject to acquisition by adverse possession." Id. at 572. In Devins the Town of Bogota acquired the disputed property, a twenty-five by one-hundred-foot lot, through foreclosure in 1962. Ibid. At the

time Bogota acquired the land, the lot was vacant. Ibid. When the plaintiffs brought their adverse possession claim against Bogota some twenty years later, the lot was still vacant, and Bogota had not dedicated its use to a public purpose. Ibid. The plaintiffs had open and consistent use of the lot since 1965, and made substantial improvements on the property including building a shed, a basketball net, and paving a portion of the lot for parking. Id. at 573. The Court concluded that "the nullum tempus[2] exception to adverse possession should not be extended to include land held by a municipality for non-governmental purposes." Id. at 575-76.

The matter under review is distinguishable from Devins for a number of reasons. Most significantly, the disputed property has been officially and formally designated for a public purpose—specifically as public housing—under the HUD Amended Declaration of Trust held by plaintiff. Moreover, the Trust actively requires plaintiff to utilize the property for a public purpose and maintain unencumbered title. Therefore, defendants' alleged claims of adverse possession and easement by prescription do not satisfy the nullum tempes exception recognized by our Court in Devins.

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[2] The Latin phrase known fully as nullum tempus occurrit regi, and often shortened to nullum tempes, translates to "[t]ime does not run against the king." Devins, 124 N.J. at 575 (quoting Black's Law Dictionary 1068 (6th ed. 1990)).

In their reply brief, defendants again concede plaintiff is a public agency but contend that we are obligated to look further into how the property is being used in order to determine whether nullum tempes should apply. Defendants attempt to liken plaintiff making minimal use of Plesinger Place to the Town of Bogota leaving its lot vacant in Devins. However, defendants' argument inappropriately asks us to reinterpret and expand the scope of Devins to permit adverse possession claims against portions of larger plots of government owned property. We reject defendants' argument because Devins did not stand for this premise. And, allowing adverse possession as to a portion of governmental land despite its overarching formal designation as public housing would directly contradict well-established case law protecting governmental interests in real property where the property is designated for a public purpose. See Patton, 93 N.J. at 190 (noting "[i]t is well-established that adverse possession does not run against the State").

Adverse possession is a method of acquiring title through the expiration of statutes of limitation which bar an ejection action and pass title to the property from the record owner to the possessor. See Patton, 93 N.J. at 185-87; O'Keeffe v. Snyder, 83 N.J. 478, 494 (1980); Stump v. Whibco, 314 N.J. Super. 560, 575-76 (App. Div. 1998). The adverse possession must be "exclusive, continuous,

uninterrupted, visible and notorious" for the statutory period. Mannillo v. Gorki, 54 N.J. 378, 386-87 (1969). The statutes governing acquisition of ownership through adverse possession vary according to the nature of the subject land and whether the claim is based on color of title. N.J.S.A. 2A:14-6 to -7, -30 to-31. In this case, the statutory period for resting title is thirty years.[3]

The legal requirements for a prescriptive easement are the same as those for obtaining title by adverse possession. Baker v. Normanoch Ass'n., 25 N.J. 407, 419 (1957); see also, J & M Land Co. v. First Union Nat. Bank, 166 N.J. 493, 498 (2001); Randolph Tower Ctr. v. Cnty. of Morris, 374 N.J. Super. 448, 454 (App. Div. 2005), aff'd in part, vacated in part, 186 N.J. 78 (2006). Since

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[3] The applicable statute reads:

> Thirty years' actual possession of any real estate excepting woodlands or uncultivated tracts, and [sixty] years' actual possession of woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, conveyance or otherwise, shall, in whatever way or manner such possession might have commenced or have been continued, vest a full and complete right and title in every actual possessor or occupier of such real estate, woodlands or uncultivated tracts, and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person whatsoever for the recovery of any such real estate, woodlands or uncultivated tracts.
>
> [N.J.S.A. 2A:14-30.]

defendants were unable to satisfy the prerequisites of adverse possession, plaintiff's application was properly granted.

Defendants also assert that the City's Board of Adjustment granted them possession over the Plesinger Place parking spaces on November 10, 2005. Ultimately, the Board of Adjustment did not, and could not, make a ruling on possession of the parking spaces on Plesinger Place as a matter of law. The trial court properly recognized the limitations of the power of the City's Board of Adjustment. N.J.S.A. 40:55D-70 outlines the powers available to a municipal board of adjustment, which notably does not include the power to determine property rights. Therefore, defendants' argument lacks merit.

What defendants refer to as proof of the Board of Adjustment's declaration of possession of the parking spaces is little more than a recitation of the Board's understanding of the current use of Plesinger Place, and the Board's demonstrably inaccurate understanding of its ownership. The Board, in granting the Best Wash Laundromat and Sunshine's "[a]pplication to convert former textile union offices to a laundromat, child daycare center and dollar store," merely noted "[t]here is no restriction in the parking along [Plesinger] Place and no designation that it belongs or connected to the housing development."

The trial court properly noted the Board was "just wrong" in stating that there was no designation it belongs to plaintiff. Similarly, pursuant to N.J.S.A. 40:55D-70, the Board of Adjustment does not possess the power to dictate the ownership or possession of the property. Defendants admit as much in their reply brief, noting the Board's comments are "not determinative of a property right."

C. N.J.S.A. 2A:39-1 Does Not Apply To This Action

Finally, defendants argue that plaintiff cannot sustain its cause of action under Rule 6:1-2(a)(4) by way of N.J.S.A. 2A:39-1. We reiterate, under Rule 6:1-2(a)(4), there are two ways for a plaintiff to sustain a cause of action: (1) bringing a claim for possession pursuant to N.J.S.A. 2A:35-1 where defendant has no colorable claim of title or possession; and (2) bringing a claim for unlawful entry pursuant to N.J.S.A. 2A:39-1. Accordingly, for this argument to be relevant, the court must find that plaintiff did not have a claim for possession under N.J.S.A. 2A:35-1 or defendants have a colorable claim for possession. Only then is it relevant whether plaintiff could alternatively proceed with N.J.S.A. 2A:39-1 as a basis for their cause of action in the Special Civil Part under Rule 6:1-2(a)(4).

In light of our decision plaintiff has proven a claim for possession under N.J.S.A. 2A:35-1 and that defendants have no colorable claim for possession, we need not address this argument. In relevant part, N.J.S.A. 2A:39-1 states "[n]o person shall enter upon or into any real property or estate therein and detain and hold the same, except where entry is given by law, and then only in a peaceable manner." Although plaintiff argues that defendants have entered its property and are unlawfully preventing the construction of a fence necessary to begin redevelopment, this does not satisfy the definition of unlawful entry requisite for a claim under N.J.S.A. 2A:39-1. The Legislature defined unlawful entry in N.J.S.A. 2A:39-2, which states in relevant part:

> If any person shall enter upon or into any real property and detain or hold the same with force, whether or not any person be in it, by any kind of violence whatsoever, or by threatening to kill, maim or beat the party in possession, or by such words, circumstances or action as have a natural tendency to excite fear or apprehension of danger, or by putting out of doors, or carrying away the goods of the party in possession, or by entering peaceably and then, by force or frightening by threats, or by other circumstances of terror, turning the party out of possession, such person shall be guilty of a forcible entry and detainer within the meaning of this chapter.

We have previously noted that the intent of the unlawful entry and detainer statutes is clearly to prohibit a landlord or anyone else from taking possession

without following proper judicial procedures. See Levin v. Lynn, 310 N.J. Super. 177, 183 (App. Div. 1998). The record is devoid of evidence of violence, fear, apprehension, or other basis to substantiate a cause of action under N.J.S.A. 2A:39-1. Moreover, at the hearing, defendants' counsel candidly admitted N.J.S.A. 2A:39-1 doesn't apply to this case.

The trial court properly found plaintiff could proceed with their claim pursuant to N.J.S.A. 2A:35-1 because defendants do not have a colorable claim of possession. Accordingly, the trial court properly granted plaintiff's requested relief in ordering defendants to vacate and permanently discontinue their use of Plesinger Place.

Affirmed.