NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

DAVE FRANEK,

Plaintiff,

vs.

TOWNSHIP OF WANTAGE, CHARLES W. MEISSNER, TRI-STATE BULK GARDEN SUPPLY, LLC, ET ALS.,

Defendants,

CHARLES W. MEISSNER,

Third-Party Plaintiff,

vs.

DAVE FRANEK, DAVE FRANEK AUTO, LLC,

Third-Party Defendants,

DAVE FRANEK,

Fourth-Party Plaintiff,

vs.

CHARLES W. MEISSNER, TRI-STATE GARDEN SUPPLY, LLC, NICHOLAS FRANCHINO, ET ALS.,

Fourth-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : SUSSEX COUNTY

DOCKET NO. SSX-L-469-24

CIVIL ACTION - CBLP

OPINION

Argued: March 28, 2025

Decided: March 28, 2025

Kevin D. Kelly, Esq. of Kelly & Ward, LLC, attorneys for the Plaintiff, Third-Party Defendant, and Fourth-Party Plaintiff, Dave Franek.

Glenn C. Kienz, Esq. of Weiner Law Group LLP, attorneys for the Defendant, Township of Wantage.

Kelly M. Stoll, Esq. and Todd M. Hooker, Esq. of Askin & Hooker, LLC, attorneys for Defendant, Third-Party Plaintiff, and Fourth-Party Defendant, Charles W. Meissner.

Erica Edwards, Esq. of Erica Edwards, Esq. Law Offices LLC, attorneys for the Defendants and Fourth-Party Defendants, Tri-State Bulk Garden Supply, LLC.

Frank J. DeAngelis, P.J. Ch.,

I. BACKGROUND INFORMATION

This matter comes before the Court by way of motions for reconsideration and summary judgment, with two cross-motions for summary judgment. The matter was first initiated by Dave Franek ("Plaintiff") against the Township of Wantage ("Township" or "Wantage"), Charles W. Meissner ("Meissner"), and Tri-State Bulk Garden Supply, LLC ("Tri-State") (collectively "Defendants"). Plaintiff does business as Dave Franek Automotive in the Township. Meissner owns real property located at 260 Sussex County Route 565, Wantage, New Jersey (the "Meissner Property") and was a member of the Wantage Township Land Use Board. Tri-State operates a soil processing business at the subject premises, and the Plaintiff alleges they also operate a soil removal business.

In April 2006, Malt Products Corporation ("Malt Products") obtained a wetlands report and delineation that concluded 83% of the 7.73-acre property is not buildable because of wetlands. Meissner purchased the Meissner Property from Malt Products in 2014. Meissner filed an application in 2019 and 2021 for a "minor site plan" at the subject premises to the Township Land Use Board to operate a soil processing/removal business. Plaintiff alleges Meissner was a member of the board throughout the application process. The board approved Meissner's plans, but Plaintiff

successfully reversed the board's approval by means of a Complaint in Lieu of Prerogative Writ in both instances. Plaintiff continues to oppose Meissner's efforts to obtain the site plan approval. Plaintiff further claims that Meissner continued to operate the soil processing/removal business despite the order invalidating the land use approvals.

During the previous cases, Plaintiff testified that the soil plant produces dust, noise, diesel, and vibrations starting at 6:30 a.m. and Meissner's operations caused him to relocate in 2020. On March 25, 2021, the Township zoning officer issued a stop work order in response to the soil business at the Meissner Property. Tri-State is leasing the Meissner Property to operate its soil processing business as Tri-State Bulk Garden Supply LLC. Plaintiff alleges that Tri-State continued operations after the stop work order and that the Township took no action to stop them. In 2022, Meissner filed a third application with the Township Land Use Board and an application to the NJDEP for stormwater detention basin construction. His application to the Board was accepted. Plaintiff commenced a third Prerogative Writ action on October 30, 2023, which was denied on August 22, 2024. On October 8, 2024, Plaintiff filed an appeal, which is currently pending before the Appellate Division.

Plaintiff also alleges the "Wantage Township Soil Importing and Exporting, Ordinance 2019-04" applies to Tri-State, and that the Township should be enforcing this ordinance. Plaintiff alleges that the Township Engineer's reports from 2019 and 2021 demonstrate that compliance with the ordinance is required for the Meissner/Tri-State operations.

On July 26, 2024, this Court denied Plaintiff's application for summary judgment and granted in part Meissner's cross-motion for summary judgment, dismissing Plaintiff's Fourth-Party Complaint ("FPC") against Meissner. In the instant application, Plaintiff moves for

reconsideration of the July 26, 2024 Order ("July Order"). Additionally, Wantage moves for summary judgment, and Plaintiff and Meissner both cross-move for summary judgment as well.

II. STANDARD OF REVIEW

a. Motion for Reconsideration

R. 4:42-2 provides that motions to reconsider interlocutory orders "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." See Lawson, 468 N.J. Super. at 134. Furthermore, a motion for the reconsideration of an interlocutory order "does not require a showing that the challenged order was 'palpably incorrect,' 'irrational,' or based on misapprehension or overlooking of significant material presented on the earlier application." Id. Rather, "[u]ntil entry of final judgment, 'only sound discretion' and the 'interest of justice' guides the trial court." Id. Additionally, the Court has found that "a trial court 'has complete power over its interlocutory orders and may revise them when it would be consonant with the interest of justice to do so.'" Id. (*quoting* Lombardi v. Masso, 257 N.J. 517, 536 (2011)).

Moreover, interlocutory rulings are "not considered 'law of the case' and are 'always subject to reconsideration up until final judgment is entered.'" Id. (*citing* Lombardi, 207 N.J. at 539). When the order is interlocutory by not resolving all issues as to all parties R. 4:42-2 is implicated, and "sound discretion" and the "interest of justice" become the touchstones of the court's required analysis. In guiding the trial courts, the Appellate Division found that:

> [s]ome [reconsideration applications] are frivolous, vexatious or merely repetitious, and some constitute an unwarranted attempt to reverse matters previously decided solely because the prior judge is no longer available. But some reconsideration motions - those that argue in good faith a prior mistake, a change in circumstances, or the court's misappreciation of what was previously argued - present

> the court with an opportunity to either reinforce and better explain why the prior order was appropriate or correct a prior erroneous order. Judges should view well-reasoned motions based on Rule 4:42-2 as an invitation to apply Cromwell's rule: "I beseech you . . . think it possible you may be mistaken." The fair and efficient administration of justice is better served when reconsideration motions are viewed in that spirit and not as nuisances to be swatted aside.

Lawson, 468 N.J. Super. at 136.

b. Motions for Summary Judgment

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with 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). The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 520 (1995) (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. When the facts present "a single, unavoidable resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Id.

III. ANALYSIS

a. Plaintiff's Motion to Reconsider and Meissner's Cross-Motion

Plaintiff submits that R. 4:42-2(b) provides that interlocutory orders are "subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of

justice." Here, Plaintiff argues that evidence provided to the Court by Plaintiff on July 26, 2024, the same day as the issuance of the July Order, should have been considered by the Court and supports reconsideration of the Court's decision to dismiss the FPC. Plaintiff alleges that upon review of the documentation submitted relative to the motions decided on July 26, 2024, there is sufficient evidence to disprove Meissner's alleged basis for his Counterclaim/Third-Party Complaint, warranting reinstatement of Plaintiff's SLAPP claims against Meissner in the FPC.

Plaintiff provides the following factual account and allegations: (1) the parties were cooperating neighbors from the time that Meissner purchased the Miessner Property, which adjoins Plaintiff's property, in 2014 (Certification of Kevin Kelly, Esq. ("Kelly Cert."), Ex. B); (2) on May 21, 2020, Meissner discontinued Plaintiff's lease and on November 30, 2020 claimed trespass for the first time (Kelly Cert., Ex. B, ¶¶ 10, 13); (3) in early 2019, Meissner filed his first application for a soil removal operation which Plaintiff opposed and filed suit on October 31, 2019 to challenge Meissner's Land Use Board approval; (4) in his Affidavit, Meissner claims that he terminated the lease between the parties because Plaintiff failed to obtain liability insurance. (Kelly Cert., Ex. B, ¶ 8); and (5) in response, Plaintiff provided proof of the required liability insurance. (Kelly Cert., Ex. G).

With respect to the supplemental evidence provided by Plaintiff on July 26, 2024, Plaintiff contends that he has provided photographic evidence that confirms the alleged boundaries as defined by Plaintiff and undermine Meissner's claims of trespass and nuisance. See Kelly Cert. Ex. C, E, F, G, H, I. Plaintiff additionally submits to the Court the "As-Built Site Plan", dated April 9, 2024 with a screenshot of the alleged property line, and six years, from 2019 to 2024, of Certificates of Liability Insurance ("Certificates of Insurance") issued to Meissner. Kelly Cert., Exs. G, H. Plaintiff submits that Meissner has been in possession or aware of these photographs

and site plans throughout the litigation and that the cited evidence all predates Meissner's April 30, 2024 Affidavit, with Exhibits C through F predating Meissner's filing of his Counterclaim and Third-Party Complaint on September 23, 2022. Accordingly, Plaintiff argues that his malicious use of process claims should not have been dismissed when the above evidence is considered.

Plaintiff maintains that the record establishes injuries suffered by him, including to the automobile business that he has operated there since he bought the property in 2003 and that he was driven from his home and has had to pay rent, duplicate expenses for insurance, utilities and maintenance, and endure the inconvenience of living elsewhere as a result of the dust, noise, fumes, and other adverse impacts caused by Defendants' operations. As such, Plaintiff argues that there are genuine issues of material facts with respect to Plaintiff's FPC and SLAPP allegations that should be determined by a jury after hearing from all the parties.

Plaintiff provides that claims that violate First Amendment protections in the public arena have been strongly protected by the judiciary in this State since LoBiondo v. Schwartz, 323 N.J. Super. 391(App. Div.), cert. den. 162 N.J. 488 (1999) and its expansion by our Supreme Court in LoBiondo II, 199 N.J. 62 (2009). Plaintiff explains that these decisions provided for malicious use of process as the appropriate remedy for SLAPP suit victims. Further, Plaintiff contends that public policy also supports a reinstatement of his SLAPP claims. N.J.S.A. 2A:53A-50. Plaintiff claims that the Court's decision to dismiss with prejudice as to Meissner leaves Plaintiff without adequate remedy, and that argue that he should be allowed to bring his case before a jury.

In opposition, Meissner alleges that Plaintiff does not contend or suggest that the Court applied the wrong legal standard in the July Order. Meissner asserts that Plaintiff continues to apply the LoBiondo v. Schwartz, 199 N.J. 62, 86-95 standard in the present motion but never identifies any specific decisions or analysis in the July Order that would result in a different

outcome under that standard. As such, Meissner argues that there is no error, or failure to consider, that would change the outcome of the July Order and so this instant motion must be denied.

Meissner contends that Plaintiff fails to identify any error in the July Order and cannot establish a prima facie case for his claim of malicious use of process. Meissner maintains that Plaintiff does not challenge the Court's holding in the July Order that the SLAPP statute, effective October 7, 2023, does not apply retroactively and cannot apply to the instant action. Meissner explains that Plaintiff instead takes aim the July Order's finding that Plaintiff failed to demonstrate "the action was actuated by malice." Meissner alleges that Plaintiff ignores the finding that Plaintiff failed to meet other prima facie elements of a malicious use of process like proving that the action terminated favorably to Plaintiff and that Plaintiff sustained a special grievance. Plaintiff notes that the instant action has not terminated favorably to Plaintiff or terminated at all as it is ongoing. Meissner also claims that Plaintiff does not identify any additional damage or harm that would support the finding of a special grievance that he has suffered, nor does Plaintiff identify any new or previously unappreciated evidence of a special grievance.

Furthermore, Meissner submits that Plaintiff's has not demonstrated actual malice in Meissner's filing of the Counterclaim and Third-Party Complaint. Meissner takes issue with Plaintiff's reliance on the Certificates of Insurance to show actual malice by Meissner. Meissner maintains that his being added as an additional insured prior to the termination of the lease is irrelevant toward his motivations. Meissner provides that his insured status does not change the fact that Meissner terminated the lease, and that Plaintiff has not removed his property from the Meissner Property. Further, Meisner purports that it does impact his claim that Plaintiff improperly removed trees from the Meissner Property.

Moreover, Meissner argues that even if they were issued prior to the termination of the lease, the Certificates of Insurance (1) were not the sole reason the lease was terminated, (2) were not actually supplied to Meissner until they were provided in discovery in the instant litigation, and (3) do not impact the alleged intrusion onto the Meissner Property following the termination of the lease which continues to this day. Meissner cites to the allegations in the Counterclaim and Third-Party Complaint, which set forth that "debris and material have been dumped on the Meissner property which adjoins the Franek property[,]" and that "[t]he debris and material originated form the Franek property[,]" and further that the sign advertising Dave Franek Automotive "enters Meissner's property[,]" and that Plaintiff removed trees from the Meissner Property. Meissner asserts that regardless of Meissner's reasons for terminating the lease with Plaintiff, the allegations in the Counterclaim and Third-Party Complaint remain unchanged and are supported by evidence. Meissner maintains that should his Counterclaim and Third-Party Complaint ultimately fail at the time of trial, he still had probable cause to assert his allegations of trespass and nuisance. Meissner attests that Plaintiff's sign extends into the Meissner Property which is reflected on the As-Built Site Plan relied on by Plaintiff and which Kenneth Dykstra, P.E., ("Dykstra") has testified as to on March 4, 2025, as are the location of the trees that Plaintiff cut down which are on the Meissner Property. See Certification of Kelly M. Stoll, Esq. ("Stoll Cert."), Ex. U.

In response to Plaintiff's motion for reconsideration, Meissner also filed a cross-motion for summary judgment as to his Counterclaim and Third-Party Complaint. In the Counterclaim and Third-Party Complaint, Meissner alleges that Plaintiff has trespassed on to the Meissner Property and created a nuisance interfering with Meissner's private property rights by removing trees on the Meissner Property, constructing a hardscaped base for Plaintiff's sign that protrudes into the

Meissner Property, and dumping debris onto the Meissner Property. In the instant application, Meissner argues that he has demonstrated a prima facie cause for private nuisance and trespass.

Meissner claims that Plaintiff created artificial conditions that intruded onto the Meissner Property, and invaded Meissner's property interests. These alleged artificial conditions include debris, automobiles, and a commercial sign. Meissner maintains that Plaintiff was notified of the conditions approximately four years ago but has refused to abate or remove the alleged debris and structures. Meissner submits that instead of curing or abating, Plaintiff continues to challenge the boundary line between the adjoining properties. Meissner takes issue with this challenge, as he alleges that the conditions, their intrusion into his property, and the boundary line cannot be disputed. Meissner relies on his expert engineer, Dykstra, who has provided plans that reflect these intrusions and show their location in relation to the boundary line. Stoll Cert., Ex. U. Meissner rebuts any challenge by Plaintiff relying on the 2018 Greenaway survey as that survey was only a boundary survey that does not identify all landmarks or features. Meissner provides subsequent plans drafted by Dykstra which reflect Plaintiff's sign protruding into the Meissner Property frontage along County Route 565. Stoll Cert., Ex. U.

In reply, Plaintiff asserts that the interest of justice warrants revisiting the July Order. Plaintiff submits that where discovery on material issues is not complete, the parties must be given the opportunity to take discovery before disposition of the motion. Pressler & Verniero, Current N. J. Court Rules, comment R. 4:46-2, sec 2.3.3 (Gann 2025). Plaintiff explains that additional discovery is required by both Meissner and Plaintiff as multiple events have occurred since the discovery end date on April 23, 2024 that will impact litigation and trial. Plaintiff claims that the record is incomplete as is, making the earlier disposition of his FPC improper.

In opposition to Meissner's cross-motion, Plaintiff continues to dispute the alleged encroachment, which Plaintiff asserts does not appear of the maps produced by Meissner in his land use applications. Plaintiff purports that the artificial conditions at issue were in the same location when he purchased his property in 2003 and when Meissner purchased his respective property subsequently in 2014. Plaintiff notes that the relief requested by Meissner is the same relief requested in his previous summary judgment motion filed on April 30, 2024 and denied on July 26, 2024.

The Court finds that Plaintiff has failed to provide sufficient grounds warranting reconsideration of the July Order. To state a claim for malicious use of process, a plaintiff must demonstrate that: (1) defendants instituted a civil action against him; (2) the action was actuated by malice; (3) the action was brought without probable cause; (4) the action was terminated in plaintiff's favor; and (5) plaintiff suffered "a special grievance caused by the institution of the underlying civil claims." LoBiondo v. Schwartz, 199 N.J. 62, 90 (2009). A special grievance has been defined as consisting of "interference with one's liberty or property." Penwag Prop. Co., Inc. v. Landau, 76 N.J. 595, 598 (1978). However, if the "plaintiff['s] only damages consist of costs of defending the original suit, then the special grievance requirement is not met." Baglini, 338 N.J. Super. at 300.

In the July Order, the Court found that Plaintiff could not establish that Meissner acted out of malice in filing the Counterclaim and Third-Party Complaint as he had just and probable cause. Even considering the evidence provided by Plaintiff, in his July 26, 2024, supplemental filing, the Court finds that Plaintiff still cannot demonstrate that Meissner acted with malice. The fact that Meissner is named on the Certificates of Insurance does not negate that Meissner terminated the lease or undermine Meissner's allegations of intrusion onto the Meissner Property. Additionally,

Meissner has provided evidence of Plaintiff's sign extending onto the Meissner Property and of Plaintiff cutting down trees on the Meissner Property. See Stoll Cert., Ex. U. Meissner has probable cause to bring suit, rendering Plaintiff's claim for malicious use of process unsustainable as a matter of law under LoBiondo.

Furthermore, the Court finds that after giving all favorable inferences to the non-moving party, Meissner has not met his burden for summary judgment and there exist genuine questions of material fact. Meissner seeks summary judgment with respect to his nuisance and trespass claims found within both the Third-Party Complaint and Counterclaim. "Trespass constitutes the unauthorized entry (usually of tangible matter) onto the property of another." Harvard Industries, Inc. v. Aetna Casualty & Surety Co., 273 N.J. Super. 467, 479 (Law. Div. 1993). There are two elements to this claim: 1) an entry onto another's property, and 2) the entry is unauthorized. A private nuisance is a non-trespassing invasion that unreasonably interferes with the private use and enjoyment of land. See 4 Restatement, Torts 2d at 85. In evaluating whether nuisance is present, the focus should be on the actual interference caused by the particular activity in question, and not whether a use may be considered "normal." Shim v. Washington Twp. Planning Bd., 298 N.J. Super. 395, 404 (App. Div. 1997). Plaintiff alleges that the artificial conditions, including the business sign, were in their current location when the parties purchased their properties. Further, while Meissner disputes the scope of the 2018 Greenaway survey, it is true that the business sign is not depicted within the boundary of the Meissner Property. As such, Meissner's motion for summary judgment is denied.

b. The Township's Motion for Summary Judgment and Plaintiff's Cross-Motion

The Township argues that it is entitled to summary judgment on all counts because he claims are either moot or not asserted before the proper body. Count I of the Complaint seeks

injunctive relief pursuant to N.J.S.A. 40:55D-18 which authorizes an interested party to enforce the Municipal Land Use Law in any ordinance or regulation made and adopted thereunder. See e.g., Washington Commons, LLC v. City of Jersey City, 416 N.J. Super. 555, 561 (App. Div. 2010), certif. den. 205 N.J. 318 (2011) (further allowing actions to be brought to enforce unfulfilled land use approval conditions). The Township asserts that the Municipal Land Use Law further confers exclusive jurisdiction upon the Township's Land Use Board, sitting in its capacity as a zoning board of adjustment, to hear and decide appeals where it is alleged that there is an error in any order, requirement, decision or refusal made by an administrative officer in regard to the enforcement of any zoning ordinance. N.J.S.A. 40:55D-70a. The Township elaborates that the Land Use Board also has the exclusive power to interpret the zoning ordinance pursuant to N.J.S.A. 40:55D-70b and N.J.S.A. 40:55D-20.

The Township maintains that to the extent Plaintiff has asserted any claim alleging a violation of either zoning ordinance, or any prior condition of any approval granted by the Land Use Board, the relief sought by Plaintiff would necessarily be considered by the Land Use Board, rather than the Township itself. The Township submits that the Land Use Board addressed Plaintiff's allegations in its October 30, 2023 approval resolution, which Plaintiff has already appealed before the Appellate Division. Thus, the Township contends that Count I of the Complaint should be dismissed with prejudice.

With respect to Count II alleging ordinance violations, the Township argues that the same logic as above applies. The Township provides that the Land Use Board previously determined that the Soil Importing and Exporting Ordinance #2019-04 (the "Ordinance") was not applicable to the uses proposed for the Meissner Property. The Township reiterates that jurisdictionally, these determinations were within the exclusive realm of the Land Use Board, not the Township itself.

Further, the Township asserts that because Plaintiff's pending challenge before the Appellate Division includes the claim for ordinance violations, there is nothing left within Count II warranting litigation here in this case.

Moreover, the Township contends that it is entitled to summary judgment as to Plaintiff's claims in Counts III and IV for nuisance and trespass. Count III alleges that the uses being undertaken on the Meissner Property create a nuisance condition on plaintiff's adjoining property. Count IV alleges unauthorized entry upon plaintiff's property without authorization. The Township asserts that while both of these claims appear directed at defendants other than the Township, the Land Use Board's approval confirmed the absence of any nuisance and/or trespass. The Township explains that variance standards of review required by the Municipal Land Use Law do not allow variances if the proposed uses would result in any substantial detriment to neighboring properties such as that owned by plaintiff. See Land Use Board's Resolution of Approval, ¶ 63. The Township maintains that unless the Appellate Division invalidates the Land Use Board's determinations, there is nothing remaining within Counts Three and Four that involve any actions of the Township.

In opposition and in support of his cross-motion for summary judgment, Plaintiff asserts that the Ordinance is a regulatory ordinance enacted pursuant to the Township's police power. Plaintiff claims that it is not the function of the board of adjustment to determine whether or not an applicant complies with regulatory ordinances as the jurisdiction of the board is related solely to zoning ordinances. Cox & Koenig, New Jersey Zoning and Land Use Administration, sec. 19-34 (Gann 2024). Plaintiff provides that "[m]unicipalities may enact regulatory ordinances on any subject matter of local concern which is reasonably related to a legitimate object of public health, safety or welfare." Quick Check Food Stores v. Springfield Township, 83 N.J. 438 (1980). Further,

Plaintiff submits that the New Jersey Supreme Court has held that soil removal ordinances that provide for governing body approval/permit are a valid exercise of police power in the public interest since 1952. Fred v. Mayor & Council of Borough of Old Tappan, 10 N.J. 515 (1952).

Plaintiff alleges that here, Wantage has exercised its police powers to adopt the Ordinance for the specific purpose of protecting the "public safety, health and general welfare." Ord. §23-2.1. Plaintiff argues that because the Ordinance requires that "all soil movement operations shall adhere to conditions, restrictions, and provisions outlined in this chapter," compliance with the Ordinance is mandatory. Id. Plaintiff maintains that compliance with the Township's regulatory ordinance and permit requirements was not an issue in the remand hearings before the Land Use Board, nor an issue for the Land Use Board to decide. Plaintiff also explains that zoning ordinances may only be adopted after the planning board has followed specific procedural requirements including the adoption of the land use and housing plan elements of a master plan, notice to both interested parties and the public, and a public hearing, among other requirements. See N.J.S.A. 40:55D-62(a), N.J.S.A. 40:49-2, N.J.S.A. 40:49-2.1. Plaintiff purports that these steps were never followed when enacting the Ordinance, and thus it cannot be considered a land use ordinance.

Next, Plaintiff contends that because the applicant for the variance failed to apply and provide the necessary notice for the interpretation of the Ordinance pursuant to N.J.S.A. 40:55D-70(b), the Land Use Board had no authority to interpret the Ordinance. Plaintiff provides that a zoning board of adjustment has no jurisdiction over general police regulations of the municipality. Apple Chevrolet v. Fair Lawn Bor., 231 N.J. Super. 91 (App. Div. 1989). Finally, Plaintiff notes that he has the right to enforce compliance of the Ordinance as an adjoining property owner. Washington Common v. Jersey City, 416 N.J. Super. 555, 561 (App. Div. 2010), certif. den. 205 N.J. 318 (2011).

In reply and in opposition to Plaintiff's cross-motion, the Township maintains its position that jurisdiction lies with the Township's Land Use Board. The Township summarizes the dispute between parties as whether a municipal zoning board of adjustment's determination as to a property's use is deemed dispositive under the Municipal Land Use Law, thereby superseding any prior use determination by Township officials, such as its zoning officer and municipal engineer. The Township submits that the Municipal Land Use Law confers exclusive jurisdiction upon the Township's Land Use Board, sitting in its capacity as a zoning board of adjustment, possessing several powers that are exclusive to that body. The Township elaborates that these powers include the power to hear and decide appeals where it is alleged that there is an error in any order, requirement, decision or refusal made by an administrative officer in regard to the enforcement of any zoning ordinance under N.J.S.A. 40:55D-70a; to interpret the zoning ordinance pursuant to N.J.S.A. 40:55D-70b; and to grant special reasons (use) variances pursuant to N.J.S.A. 40:55D-70d.

The Township claims that Plaintiff has already asserted claims involving alleged violations of the Ordinance before the Land Use Board and before the Superior Court in the Prerogative Writ action. The Township takes issue with Plaintiff's alleged attempt to relitigate the same issues in this case. The Township contends that given its exclusive powers under the Municipal Land Use Law, the Land Use Board's determinations as to Plaintiff's allegations, as addressed by its October 30, 2023 approval resolution, confirm that Plaintiff cannot be permitted to separately maintain such claims in this action.

The Court first addresses Count I and II of the Complaint. In Counts I and II, Plaintiff requests injunctive relief enforcing the Ordinance and alleges violations of the Ordinance. R. 4:69 governs actions in lieu of prerogative writ. A complaint in lieu of prerogative writ is filed to

challenge a municipal action. See R. 4:69, et seq. "[E]very proceeding to review the action or inaction of a local administrative agency would be by complaint in the Law Division," through an action in lieu of prerogative writ. Selobyt v. Keough-Dwyer Correctional Facility of Sussex County, 375 N.J. Super. 91, 95 (App. Div. 2005). In an action in lieu of prerogative writ a court is called upon to review the administrative action of an agency, board, or other government subdivision in accordance with R. 4:69-1, et seq., based upon the record before that body. See Fischer v. Bedminster Twp., 5 N.J. 534, 539 (1950).

Here, in essence, Plaintiff is challenging the Township's inaction in enforcing the Ordinance. Thus, the proper means by which to assert these claims, are through the filing of a compliant in lieu of prerogative writ. Such is evidenced by Plaintiff's Prerogative Writ action, commenced in October of 2023 before the Hon. Stuart A. Minkowitz, A.J.S.C. Judge Minkowitz has dismissed Plaintiff's Complaint regarding the Ordinance, and upheld the variance issued to Tri-State. A motion for summary judgment is the not the proper forum to relitigate issues that have already been determined in a previous proceeding. Accordingly, no questions of material fact remain with respect to Counts I and II, and they are dismissed with prejudice as to the Township.

Counts III and IV of the Complaint allege nuisance and trespass. The Court finds that after giving all favorable inferences to the non-moving party, no genuine questions of material fact remain. A private nuisance is a non-trespassing invasion that unreasonably interferes with the private use and enjoyment of land. Restatement (Second) of Torts § 822 (1979). The determination of a private nuisance is made on a case-by-case basis and requires the court to balance competing property interests. Sans v. Ramsey Golf and Country Club, 29 N.J. 438 (1959); Ruiz v. Kaprelian, 322 N.J. Super. 460, 472 (App. Div. 1999); Smith v. Jersey Cent. Power &

Light Co., 421 N.J. Super. 374, 392 (App. Div.), certif. denied, 209 N.J. 96 (2011) (holding that negligence is not an essential element to demonstrate nuisance).

In evaluating whether nuisance is present, the focus should be on the actual interference caused by the particular activity in question, and not whether a use may be considered "normal." Shim v. Washington Twp. Planning Bd., 298 N.J. Super. 395, 404 (App. Div. 1997). A subjective standard should not be used in evaluating whether a use creates a nuisance. State v. Friedman, 304 N.J. Super. 1, 7 (App. Div. 1997) (finding that the lower court incorrectly used a subjective standard in determining whether a dog's barking constituted nuisance). A qualitative analysis of the factors is more appropriate for evaluating nuisance. Paternoster v. Shuster, 296 N.J. Super. 544, 557 (App. Div. 1997).

The elements for continuing trespass are similar to those of nuisance. "Liability for a 'continuing trespass' arises with the 'continued presence' on another's 'land of a structure, chattel, or other thing which the actor has tortiously placed there.' […]." Ross v. Lowitz, 222 N.J. 494, 510 (2013). However, a defendant is not liable in trespass for an unintentional and non-negligent entry on land in the possession of another, regardless of the harm done. Restatement (Second) of Torts § 166 (1965).

The claims for nuisance and trespass appear to be directed at Meissner and Tri-State as opposed to the Township. However, no such distinction was made clear in the Complaint. Plaintiff has provided no evidence that would support these claims as against the Township and has not provided a legal basis for their assertion. Thus, Counts III and IV are dismissed with prejudice as to the Township.

IV. CONCLUSION

Accordingly, Plaintiff's motion for reconsideration and Meissner's cross-motion for summary judgment are denied. The Township's motion for summary judgment is granted in its entirety and Plaintiff's cross-motion for summary judgment is denied.