



Heritage Woods Homeowners Association

2007 | Cited 0 times | New Jersey Superior Court | August 16, 2007

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Submitted May 16, 2007

Before Judges Lefelt, Parrillo and Sapp-Peterson.

Defendants Leonard Wisniewski and Barbara A. Wright appeal from four orders entered by the Law Division essentially requiring them to remove structures they erected upon common property adjacent to their home and to pay counsel fees and costs incurred by plaintiff, the Heritage Woods Homeowners Association, Inc. (Association), as well as fines assessed against them by the Association. We remand to the trial court for further proceedings related to the award of counsel fees, costs and fines, but otherwise affirm the October 31, 2005, the two July 14, 2006, and the July 19, 2006 orders.

These are the facts that emerge from a protracted procedural history. The Association is a New Jersey non-profit membership corporation incorporated in connection with the Heritage Woods Major Subdivision and Development (the Development), which consists of 163 single-family homes in Deptford Township (Township). Defendants own one of those homes located at 140 Azalea Drive. Adjacent to their home is an area designated in the major subdivision plan as a common area. As owners of property within the Development, defendants possess a membership interest in the common areas, which the residents of the Development are permitted to use in accordance with the ByLaws of the Heritage Woods Homeowners Association, Inc. (ByLaws).

The Township resolution preliminarily approving the construction of the Development was conditioned upon the requirement that "the Developer maintain[] the open space by a plan subject to the Planning Board approval." Also associated with the Development were the following governing documents: a November 19, 1992 Declaration of Covenants, Restrictions, Easements, Charges and Liens, as amended on October 21, 1993 (the Declaration); a September 24, 1992 Certificate of Incorporation, as amended on November 19, 1992; and the By-Laws.

Richard Wisniewski (Wisniewski) served as president of the Association from 1998 to 2000. While president, he introduced a proposed amendment to the By-Laws that would permit property owners, whose property was located adjacent to common areas, to use these areas for private purposes. Defendants also sought approval to erect a fence and jungle gym on the common grounds situated adjacent to their home. Although the amendment was never adopted, the Association's Board of



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Trustees (Board), over which Wisniewski presided, approved their request to make the proposed improvements. In addition to the fence and jungle gym, defendants also erected a pole with electrical run-ups. The fence enclosure extended defendants' property lines by approximately eighty feet. Later, the Board, under new leadership and allegedly to reduce the Association's liability, approved the erection of a fence behind defendants' home and that of another resident to protect visitors to the common areas from unknown hazards in the common areas. Finally, defendants secured approval from the Deptford Township Zoning Board to erect a cabana and garage.

In July 2002, the Board sent a notice to defendants advising that the approval of defendants' use of the common grounds had been rescinded and demanded that defendants remove the structures. The Township also notified defendants that their use of the common areas was contrary to law and directed defendants to remove the structures. Defendants' counsel notified the Association that its actions towards defendants constituted harassment. Defendants' attorney also responded to the Township's notice, advising that the Board had approved the improvements and that other residents had made similar improvements to adjacent common areas.

After unsuccessfully pursuing an action against defendants in the Township Municipal Court, plaintiff filed a Verified Complaint and Order to Show Cause (OTSC) in the Chancery Division. The Verified Complaint sought, among other things, an order compelling defendants to remove the structures and compelling payment of fines the Association assessed against defendants for their continued failure to remove the structures, as well as counsel fees incurred by the Association. Plaintiff requested that the matter proceed summarily pursuant to Rule 4:67-1.

In lieu of filing an answer, defendants filed a motion to strike plaintiff's pleadings, claiming that the Association's authorized representatives, Mary Shute and Dennis Pierattini, who brought the lawsuit, lacked the authority to initiate the action on behalf of the Association. On October 31, 2005, the court denied defendants' motion to strike, finding that the motion was procedurally improper. Specifically, the court concluded,

This is a stupid neighborhood dispute that this Court really has difficulty dealing with because . . . according to the papers filed by [defense counsel] we have a major challenge to the directors and the organization of this corporation.

I have reviewed the papers. I've reviewed the arguments. I'm going to grant your application, [plaintiff's counsel], that the property -- the items that are on common ground will be ordered to be removed.

If [defense counsel] wishes to challenge the position of the directors and wishes to assert those challenges he's going to have to file a new complaint cause I don't think procedurally it's properly brought in this case.



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If we're going to have major litigation about who the directors are of the corporation and whether they're valid directors and whether there's other disputes regarding the organization of the association, I don't think that has anything to do with removing property from a common area where it's not supposed to be.

The court also denied defendants' request for an additional ten days to file a responsive pleading pursuant to Rule 4:6-1(b).

Thereafter, plaintiff filed a motion seeking payment of fines, counsel fees and costs relying upon provisions within its By-Laws and Declaration. While this motion was pending, defendants filed their first appeal, and the hearing on the motion was postponed pending resolution of the appeal. Although filed as an appeal from a final judgment, given the pending motion, defendants' appeal was interlocutory and defendants failed to seek leave to file an interlocutory appeal. Therefore, in April 2006, we granted plaintiff's motion to dismiss the appeal as procedurally barred.

In early 2006, however, while the lower court motion and appeal were both still pending, defendants filed an OTSC and Verified Complaint against the Association's officers. Defendants primarily sought to restrain Shute and Pierattini, who at the time were two of the Association's current directors, from participating in the forthcoming general association meeting and elections based upon information defendants claimed they learned in depositions. Specifically, defendants contended that discovery revealed that the Association's elections from 2001 to 2005 were defective because no quorum was present for the elections held in those years. The court denied the relief requested and the two officers were re-elected by a sixty-seven to zero margin.

After defendants' appeal was dismissed and subsequent to the dismissal of defendants' OTSC, the court listed the pending motion for a hearing in July 2006. Defendants filed opposition to the motion as well as a cross-motion to vacate the initial order entered on October 31, 2005, denying defendants' motion to strike and ordering the removal of the structures. The court entered two orders on July 14, 2006, denying defendants' motion to vacate the October 31, 2005 order and granting the award of counsel fees and costs in favor of plaintiff, as well as fines against defendants for violating the Association's rules and regulations. On July 19, 2006, the court entered a third order directing defendants to remove the structures within forty-five days of entry of the order or pay plaintiff for any expenses incurred to remove the structures.¹ Likewise, the court concluded that defendants' motion to vacate lacked "legal or factual basis for any relief." The present appeal followed.

Defendants raise the following issues for our consideration:

LOWER COURT'S OCTOBER 31, 2005 ORDER

1. THE LOWER COURT ERRED BY FAILING TO ADDRESS APPELLANTS' RULE 4:6 MOTION ON THE MERITS



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2. THE LOWER COURT ERRED BY NOT ALLOWING APPELLANTS TEN DAYS TO ANSWER THE COMPLAINT PURSUANT TO RULE 4:6 THEREBY ESSENTIALLY GRANTING PERMANENT EX-PARTE RELIEF TO APPELLEE
3. THE LOWER COURT ERRED BY ENFORCING AN INVALID RESCISSION OF APPELLANTS' 1999 APPROVAL
4. THE LOWER COURT ERRED BY ADMITTEDLY FAILING TO ADDRESS ALL OF THE ISSUES BEFORE THE COURT IN OCTOBER, 2005 LOWER COURT'S JULY, 2006 ORDERS
5. THE LOWER COURT ERRED BY DENYING APPELLANTS' [RULE] 4:50 MOTION
 - A. THE LOWER COURT ERRED BY FAILING TO ENFORCE NEW JERSEY'S LAWS AND CORPORATE STATUTES
 - B. THE LOWER COURT ERRED BY FAILING TO ENFORCE THE ASSOCIATION'S GOVERNING DOCUMENTS
6. THE LOWER COURT ERRED BY FAILING TO RECOGNIZE THAT APPELLANTS' STRUCTURES ON THE COMMON GROUNDS WERE LAWFUL
7. THE UNAUTHORIZED ACTS OF THE INDIVIDUALS CLAIMING TO BE DULY ELECTED DIRECTORS OF THE ASSOCIATION CANNOT BE RATIFIED

Other than remanding to the trial court for a statement of reasons on the award of counsel fees, costs, and fines, we reject all of defendant's arguments.

I.

A. Standing

Defendants argue that the trial court erred in refusing to address the merits of defendants' claim that the Association's officers, Shute and Pierattini, did not have the authority to bring the action on behalf of the Association. Defendants submit that the requirement of standing is a threshold issue that must be resolved before a matter may proceed. Defendants contend the trial court should have allowed discovery on the issue. Defendants rely upon *Citibank, N.A. v. Estate of John A. Simpson*, 290 N.J. Super. 519 (App. Div. 1996), in support of this argument. We agree that the trial court erred in not resolving the question of standing but disagree that further discovery was warranted.

Standing is governed by Rule 4:26-1, which provides that "[e]very action may be prosecuted in the name of the real party in interest[.]" There is no distinction between a party in interest and standing



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in New Jersey. N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 413 (App. Div.), certif. granted, 152 N.J. 13 (1997), appeal dismissed as moot 152 N.J. 361 (1998); see also Pressler, Current N.J. Court Rules, comment 2.1 on R. 4:26-1 (2007) (stating that "real party in interest rule is ordinarily determinative of standing to prosecute an action"). Standing refers to a party's "ability or entitlement to maintain an action before the court." N.J. Citizen Action, supra, 296 N.J. Super. at 409. Standing has been broadly construed in New Jersey as "our courts have considered the threshold for standing to be fairly low." Reaves v. Egg Harbor Twp., 277 N.J. Super. 360, 366 (App. Div. 1994). It "is an element of justiciability that cannot be waived or conferred by consent." In re Adoption of Baby T., 160 N.J. 332, 341 (1999) (citing N.J. Citizen Action, supra, 296 N.J. Super. at 411).

Accordingly, the trial court should have addressed the issue of standing prior to making a ruling on the issues presented in the case. This failure, however, does not warrant a complete reversal of the October 31, 2005 order because even assuming Shute and Pierattini were not duly elected officers, as homeowners within the development they had standing to challenge defendants' privatization of the common areas. See Comm. for a Better Twin Rivers v. Twin Rivers Homeowners Ass'n, 383 N.J. Super. 22, 55-57 (App. Div.), certif. granted, 186 N.J. 608 (2006).

B.

Defendants next argue that once the trial court denied their motion to strike, it erred in failing to allow defendants ten additional days to file a responsive pleading pursuant to Rule 4:6-1(b). Defendants further contend that by refusing to allow defendants time to file a responsive pleading, the trial court essentially made an ex-parte ruling on the merits of plaintiff's application. We disagree.

Rule 4:6-1(b) provides,

Time; Effect of Certain Motions. Unless the court fixes a different time period, the time periods prescribed in paragraph (a) of this rule are altered by the filing and service of a motion under R. 4:6 . . . as follows: (1) if the motion is denied in whole or part or its disposition postponed until trial, the responsive pleading shall be served within 10 days after notice of the court's action[.] [Ibid.]

Defendants' motion to strike on the basis of an absence of standing is the equivalent of a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 4:6-2(e). Thus, ordinarily defendants would have been entitled to ten additional days to file a responsive pleading. In this case however, the court's September 6, 2005 scheduling order placed all parties on notice that the matter would proceed as a summary action pursuant to Rule 4:67-1.

Rule 4:67-1 provides in pertinent part,

This rule is applicable (a) to all actions in which the court is permitted by rule or by statute to proceed in a summary manner, other than actions for the recovery of penalties which shall be



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brought pursuant to R. 4:70; and (b) to all other actions in the Superior Court other than matrimonial actions and actions in which unliquidated monetary damages are sought, provided it appears to the court, on motion made pursuant to R. 1:6-3 and on notice to the other parties to the action not in default, that it is likely that the matter may be completely disposed of in a summary manner.

The purpose of this rule is to permit the court to dispose of matters that lend themselves to summary disposition. Pressler, Current N.J. Court Rules, comment 1 on R. 4:67-1 (2007). A defendant must be given an opportunity to be heard, but is not, as in a summary judgment motion, entitled to favorable inferences. *O'Connell v. N.J. Mfrs. Ins. Co.*, 306 N.J. Super. 166, 172 (App. Div. 1997), appeal dismissed 157 N.J. 537 (1998). See also *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373, 378-79 (App. Div. 2003) (distinguishing summary proceedings from summary judgment).

Defendants did not object to proceeding summarily. As such, the court directed "[d]efendants [to] file and serve an answer to the complaint and any pleadings in opposition to the Plaintiff's Application by September 23, 2005." Moreover, the court also, in the same order, placed all parties on notice that "[a]fter receipt and review of the above-referenced pleadings, the Court may schedule oral argument, if it deems oral argument necessary, and shall thereafter decide the Application based on the pleadings submitted by the parties."

Although defendants filed a motion to strike rather than an answer, the court was apparently satisfied that the question of legality of the structures on the designated common areas was ripe for resolution without further pleadings, briefing, discovery, or trial. We are satisfied that the record before the court demonstrated "palpably that there [was] no genuine issue as to any material fact" and that the court properly tried the issue on "pleadings and affidavits" as it was permitted to do in a summary proceeding. See Rule 4:67-5.

II.

We turn now to the court's determination that the presence of the structures on the common areas was contrary to law. Both the local ordinance and the Municipal Land Use Development Law (MLUL), N.J.S.A. 40:55D-1 to -129, expressly prohibit the privatization of common areas under the circumstances present here. By resolution adopted December 21, 1977, the Deptford Township Planning Board granted approval of the Development subject to the "Developer maintain[ing] the open space by a plan subject to the Planning Board approval." The Deptford Township Ordinance in effect at the time defendants purchased their home provided, in pertinent part, that "the open space shall be restricted against any future building, development or use, except as is consistent with that of providing for open space for recreational, conservation, agriculture or aesthetic satisfaction of the residents of the development or of the general public." Deptford Twp., N.J., UNIFORM DEVELOPMENT ORDINANCE §32 (1995). This provision implements N.J.S.A. 40:55D-43(a), which prohibits disposition of open space by "sale or otherwise . . . without first offering to dedicate the



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same to the municipality . . . where the land is located."

Before the trial court, defendants did not challenge plaintiff's contention that the structures they erected in the common areas violated Section 32 of the Deptford Township Municipal Ordinance and N.J.S.A. 40:55D-43 of the MLUL.² Rather, defendants challenged the standing of the officers to bring the action on behalf of the Association and the validity of the Boards' rescission of the approval. On appeal, however, defendants' attempt to factually distinguish their privatization of the common areas by contending that the Board's approval permitting them to erect structures on the common areas was not a sale or conveyance contrary to the ordinance or statute. In their application to the Board, defendants did not seek to erect the fence, the jungle gym or the electric pole for the residents of the Development pursuant to Article II Section 1 of the Declaration that grants to residents an "easement of enjoyment" of the common areas subject to the limitations set forth in the Declaration. Rather, defendants erected the structures solely for their private benefit. Consequently, irrespective of a formal sale or conveyance of title, the privatization of any portion of the common areas was contrary to the local ordinance and the MLUL.

III.

New Jersey generally adheres to the American Rule, which precludes a litigant from receiving counsel fees from a party when the fees were incurred in an action to establish that party's liability. In *Re Estate of Lash*, 169 N.J. 20, 30 (2001). However, the American Rule does not prohibit the recovery of counsel fees where expressly authorized by contract. *Id.* at 43.

Plaintiff contends its application for fees is pursuant to its By-Laws and Declaration that authorize the Association to enforce obligations of its members and, if necessary, to do so through commencement of legal action. Specifically, Article III, Section 8 of the Declaration provides,

If the assessment is not paid within thirty (30) days after the delinquency date, the assessment shall bear interest from the date of delinquency at the rate of twelve percent (12%) per annum, and the Association may bring legal action against the Owner, who is personally obligated to pay the same, or the Association may enforce or foreclose the lien against the property; and in the event a judgment is obtained, such judgment shall include interest on the assessment as above provided and a reasonable attorney's fee, to be fixed by the Court, together with the costs of the action.

We agree that the Declaration authorizes the Association to recover legal fees, costs, and fines. In this case, the complaint was filed on behalf of the Association by Mary Shute and Dennis Pierattini, who defendants claim lacked authority to initiate the lawsuit because they were not duly elected officers. As noted earlier, their status as residents is sufficient to establish their right to commence an action against defendants. We do not, however, agree that residential status confers upon them a right to receive counsel fees, costs, and fines on behalf of the Association. Because such an award is solely for the benefit of the Association in accordance with the By-Laws and Declaration, it must



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first be established that Shute and Pierattini were authorized to act on behalf of the Association. *Erie Railroad. Co. v. S.J. Groves & Sons Co.*, 114 N.J.L. 216, 218-19 (E & A 1935).

The Association provides no authority to support its contention that even if not duly elected, Shute's and Pierattini's actions must be upheld as actions of de facto officers. Actions of de facto officers on behalf of the corporation have only been held to bind the corporation in favor of the rights of third persons rather than as a basis to take action against third parties. See *Kuser v. Wright*, 52 N.J. Eq., 828-29 (E & A 1894) (holding that "[f]rom a very early time it has been held that the acts of de facto officers are binding upon the corporation until they are lawfully ousted, especially so far as their acts create rights in favor of third persons.") *Mechanics Nat'l Bank of Newark v. H.C. Burnet Mfg. Co.*, 32 N.J. Eq. 236 (Ch. Div. 1880) (emphasis added). Therefore, remand is required for the trial court to resolve the authority of Shute and Pierattini to commence the present action on behalf of the Association.

Remand is also warranted for yet another reason. Even assuming Shute and Pierattini were duly elected and therefore authorized to commence this action on behalf of the Association, the court's written opinion did not explain how it arrived at the particular amount of counsel fees, costs, and fines it awarded. *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 21 (2004). See also Rule 1:7-4(a).

We vacate the award of counsel fees and remand for further proceedings consistent with this opinion. The orders of October 31, 2005, July 14, 2006, and July 19, 2006 are affirmed in all other respects. We do not retain jurisdiction.

1. In the court's July 19, 2006 written opinion, the court also stated that if the structures were not removed within forty-five days, the court would impose fines of \$100 per day until the structures were removed.

2. Defendants, on appeal, for the first time raise the validity of the ordinance in so far as its effective date. However, plaintiffs, as part of the record on appeal, have attached a copy of the ordinance in effect when defendants purchased their home. Consequently, apart from the fact that we decline to address issues presented for the first time on appeal, *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973) (holding that "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest'"), the provision of the 1995 ordinance renders the issue moot because it is the same ordinance. See *Deptford Twp., N.J.*, supra, UNIFORM DEVELOPMENT ORDINANCE §32 (1995).

