NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Argued December 6, 2011

Before Judges Reisner, Simonelli and Hayden.

In this prerogative writs matter, defendant Valley National Bank (VNB)[1] appeals from three Law Division orders: (1) that part of the April 3, 2009 order, which denied its motion to compel discovery; (2) the April 30, 2010 order, which denied its motion for leave to file an amended counterclaim, compel discovery, and appoint a discovery master; and (3) a second April 30, 2010 order, which granted summary judgment to plaintiff John C. Evans Project, Inc. (Evans) and dismissed the counterclaim with prejudice.

Evans cross-appeals from two orders: (1) the March 26, 2008 order, which dismissed its complaint in lieu of prerogative writs with prejudice; and (2) the June 11, 2010 order, which denied its motion for attorney's fees and sanctions against VNB pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1. We affirm all orders.

In April 2006, VNB, as contract purchaser for property located on North Main Street (the property), submitted an application to defendant Milltown Zoning Board of Adjustment (Board) for preliminary and final major site plan approval with a use variance and bulk variances to build a 3700 foot bank with a three-lane drive-through facility. The property, owned by Dr. Bhudev Sharma (Dr. Sharma), is located in the B-1 commercial zone of the Borough of Milltown (Borough). To the north of the property is a residential apartment building, to the south is a parking lot for a commercial building, to the west is a school, and directly across the street to the east is a bank with a three-lane drive-through facility. The B-1 zone permits banks and fiduciary institutions, but prohibits drive-in or drive-through facilities. Thus, a use variance was required for VNB's proposed drive-through facility.[2]

In its application, VNB sought to demolish two buildings located on the property: an abandoned residence and a building called the "Forney House and Clinic" (Forney House). The Forney House was in a state of extensive deterioration and disrepair at the time VNB submitted the application. However, it had historical significance because the father of the Borough's first mayor built it circa 1860, and it was used as a medical office and clinic since approximately 1907. In an effort to preserve the Forney House, in June 2006, the vice-chair of the Borough's Environmental Commission, Michael

Shakarjian (Shakarjian), applied to the New Jersey Department of Environmental Protection, Historic Preservations Office (HPO) to determine whether the Forney House was eligible for listing on the New Jersey and National Registers of Historic Places. Shakarjian later helped form Evans, and became its president and registered agent.

In August 2006, the Forney House was deemed eligible for listing on the New Jersey and National Registers of Historic Places. Because of that determination, the National Historic Preservation Act, 16 U.S.C.A. § 470f, required that the agency with jurisdiction to approve all licenses for new bank branches, here the Office of the Comptroller of Currency (OCC), must conduct a review before issuing the federal license to open the bank. According to the applicable regulations, the review must consider the effect of the project on the historic property, and how the project seeks to avoid, minimize, and mitigate harm from that effect. 36 C.F.R. §§ 800.1(a), 800.6(a). If the agency and the concerned parties agree on a means of abating the effects, they must execute a memorandum of agreement (MOA). 36 C.F.R. § 800.6(b)(1)(iv), (b)(2). The MOA evidences compliance with all applicable statutes and regulations. 36 C.F.R. § 800.6(c). In September 2006, the HPO notified VNB that the proposed demolition of the Forney House and new construction of the bank would have an adverse effect on the Forney House. The HPO also advised it would consult with the OCC to develop and evaluate alternatives or modifications to avoid, minimize, or mitigate that effect.

The hearings before the Board on VNB's application began on August 2, 2006,[3] shortly before the HPO's notice. Because part of Evans's cross-appeal concerns VNB's alleged failure to satisfy the negative criteria for the use variance for the drive-through facility, we focus on the proofs relating to this particular issue.

VNB presented extensive factual and expert evidence at the hearings regarding the use variance for the drive-through facility, which we summarize here. According to VNB's senior vice president in charge of real estate development, Michael Ghabrial, a bank with a drive-through facility has become the standard within the banking industry, and a demographics study showed a need for another bank in the Borough. He explained that the incorporation of technological advances into the banking industry has resulted in a reduction in walk-in bank customers, and from a convenience and safety perspective, customers do not wish to leave their vehicles to conduct their banking.

VNB's expert architect and planner, Salvatore Corvino, established that a drive-through facility is necessary and is now the industry standard. He testified that VNB would place the proposed drive-through facility at the back of the proposed building with a narrow egress that makes it a safer feature than other banks with drive-through facilities. In addition, the drive-through facility would help reduce the parking demand on the property.

Corvino also testified that the proposed building was a much safer design than the Forney House because it would be set back farther from Main Street; the proposed building complies with the zoning ordinance's front setback requirement while the Forney House does not; and the application

encouraged commercial development, which the Borough had planned for the Main Street corridor, while removing the Forney House, which was a non-conforming residential/office use that had significant structural and environmental issues, and was unsafe and "ready

to collapse."

Corvino concluded that the site was particularly suitable for the drive-through facility, and the application satisfied both the zoning ordinance requirements for preliminary and final site plan approval, and the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163, particularly N.J.S.A. 40:55D-2(a), (c), (g) and (i).

VNB's expert site engineer, Joseph Hanrahan, testified thatbanks no longer exist without drive-through facilities, and inengineering terms, drive-through facilities are the industry standard.He established that the proposed use satisfies a community need,provides adequate buffering and enhanced aesthetics, promotes safetyby removing street parking and locating it on the property,[4] and the one-way circulation around the proposed building andlocation of parking by the exit both increase the safety of theproperty. He concluded that the application advanced the goals of theMLUL because the proposed use would remove a non-conformingresidential structure that was in a state of disrepair and replace itwith a new conforming structure. He also concluded that the proposed use advanced theBorough's zoning ordinance and master plan.

VNB's expert traffic engineer, Nicholas Verderese, performed traffic studies, a gap study, and a pedestrian study. He testified that the property was particularly suited for the proposed use because it was in a commercial area on Main Street, and VNB's anticipated traffic volumes were similar to other uses on Main Street. According to Verderese, the proposed use was a better zoning alternative because it eliminated parking on Main Street and placed it on-site, where there was sufficient parking; the proposed three-lane drive-through facility would not bring in more traffic to the site than a two-lane facility; the proposed development and the traffic attendant thereto would cause no detriment to the community; and the site could accommodate the proposed drive-through facility. He concluded that the application advanced the zoning ordinance and master plan from an engineering perspective, and met the standards of preliminary and final site plan approval because the ingress and egress were safe, and there was adequate parking and onsite circulation.

In addition to VNB's experts, the Board's experts supported the proposed drive-through facility, and they reviewed the application and agreed it met the zoning ordinance requirements and performance standards. The objectors who appeared at the hearings presented no expert evidence, nor did they cross-examine VNB's experts.

On April 6, 2007, the Board passed a resolution approving the application. The Board found credible and accepted the testimony of VNB's experts, made extensive factual findings, and concluded that the use variance for the drive-through facility satisfied the positive and negative criteria of N.J.S.A.

40:55D-70. Regarding the negative criteria, the Board found that the proposed use will not cause substantial detriment to the surrounding community at large, nor would the grant of a use variance cause substantial detriment to the public good and the surrounding neighborhood. The Board also found as follows:

With regard to the negative criteria and the enhanced level of proof required pursuant to Medici v. BPR, [107 N.J. 1 (1987)], both Mr. Ghabrial and Mr. Corvino testified to the changing nature of banks over the years. Specifically, when Mr. Corvino began designing banks in the late 1980's and early 1990's there were [fewer] drive[-]thrus or no drive[-]thrus at all. ATM's were just coming out so not every bank had that technology. As time progressed, drive[-]thrus became very prevalent in the industry. Because of that change in the banking industry, including but not limited to online banking, call-in banking, ATMs, direct deposit and drive[-]thrus there's less pedestrian traffic into the bank, thus the drive[-]thrus become prominent and necessary. Mr. Vederese testified that he has never testified for a bank development that did not have a drive[-]thru facility and that in this day and age the bank and the drive[-]thru uses go hand in hand. Mr. Corvino testified that the provision of the Milltown Borough Ordinance, prohibiting the drive[-]thru use does not seem to apply well to banks the way they are run today especially in downtown quarters such as Main Street where there are many mitigating circumstances in favor to allow banks to have drive[-]thru lanes as modern banks virtually depend upon their drive[-]thru for better customer satisfaction, convenience and increase their efficiency with the drive[-]thru lanes. The Board determines that this testimony reconciles the Borough's omission of a drive-thru in this zone as a permitted use in this B-1 zone.

The Board concluded that the grant of the use variance was not inconsistent with the intent and purpose of the Borough's master plan and zoning ordinance, and that VNB satisfactorily reconciled the grant with the ordinance's continued omission of the drive-through facility from those permitted in the B-1 zone.

On May 29, 2007, Shakarjian, and others who had appeared at the hearings in opposition to the application, formed Evans as a non-profit corporation to, in part, "support the appreciation and protection of historic structures and character in the Borough of Milltown and environs." Evans filed a complaint in lieu of prerogative writs, challenging the Board's grant of a use variance for the drive-through facility, among other things. In addition to the complaint, Shakarjian and other Evans shareholders and officers remained extensively involved in the proceeding before the OCC and HPO in their continued effort to preserve the Forney House.

On July 5, 2007, VNB filed a counterclaim, alleging that Evans intentionally interfered with VNB's contract to purchase the property, and intentionally and maliciously interfered with VNB's prospective business advantage. VNB asserted that the individuals involved in Evans had a history of repeatedly blocking Dr. Sharma's attempts to sell or develop the property, and had engaged in actions to prevent VNB from developing it as well.

In a March 26, 2008 written decision and order, Judge Jessica Mayer dismissed the complaint. Addressing the negative criteria, the judge found the unchallenged expert evidence supported the Board's conclusions that: (1) the proposed use would not cause substantial detriment to the surrounding community; (2) the use variance for the drive-through facility would not substantially impair the intent and purpose of the zoning ordinance and master plan, and would not cause substantial detriment to the public good; and (3) the application satisfied various goals of the zoning ordinance. The judge also found there was ample proof that drive-through facilities were not necessarily contemplated at the time the Borough enacted the zoning ordinance, thus dispelling any concern that the exclusion of a drive-through facility was deliberate. The judge concluded that "[t]he Board thoroughly considered the demand for such uses consistent with the needs and character of the entire community in support of the granting [o VNB's] use variance."

Addressing the enhanced level of proof under the negative criteria,Judge Mayer found the expert evidence supported the Board's conclusionthat the bank drive-through facilities generate no additional traffic,noise or odors, they promote efficiency in traffic patterns, and theyaccommodate the ever-changing lifestyle of modern banking customers;and "the drafters of the Borough's Master Plan did not, and could not,conceive of such a change regarding the manner of banking transactionsat the time of the most recent master plan reexamination."[5] The judge concluded that the Board properly exercised itsdiscretion in weighing the use variance's benefits against potentialharms associated with its granting, and the record contained adequateproofs for the Board to conclude that the harms, if any, were deminimis and the benefits of the proposed use variance preponderated.The judge also concluded that the Board had not acted arbitrarily,capriciously, or unreasonably.

On October 15, 2008, VNB entered into a MOA with the HPO, the OCC, and the Advisory Council on Historic Preservation to sell the Forney House and have it moved to a new location, or demolish it if no offers were made to purchase it. VNB also agreed to permit the Milltown Historical Society and the Milltown Historical Preservation Society to remove artifacts from the building. VNB ran newspaper advertisements seeking a buyer at a sale price of one dollar.

Having received no offers, VNB demolished the Forney House, and built the bank with the drive-through facility. Thereafter, VNB continued prosecuting its counterclaim. On March 10, 2009, VNB filed a motion to compel more specific interrogatory answers and responses to its notice to produce documents. In an April 3, 2009 order, Judge Mayer granted the motion as to some of the interrogatory answers, but denied it as to the documents.

On March 16, 2010, Evans filed a motion for summary judgment and to dismiss the counterclaim with prejudice. On April 14, 2010, VNB filed a motion, seeking leave to amend the counterclaim, compel discovery, and appoint a special discovery master. In an April 30, 2010 order, Judge Edward Ryan granted Evans's motion, holding that VNB failed to make a prima facie showing of intentional interference with both its contract to purchase the property and its prospective business advantage because it did not establish that Evans acted intentionally, with malice, and without justification. In

a second April 30, 2010 order, the judge denied VNB's motion.

On May 19, 2010, Evans filed a motion for fees and sanctions pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1. In a June 11, 2010 order, Judge Ryan denied the motion. This appeal and cross-appeal followed.

On appeal, VNB contends that Judges Mayer and Ryan erred in denying its discovery motions, and Judge Ryan erred in granting Evans's summary judgment motion and dismissing the counterclaim, and denying VNB's motion to amend the counterclaim. On cross-appeal, Evans contends that Judge Mayer erred in dismissing the complaint, and Judge Ryan erred in denying its motion for fees and sanctions.

I.

We first address the denial of VNB's discovery motions. Evans asserted that the counterclaim was an improper Strategic Lawsuit Against Public Participation (SLAPP suit), and the Noerr-Pennington doctrine[6] immunized it from tort liability. VNB argued below, as is does here, that Evans's individual members created Evans as a sham to protect them from liability for their conspiratorial role in delaying the project, and harassing and urging a boycott of VNB. VNB thus concludes that Judges Mayer and Ryan erred in denying its discovery motions because the discovery related to the sham exception to the Noerr-Pennington doctrine and the causes of action in the counterclaim.

We generally defer to a trial court's decisions regarding discovery matters absent an abuse of discretion or mistaken understanding of the applicable law. Pomerantz Paper Corp. v. New Comty. Corp., 207 N.J. 344, 371 (2011); see also Pressler & Verniero, Current N.J. Court Rules, comment 4.5 on R. 2:10-2 (2012). We discern no abuse of discretion here in the denial of VNB's discovery motions.

The New Jersey Legislature has not enacted anti-SLAPP legislation. LoBiondo v. Schwartz, 199 N.J. 62, 88 (2009). Our courts consider SLAPP-type litigation under the tort action of malicious use of process. Id. at 104; LoBiondo v. Schwartz, 323 N.J. Super. 391, 422 (App. Div), certif. denied, 162 N.J. 488 (1999). One of the elements of such a cause of action is proof of a special grievance. LoBiondo, supra, 323 N.J. Super. at 423. Noting that special grievance was an "elusive concept" which included interference with one's liberty, we concluded in LoBiondo that, in the context of SLAPP suit-type litigation, liberty included the "entire bundle of freedoms afforded by the Constitution--including freedom of speech and freedom to petition." Id. at 423-24. We explained that it was not only the defendant in a SLAPP suit who suffered; rather, the "common weal" was impaired because others were deterred from speaking out. Id. at 424. Hence, we concluded that the suppression of public debate on public issues and the placing of a price on the right to petition for redress was special grievance enough. Ibid.

In Baglini v. Lauletta, 338 N.J. Super. 282, 302 (App. Div.), certif. denied, 169 N.J. 607, and appeal

dismissed, 169 N.J. 608 (2001), we adopted our holding in LoBiondo with respect to proof of a special grievance. We held that, in the context of a challenge to land use approvals, the interested parties had a firmly rooted constitutional privilege to speak out and protest. Ibid. Similarly, in Structure Building Corp. v. Abella, 377 N.J. Super. 467, 471 (App. Div. 2005), we held that residents dissatisfied with a zoning board's actions have the absolute right to participate in hearings, oppose zoning applications that affect their property, and appeal to the courts. We noted that the Noerr-Pennington doctrine affords immunity to persons who object to land use applications. Ibid.

In Fraser v. Bovino, 317 N.J. Super. 23, 37-38 (App. Div. 1998), certif. denied, 160 N.J. 476 (1999), we established the general rule that objectors to land use applications are immune from tort liability under the Noerr-Pennington doctrine. We noted that "[t]he one exception to such immunity is if the conduct at issue 'is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.'" Id. at 37 (quoting Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 1928, 123 L. Ed. 2d 611, 624 (1993)). We also noted that The question whether the conduct at issue constitutes a mere sham, thus subjecting the actor to the potential of tort liability, is answered objectively, without consideration of the actor's underlying motivation, no matter how improper it may be. The legality of objectively reasonable petitioning directed toward obtaining governmental action is not at all affected by any anticompetitive purpose the actor may have had. That a private party's . . . motives are selfish is irrelevant (under Noerr-Pennington). [Id. at 38 (internal quotations, citations and alterations omitted).]

We concluded that "to constitute sham litigation, and thus expose a litigant to loss of Noerr-Pennington immunity, 'the lawsuit must be objectively baseless in the sense that no reasonable litigant . . . could conclude that the suit is reasonably calculated to elicit a favorable outcome.'" Id. at 38-39 (quoting Prof'l Real Estate Investors, supra, 508 U.S. at 60, 113 S. Ct. at 1928, 123 L. Ed. 2d at 624).

The sham exception to the Noerr-Pennington doctrine does not apply to Evans because it was not a competitor of VNB. Further, under the objective standard, the Borough's residents, including Evans, had the absolute right to challenge the Board's approval of VNB's application regardless of any underlying or selfish motives. Because the discovery VNB sought would not have supported the sham exception or allegations in the counterclaim, Judges Mayer and Ryan properly exercised their discretion to deny VNB's discovery motions.

II.

VNB contends that Judge Ryan erred in granting summary judgment and dismissing the counterclaim. It argues that it presented sufficient facts to establish each element of intentional interference with both its contract to purchase the property and its prospective business advantage. We disagree.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Coyne v. New Jersey Dep't of Transp., 182 N.J. 481, 491 (2005); Twp. of Cinnaminson v. Bertino, 405 N.J. Super. 521, 531 (App. Div.), certif. denied, 199 N.J. 516 (2009). Thus, we consider, as the trial judge did, "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009).

A cause of action for tortious interference protects the right "to pursue one's business, calling, or occupation, free from undue influence or molestation." Lamorte Burns & Co. v. Walters, 167 N.J. 285, 305 (2001). The claim must be directed against someone who is not a party to the underlying relationship. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 752 (1989); Jenkins v. Region Nine Hous. Corp., 306 N.J. Super. 258, 265 (App. Div. 1997), certif. denied, 153 N.J. 405 (1998). That is, the tort requires meddling into the affairs of another. Cappiello v. Ragen Precision Indus., Inc., 192 N.J. Super. 523, 529 (App. Div. 1984).

A claim of tortious interference with contractual relations requires the following proof: "(1) actual interference with a contract; (2) that the interference was inflicted intentionally by a defendant who is not a party to the contract; (3) that the interference was without justification; and (4) that the interference caused damage." Russo v. Nagel, 358 N.J. Super. 254, 268 (App. Div. 2003). Such a claim must be based on facts showing that the interference was done intentionally and with malice. Printing Mart-Morristown, supra, 116 N.J. at 751. In addition, "[f]or purposes of this tort, '[t]he term malice is not used in the literal sense requiring ill will toward the plaintiff.'" Ibid. Rather, malice means that the harm was inflicted intentionally and without justification or excuse. Ibid.

To constitute a wrongful act for the purpose of this cause of action, the conduct must be "transgressive of generally accepted standards of common morality or of law." Lamorte Burns, supra, 167 N.J. at 306 (internal citation omitted). That which one has a right to do cannot become a tort when it is done. Kopp, Inc. v. United Techs., Inc., 223 N.J. Super. 548, 560 (App. Div. 1988). Thus, an act that is done in the exercise of an equal or superior right cannot support this cause of action. Ibid. The standard is a flexible one, and the complained-of actions should be viewed in the context presented. Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 199 (App. Div.), certif. denied, 141 N.J. 99 (1995).

A claim of tortious interference with prospective economic advantage requires proof of "some protectable right," usually by demonstrating that the offended party had sufficiently pursued a business opportunity to have "some 'reasonable expectation'" of securing it. Printing Mart-Morristown, supra, 116 N.J. at 751 (quoting Harris v. Perl, 41 N.J. 455, 462 (1964)). Also required is proof that the interference was done "intentionally and with 'malice,'" which means "that the harm was inflicted intentionally and without justification or excuse." Ibid. (quoting Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 588 (E. & A. 1934)). In addition, there must be proof that "the interference caused the loss of the prospective gain," so that, in the absence of the interference, there would have been "'a reasonable probability that the victim of the interference would have received the anticipated economic benefits.'" Ibid. (quoting Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 185-86 (App. Div.), certif. denied, 77 N.J. 510 (1978)). Finally, thre must be proof "that the injury caused damage." Id. at 752.

VNB did not establish a genuine factual dispute as to its counterclaim allegations. There is no evidence that Evans actually interfered with or acted with intent or malice with respect to VNB's contract with Dr. Sharma, or that Evans's actions in challenging the Board's decision were without justification or excuse. To the contrary, Evans had the absolute right to challenge the Board's approval of VNB's land use application, regardless of its underlying motivation. Fraser, supra, 317 N.J. Super. at 37-38. Under the NoerrPennington doctrine, Evans was immune from tort liability and the sham exception does not apply. Accordingly, Judge Ryan properly granted summary judgment and dismissed the counterclaim with prejudice.

III.

VNB contends that Judge Ryan erred in denying its motion to amend the counterclaim to add Evans's individual members and its attorney as parties. It alleged in the proposed amended counterclaim that these individuals engaged in a civil conspiracy to intentionally interfere with both VNB's contract to purchase the property and its prospective business advantage by their delay tactics and their urging a boycott of VNB. VNB argues that the judge should have permitted the amendment to determine whether to pierce Evans's corporate veil.

We review the judge's decision on a motion to amend a pleading under an abuse-of-discretion standard. Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998). The exercise of discretion requires a two-step analysis: (1) whether the non-moving party will be prejudiced by the amendment; and (2) whether granting the amendment would nonetheless be futile. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). We conclude that the granting of the amendment in this case would have been futile.

Our Supreme Court has defined civil conspiracy as follows:

'[A] combination of two or more persons acting in concert to commit an unlawful act, or to commit a

lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or an injury upon another, and an overt act that results in damage.' [Banco Popular N. America v. Gandi, 184 N.J. 161, 177 (2005) (quoting Morgan v. Union Cnty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994)).]

Under this definition, VNB had to establish an underlying unlawful act or a lawful act committed by unlawful means, and an overt act that resulted in damage. As we have previously held herein, the counterclaim was properly dismissed because VNB failed to make a prima facie showing of intentional interference with both its contract to purchase the property and its prospective business advantage. Because of these proof failures, there is no unlawful act to sustain a claim of civil conspiracy or pierce the corporate veil. Accordingly, Judge Ryan properly denied VNB's motion to amend the counterclaim.

IV.

On cross-appeal, Evans contends that Judge Mayer erred in holding that the Board did not act arbitrarily, capriciously and unreasonably in granting the use variance for the drive-through facility. Evans argues that VNB did not present sufficient evidence to establish the negative criteria--that the use variance could be granted without substantial detriment to the public good, and the variance was not inconsistent with the intent and the purpose of the Borough's master plan and zoning ordinance.

We have considered Evans's contention in light of the record and applicable legal principles, and conclude it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We are satisfied that the record amply supports the Board's decision to grant the use variance for the drive-through facility, and that it did not act arbitrarily, capriciously or unreasonably in granting the application and the use variance. We affirm substantially for the reasons Judge Mayer expressed in her well-written, comprehensive decision rendered on March 26, 2008.

V.

Evans challenges Judge Ryan's denial of its motion for fees and sanctions against VNB pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1. Judge Ryan held that VNB did not act in bad faith, and its counterclaim was not completely devoid of new law and reasonable argument. Evans argues on appeal that the judge should have granted the motion because the Noerr-Pennington doctrine immunized Evans from tort liability, and the allegations in the counterclaim were baseless.[7]

We review the judge's decision on a motion for frivolous lawsuit sanctions under an abuse-of-discretion standard. United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 390 (App. Div.), certif. denied, 200 N.J. 367 (2009). We will reverse a decision when "the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super.

181, 193 (App. Div. 2005).

VNB argued before Judge Ryan that Evans's motion should be denied for its failure to submit an appropriate affidavit of services. Although Judge Ryan did not address this argument, we will exercise our original jurisdiction because the record on this issue is clear and complete. Huster v. Huster, 64 N.J. Super. 29, 34 (App. Div. 1960); R. 2:10-5.

The court may award "reasonable" expenses and attorney's fees to the prevailing party on a motion for frivolous lawsuit sanctions. R. 1:4-8(b)(2). In order to establish reasonableness, the moving party's attorney must submit an affidavit of services, which shall include the following information:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent. [R.P.C. 1.5(a).]

The affidavit of services must also include "a detailed statement of the time spent and services rendered by paraprofessionals, a summary of the paraprofessionals' qualifications and the attorney's billing rate for paraprofessional services to clients generally[,]" and a statement as to how much the client had paid, and "what provision, if any, has been made for the payment of fees to the attorney in the future." R. 4:42-9(b) and (c).

Evans's lead counsel submitted an affidavit of services, seeking a total of $53,918 for fees and $1,869.55 for costs allegedly incurred in defending the counterclaim only, for a total of $55,787.55. Counsel claimed that a total of 249.50 hours were spent on defending the counterclaim as follows: associates-123.45 hours; senior associates-.40 hours; partners-2.85 hours; senior partners-86.5 hours; and paralegals-36.30 hours. However, counsel failed to provide any itemization or supporting billing records,[8] which are required in order for the court to properly determine the reasonableness of the

fee sought.

In addition, the affidavit of services violates R.P.C. 1.5(a)(1), (2), (3), (5), (6) and (8). It also violates R.P.C. 1.5(a)(7) because, except for lead counsel, it does not provide "the experience, reputation, and ability of the lawyer or lawyers performing the services."

The affidavit of services violates Rule 4:42-9(b) because it does not include a detailed statement of the type of services the paralegals rendered, or a summary of their qualifications and the general billing rate. The affidavit also violates Rule 4:42-9(c) because it does not state how much Evans paid, and what provision, if any, was made for future payment. Because Evans's motion was not supported by an appropriate affidavit of services, it was not entitled to frivolous lawsuit sanctions.

Addressing the merits, we discern no abuse of discretion in Judge Ryan's denial of the motion. N.J.S.A. 2A:15-59.1a(1), which governs frivolous lawsuit claims against parties, such as the claim Evans asserts here against VNB,[9] provides that: [a] party who prevails in a civil action, either as plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous.

For the purpose of the statute, a finding that the pleading is "frivolous" must be based upon a finding that:

(1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or

(2) The non-prevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. [N.J.S.A. 2A:15-59.1b(1) to (2).]

The frivolous litigation statute is interpreted restrictively. DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226 (App. Div. 2000); Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div.), certif. denied, 162 N.J. 196 (1999). Sanctions should be awarded only in exceptional cases. Fagas v. Scott, 251 N.J. Super. 169, 181 (Law Div. 1991). See Iannone v. McHale, 245 N.J. Super. 17, 28 (App. Div. 1990) ("[T]he counsel-fee sanction must not be made available for every litigation infraction.")

"'[T]he burden of proving that the non-prevailing party acted in bad faith' is on the party who seeks fees and costs pursuant to N.J.S.A. 2A:15-59.1." Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 408 (App. Div.) (quoting McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 559 (1993)), certif. denied, 200 N.J. 502 (2009). When a prevailing party's allegation is based on an assertion that the non-prevailing party's claim lacked "'a reasonable basis in law or equity,'" and the non-prevailing

party is represented by an attorney, "an award cannot be sustained if the '[non-prevailing party] did not act in bad faith in asserting' or pursuing the claim." Ibid. (quoting McKeown-Brand, supra, 132 N.J. at 549). "The rationale for requiring proof of bad faith is that clients generally rely on their attorneys 'to evaluate the basis in law or equity of a claim or defenses,' and 'a client who relies in good faith on the advice of counsel cannot be found to have known that his or her claim or defense was baseless.'" Ibid. (quoting McKeown-Brand, supra, 132 N.J. at 557-58).

"When the [non-prevailing party's] conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided claim, he or she should not be found to have acted in bad faith." Belfer, supra, 322 N.J. Super. at 144-455. "Thus, a grant of a motion for summary judgment in favor of a [prevailing party], without more, does not support a finding that the [non-prevailing party] filed or pursued the claim in bad faith." Ferolito, supra, 408 N.J. Super. at 408.

Here, Evans's counsel served two "safe harbor" letters on VNB's counsel outlining the alleged frivolous nature of VNB's counterclaim. VNB's counsel responded that the counterclaim was not a SLAPP suit, but rather, a good faith attempt to protect VNB's legitimate business interests, particularly in light of the boycott Evans's members had urged against VNB, and their attempts to cease or delay the project. VNB's counsel also opined that the SLAPP suit cases which Evans cited in the "safe harbor" letter did not apply or were distinguishable, Evans's complaint was a sham, and that existing case law supported the counterclaim based on the discovery VNB had obtained.

In addition, Ghabrial submitted a certification in opposition to Evans's motion, stating that VNB did not act maliciously or seek to harass, delay or silence Evans or its members; rather, it was merely seeking "recompense for the extra expenses incurred as a result of the delays caused by [Evans] and its members during the approval processes required to complete [the] development." Ghabrial emphasized that Evans and its members had received "every opportunity to be heard" before the Board, the HPO, the OCC, and the court.

We are satisfied that Evans failed to prove that VNB acted in bad faith in asserting or pursuing the counterclaim. To the contrary, the evidence established that, however ill-founded, VNB honestly sought to protect its business interests and recover its costs and expenses resulting from the delay caused by Evans and its members, who continued this litigation long after the Forney House was demolished and the bank was built.

Affirmed.

1. VNB was improperly pled as Valley National Bancorp.

2. VNB also required, and received, bulk variances and waivers for parking, loading zone, trash enclosure, and signage, which are not at issue in this appeal.

3. The hearings continued on October 4, 2006, and January 3, February 7, and March 7, 2007.

4. Patients who had used the Forney Clinic parked on North Main Street.

5. The Master Plan was reexamined in 2002.

6. United Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 1593, 14 L. Ed. 2d 626, 636 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135, 81 S. Ct. 523, 528, 5 L. Ed. 2d 464, 470 (1961).

7. We decline to address the arguments raised on appeal by Evans and the amici curiae that SLAPP suit sanctions should be imposed against VNB. Evans specifically represented to Judge Ryan at oral argument that it was not seeking SLAPP suit sanctions under LoBiondo, and that its motion was "strictly a Rule 1:4-8, and a frivolous complaint application." In any event, we are not satisfied that VNB's counterclaim was a SLAPP suit. The record clearly establishes that Evans and its members were never intimidated and silenced in any way by VNB or the counterclaim, nor was their participation in the proceedings before the Board, the OCC, the HPO, and the court chilled. Evans and its members received a full and fair opportunity to exercise their First Amendment rights and challenge VNB's application and the Board's decision.

8. N.J.S.A. 2A:15-59.1c(1) mirrors R.P.C. 1.5(a), and N.J.S.A. 2A:15-59.1c(2) mirrors Rule 4:42-9(c). Contrary to Evans's counsel's claim in his affidavit of services, nowhere does N.J.S.A. 2A:15-59.1c provide that itemization of the hours and fees is not required.

9. Rule 1:4-8 governs frivolous lawsuit claims against attorneys, which is not the case here. Claims against parties governed by N.J.S.A. 2A:15-59.1 are affected by the procedural but not the substantive provisions of Rule 1:4-8 governing attorneys. Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 69-73 (2007). There is no dispute that Evans complied with the procedural provisions of Rule 1:4-8.