CITY OF NORTH WILDWOOD, Appellant, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1677-23 DEP Ref No. 0507-03-0009.8 CAF240001 Civil Action

BRIEF AND APPENDIX OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION IN OPPOSITION TO THE CITY OF NORTH WILDWOOD'S MOTION FOR EMERGENT RELIEF

Date Submitted: February 15, 2024

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625
Attorney for Respondent,
New Jersey Department of
Environmental Protection
Jason.Kane@law.njoag.gov

Jason Brandon Kane
(ID: 161592015)
Deputy Attorney General
On the Brief

FILED, Clerk of the Appellate Division, February 15, 2024, **A-001677-23**, **M-003068-23**

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS 2

ARGUMENT 6

POINT I

NORTH WILDWOOD SHOULD BE REQUIRED TO EXHAUST ITS AVAILABLE ADMINISTRATIVE REMEDY. (Responding to North Wildwood's Points I & III). 6

POINT II

NORTH WILDWOOD DOES NOT DEMONSTRATE THAT IT IS ENTITLED TO THE EXTRAORDINARY REMEDY OF INJUNCTIVE RELIEF. 13

A. North Wildwood Fails to Demonstrate a Reasonable Probability of Success on the Merits (Responding to North Wildwood's Point II.B) 14

1. An emergency does not exist as North Wildwood has not demonstrated an imminent severe loss of property............................16

2. North Wildwood does not adequately demonstrate that its project complies with the Coastal Engineering Rule, N.J.A.C. 7:7-15.11 and improperly proposes wetlands destruction. 20

B. North Wildwood Has Not Demonstrated by Clear and Convincing Evidence That It Will Suffer Irreparable Harm (Responding to North Wildwood's Point II.A)...22

C. North Wildwood Fails to Demonstrate That a Balancing of Hardships Favors Relief as Relief Would Negatively Impact the Public Interest and Outweigh Any Potential Benefit to the City (Responding to North Wildwood's Point II.C & D) 24

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Abbott v. Burke,
100 N.J. 269 (1985) 8, 9, 11

Bd. of Educ. of Upper Freehold Reg'l Sch. Dist. v. State Health Benefits Comm'n,
314 N.J. Super. 486 (App. Div. 1998) 9

Boldt v. Correspondence Mgmt., Inc.,
320 N.J. Super. 74 (App. Div. 1999) 9, 12

Boss v. Rockland Elec. Co.,
95 N.J. 33 (1983) 9

Bouie v. Dep't of Cmty. Affairs,
407 N.J. Super. 518 (App. Div. 2009) 6

Cleef v. P. Serelis Corp.,
WRN-C-160005-05 (Ch. Div. Apr. 8, 2005) 23

Crowe v. DeGioia,
90 N.J. 126 (1982) 13, 14, 22

Eccles v. Peoples Bank,
33 U.S. 426 (1948) 22

In re Distrib. of Liquid Assets,
168 N.J. 1 (2001) 10

In re Eastwick Coll. LPN-to-RN Bridge Program,
225 N.J. 533 (2016) 15

In re Freshwater Wetlands Prot. Act Rules,
180 N.J. 478 (2004) 15

In re Freshwater Wetlands Statewide Gen. Permits,
185 N.J. 452 (2006) 22

Garden State Equal. v. Dow,
216 N.J. 314 (2013) 13, 14, 22, 24

In re Hermann,
192 N.J. 19 (2007) 14

Infinity Broad. Corp. v. N.J. Meadowlands Comm'n,
187 N.J. 212 (2006) 9

McNeil v. Leg. Apportionment Comm'n of N.J.,
176 N.J. 484 (2003) 13

In re NJPDES Permit No. NJ0025241,
185 N.J. 474 (2006) 7

In re Proposed Xanadu Redevelopment Project,
402 N.J. Super. 607 (App. Div. 2008) 14

In re Resolution of State Comm'n of Investigation,
108 N.J. 35 (1987) 22

Roseberg v. Am. Hotel & Garden Co.,
121 A. 9 (N.J. Ch. 1923)..23

Scherman v. Stern,
93 N.J. Eq. 626 (N.J. 1922) 23

SMB Assocs. v. N.J. Dep't of Env't Prot.,
137 N.J. 58 (1994) 9

In re Stoeco Dev., Ltd.,
262 N.J. Super. 326 (App. Div. 1993) 6

In re Taylor,
158 N.J. 644 (1999) 14

In re Thomas Orban/Square Props., LLC,
461 N.J. Super. 57 (App. Div. 2019) 15, 22

Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env't Prot.,
191 N.J. 38 (2007) 14

Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth.,
399 N.J. Super. 508 (App. Div. 2008) 24

In re Waterfront Dev. Permit No. WD88-0443-1, Lincoln Harbor Final Dev., Weehawken, Hudson Cnty.,
244 N.J. Super. 426 (App. Div. 1990) 8, 10

Williams v. Dep't of Human Servs.,
116 N.J. 102, 107 (1989) 11

Yakus v. United States,
321 U.S. 414 (1944) 24

Zoning Bd. of Adjustment v. Serv. Elec. Cable Television,
198 N.J. Super. 370 (App. Div. 1985) 13, 22

Statutes

N.J.S.A. 13:9B-2 22

N.J.S.A. 13:9B-9 22

N.J.S.A. 13:9B-20 8

N.J.S.A. 13:9B-24 22

N.J.S.A. 13:19-5 16

N.J.S.A. 52:14B-1 to -15 6

N.J.S.A. 52:14B-2 7

N.J.S.A. 52:14B-9 7

N.J.S.A. 52:14B-3.1 7

N.J.S.A. 52:14B-3.2 7

N.J.S.A. 52:14B-12 .... 6, 7

Regulations

N.J.A.C. 1:1-9.4 12

N.J.A.C. 1:1-12.6 12

N.J.A.C. 7:7 4

N.J.A.C. 7:7-9.16 17

N.J.A.C. 7:7-9.27 17

N.J.A.C. 7:7-10.3 4

N.J.A.C. 7:7-15.11 .... 17, 20, 21

N.J.A.C. 7:7-21.1 .... 4, 15, 20

N.J.A.C. 7:7-21.3 .... 16, 20

N.J.A.C. 7:7-28.1 .... 7, 8

N.J.A.C. 7:7A-14.1 21

Court Rules

Rule 2:2-3 6

Rule 2:5-5 9

TABLE OF APPENDIX

Cleef v. P. Serelis Corp.,
WRN-C-160005-05 (Ch. Div. Apr. 8, 2005) 1

PRELIMINARY STATEMENT

The City of North Wildwood asks this court to affirmatively issue a coastal development authorization the Department of Environmental Protection ("DEP") already denied. This would require the court to substitute its judgment for DEP's, the agency that has extensive experience, expertise, and Legislative authority to review, design, and permit shore protection and coastal engineering projects, to allow a three-city-block-long steel bulkhead on the beach. This bulkhead would cut through North Wildwood's beach and dune system, which could worsen erosion that the City's beach already experiences. Based on North Wildwood's January 19, 2024 emergency authorization ("EA") request, DEP's own site visit photographs and other information, on January 31, 2024 DEP determined that an emergency does not exist and properly denied the EA.

North Wildwood's attempt to challenge DEP's decision fails. First, it is incurably premature. Before requesting judicial intervention, North Wildwood is subject to the adjudicatory process set forth by the Administrative Procedure Act ("APA") in the Office of Administrative Law ("OAL"). Without exhaustion of that administrative remedy, North Wildwood's appeal should be dismissed, and this motion denied. Second, even if the court retains jurisdiction, North Wildwood cannot meet the demanding criteria for injunctive relief. Its alleged harms about potential infrastructure and private property damages are not

irreparable as they are speculative, and if proven, could be addressed through monetary compensation. The City likewise does not demonstrate it is likely to succeed on the merits, relying heavily on new and self-serving certifications from its own agents that an emergency exists. But the full record demonstrates that there is no emergency. Finally, the hardships tip against granting the requested relief due to the bulkhead's detrimental impact in its proposed location as compared to the City's purported benefit. The court should deny this motion.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS [1]

North Wildwood is located on the northernmost portion of a barrier island in Cape May County. (Certification of Dr. Stewart Farrell ("Farrell Cert.") at ¶4). The City borders the Atlantic Ocean on its eastern shore and the Hereford Inlet on its northwestern edge. (Ibid.; Certification of Neil Yoskin, dated February 9, 2024 ("Yoskin Cert.") at Ex. B 14). North Wildwood has historically experienced beach erosion due to wave and current forces of the Hereford Inlet meeting the Atlantic Ocean, which is greatest at the northern portions of North Wildwood's shoreline. (Yoskin Cert. Ex. B 3). The City's oceanfront moving landward historically consisted of a beach, a dune system, boardwalk or a bike path with stormwater infrastructure, and then a mix of

[1] Because they are closely related, the procedural and factual histories are combined for efficiency and the court's convenience.

residential and commercial development. (Id. at 14). The North Wildwood Beach Patrol building juts out on the beach waterward of the bike path, interrupting the dune system at the end of 15th Avenue. Ibid.

For many years prior to this appeal, North Wildwood has installed bulkheads and performed other extensive oceanfront work without the required coastal permits. (Certification of Colleen Keller ("Keller Cert."), dated February 14, 2024, at Exs. A & H). In 2020, North Wildwood applied for an individual permit to legalize its unauthorized work and to install a bulkhead along its entire Atlantic Ocean-facing beach, but has never completed that comprehensive application for DEP's review. (Id. at Ex. E). This is also not the City's first EA request. In October 2022, DEP issued the City an EA authorizing jersey barrier placement along the eastern front of the Beach Patrol building behind the dune due to the building's waterward location and hurricane damage. (Id. at Ex. F). In September 2023, DEP authorized installation of a steel bulkhead along the southern and eastern edges of this structure. (Id. at Ex. D). North Wildwood has not applied for the requisite permit for this work. (Yoskin Cert. Ex. A 2).

On January 19, 2024, North Wildwood submitted its latest EA request, which also included a site location map, site photographs, and a project plan. (Id. at Ex. B). It proposed the "[i]nstallation of ±752 linear feet cantilevered

steel bulkhead (coated) with timber cap" running from the end of the unauthorized bulkhead from 12th and 13th Avenue to the Beach Patrol Building bulkhead at 15th Avenue. (Id. at 5). The proposed bulkhead project area consists of a dune system with some exceptional resource value wetlands and associated transition areas that both absorb and divert any wave forces that reach those areas. (Id. at Exs. A 2-4 & B 4). North Wildwood described an alleged dune breach between 13th and 14th Avenues and "overwash" conditions purportedly created by storms that occurred between January 9 and 14, 2024. (Id. at Ex. B 4). Thus, reasoning that there is an emergency and imminent risk of severe property damage, North Wildwood asked DEP to approve a bulkhead through the dune systems and wetlands on site and allow disturbance to freshwater wetlands. (Id. at 4-7). It also provided an alternatives analysis referencing emergency post-storm beach restoration under N.J.A.C. 7:7-10.3, concluding that all other alternatives to a bulkhead would take too long or were too expensive. (Id. at 8-10).

On January 31, 2024, DEP denied North Wildwood's EA request. (Id. at Ex. A). DEP considered the emergency authorization standard, N.J.A.C. 7:7-21.1, as well as the request's compliance with the other Coastal Zone Management ("CZM") rules, N.J.A.C. 7:7. Ibid. DEP reviewed North Wildwood's submissions, DEP's own site visit photographs, video footage,

aerials, and prior permit files, and consulted with DEP's Office of Coastal Engineering. (Id. at 3). DEP's photos show additional perspectives of North Wildwood's photos of site conditions within beach and dune areas. (Keller Cert. at Exs. B, C, & D).

Based on its expertise and review of the record, while DEP agreed there was some erosion, it determined that an emergency does not exist to warrant issuing an EA to North Wildwood. (Yoskin Cert. Ex. A at 4-5). Particularly, DEP noted that there were no "overwash areas" as North Wildwood reported as defined by the CZM rules' definition, as there was no evidence of sediment deposited landward of the vegetated dune system by the rush of water over the crest of the dune system. (Id. at 2, 4). Rather, DEP found evidence of "sand deposition" along the waterward edge of the dune system. Ibid. Applying its expertise in coastal resources, DEP verified through its site visit and photos that a "vegetated dune system and wetlands remain on site" that is between 100 and 160 feet wide which provides "substantial protection from storm-induced erosion, . . . which is currently functioning as effective, non-structural natural shore protection for this area." (Id. at 4). Given the erosion and the City's numerous EA requests, DEP "strongly" recommended that North Wildwood submit the information necessary for DEP to technically review the presently

deficient permit application for all of its shore protection activities comprehensively to avoid serious environmental consequences. (Id. at 5).

This appeal and emergent motion followed.

ARGUMENT

POINT I

NORTH WILDWOOD SHOULD BE REQUIRED TO EXHAUST ITS AVAILABLE ADMINISTRATIVE REMEDY. (Responding to North Wildwood's Points I & III)

This court should decline to hear this appeal because North Wildwood must exhaust its available administrative remedy to request and participate in an adjudicatory hearing in OAL to address its numerous disputed facts.

Under the APA, N.J.S.A. 52:14B-1 to -15, when a statute or regulation provides for an internal appeal within an agency, "judicial review shall be from the final action of the agency." N.J.S.A. 52:14B-12. An agency action is not final "until all avenues of internal administrative review have been exhausted." Bouie v. Dep't of Cmty. Affairs, 407 N.J. Super. 518, 527 (App. Div. 2009). Under Rule 2:2-3(a)(2), the Appellate Division does not review an agency action when "there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise." In re Stoeco Dev., Ltd., 262 N.J. Super. 326, 335 (App. Div. 1993). The APA provides that "[p]ersons who have particularized property interests or who are directly

affected by a permitting decision[,]" N.J.S.A. 52:14B-3.1, have the right to a contested case hearing in the OAL. N.J.S.A. 52:14B-9(a). Indeed, a permit decision challenge is the classic example of a contested case. N.J.S.A. 52:14B-2; In re NJPDES Permit No. NJ0025241, 185 N.J. 474, 481 (2006).

Here, North Wildwood failed to its exhaust administrative remedies. Specifically, it has the right to an adjudicatory hearing before OAL, which decision is then reviewed and determined by the DEP Commissioner before all administrative remedies are exhausted. Under the APA, DEP's denial of North Wildwood's EA request is a "permit decision" as it is a "decision by a State agency" to deny an agency approval. N.J.S.A. 52:14B-3.2. DEP's decision also "directly affect[s]" North Wildwood's unique "particularized property interests" as both the applicant and property owner. N.J.S.A. 52:14B-3.1. CZM permit applicants thus have a constitutional right to an adjudicatory administrative hearing to contest any decision to issue or deny a CZM application, which the DEP Commissioner reviews. N.J.A.C. 7:7-28.1(g). Judicial review in this court proceeds from the Commissioner's final decision. N.J.S.A. 52:14B-12; N.J.A.C. 7:7-28.1(g). Thus, before this court reviews the dispute, North Wildwood should be required to pursue an OAL adjudicatory hearing leading to a final agency decision of the DEP Commissioner.

Here, the exhaustion of administrative remedies before adjudication is particularly apt as it "will serve the interests of justice." Abbott v. Burke, 100 N.J. 269, 297 (1985). Those interests: 1) ensure "that claims will be heard, as a preliminary matter, by a body possessing expertise in the area;" 2) allow "the parties to create a factual record necessary for meaningful appellate review;" and 3) provide process for an "agency decision [that] may satisfy the parties and thus obviate resort to the courts." Id. at 297-98. All of these factors require that this appeal be dismissed.

First, this matter should "be heard, as a preliminary matter, by a body possessing expertise in the area." Abbott, 100 N.J. at 297. Here, the DEP Commissioner reviews the Administrative Law Judge ("ALJ") decision after an OAL hearing and makes the final decision for a CZM permit challenge. N.J.S.A. 13:9B-20; N.J.A.C. 7:7-28.1(g). The Commissioner's decision is the outcome of a "carefully tooled system" that brings together the "special insights of the Division [of Land Resource Protection], the fact-finding skills of the [OAL] and the expertise of the agency head," to ensure "a multi-faceted analysis of permit applications so as to fulfill most effectively DEP's statutory mission to protect the environment." In re Waterfront Dev. Permit No. WD88-0443-1, Lincoln Harbor Final Dev., Weehawken, Hudson Cnty., 244 N.J. Super. 426, 437 (App. Div. 1990) ("Lincoln Harbor Permit"). Completing the administrative process

is particularly necessary when the issues concern "the interpretation and application of statutes and regulations governing a program the administration of which has been expressly delegated to" a Legislatively-authorized agency (here, DEP). Bd. of Educ. of Upper Freehold Reg'l Sch. Dist. v. State Health Benefits Comm'n, 314 N.J. Super. 486, 494 (App. Div. 1998). Judicial intervention now would "usurp an administrative body's position as a fact-finder and expert in a particular field." SMB Assocs. v. N.J. Dep't of Env't Prot., 137 N.J. 58, 70 (1994). This case that involves analysis of technical facts requiring DEP's expertise calls for precisely such "restraint" against prematurely resorting to the judiciary. Ibid.

Second, the factual record is not fully developed for meaningful appellate review. Abbott, 100 N.J. at 297. An adjudicatory hearing will elicit evidence through discovery or testimony, enabling the OAL to make the requisite findings of fact for the Commissioner to accept, reject, or modify. And this court is not a fact-finding body, as its own rules explicitly address at Rule 2:5-5(b). Infinity Broad. Corp. v. N.J. Meadowlands Comm'n, 187 N.J. 212, 225-27 (2006). The ALJ is the fact-finder who develops the administrative record. See Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 84 (App. Div. 1999) (citing Boss v. Rockland Elec. Co., 95 N.J. 33, 41 (1983)) ("[W]here evidence is to be

taken, and findings of fact to be made, this is best done by the administrative body statutorily charged with that function.").

North Wildwood's challenge requires agency expertise to determine whether its Project complies with numerous CZM regulations DEP administers under its CAFRA authority. These regulations implicate coastal engineering technical issues impacting beach and dune systems, wave attenuation, and erosional forces, (Yoskin Cert. Ex. A), which require the "fact-finding skills of the [OAL] and the expertise of the agency head," Lincoln Harbor Permit, 244 N.J. Super. at 435. Indeed, North Wildwood's emergent application is replete with new facts that were not presented to DEP in the City's EA request. (Keller Cert. ¶10. Compare Yoskin Cert. Ex. B with Certification of James W. Verna III, dated February 8, 2024 ("Verna Cert.), Certification of Peter Lomax III dated February 9, 2024 ("Lomax Cert.), & Farrell Cert.). North Wildwood asks this court to issue a permit without any input from DEP on the new facts within the certifications. (Mb4, 19-20, 39; Yoskin Cert. Ex. H).[2] But established law holds the "'fundamental consideration' in reviewing agency actions is that a court may not substitute its judgment for the expertise of an agency 'so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable.'" In re Distrib. of Liquid Assets, 168 N.J. 1, 10 (2001) (quoting

[2] "Mb" refers to North Wildwood's February 9, 2024 motion brief.

Williams v. Dep't of Human Servs., 116 N.J. 102, 107 (1989) (internal citation omitted)). To the extent North Wildwood wants to further develop the record utilizing facts from these certifications, the OAL – rather than the Appellate Division – is the proper forum to do so.

Third, the Commissioner's decision "may satisfy" many of North Wildwood's challenges to DEP's permitting decision and "obviate resort to the courts." Abbott, 100 N.J. at 298. As discussed, North Wildwood raises numerous facts that were not before DEP for this permit decision. The ALJ can review these new claims and make findings of fact and conclusions of law for the Commissioner's final decision. The Commissioner could concur with North Wildwood, mooting the judicial intervention North Wildwood currently seeks. Accordingly, this exhaustion factor – like the other two – is met, and the City must exhaust its administrative remedies.

Rather than address this settled law, North Wildwood instead suggests that the court can "waive" the exhaustion requirement. (Mb38). The court balances the interests of justice with specific and narrow exceptions to determine whether a party should not have to exhaust its administrative remedies prior to adjudication. Abbott, 100 N.J. at 298. The court considers whether: 1) only a question of law need be resolved; 2) the administrative remedies would be futile; 3) irreparable harm would result; 4) the agency's jurisdiction is doubtful; and 5)

an overriding public interest calls for a prompt judicial decision. Boldt, 320 N.J. Super. at 83 (citing Abbott, 100 N.J. at 298). None of these exceptions apply here, so North Wildwood should be required to pursue its remedies.

First, this case presents mixed questions of fact and law, and the factual record must be developed before further adjudicatory review. Second, the administrative remedy of an adjudicatory hearing followed by a final agency decision is not futile. This matter would benefit from additional administrative process to allow the DEP Commissioner to review the ALJ's findings of fact and conclusions and make a final decision to create a fully developed record for appellate review and narrow many of the proposed issues for appeal. Third, no irreparable harm will occur by requiring North Wildwood to exhaust its administrative remedy. To the extent North Wildwood believes a final decision should be expedited, North Wildwood could have requested an adjudicatory hearing and concurrently applied for emergency relief (N.J.A.C. 1:1-12.6) or accelerated proceedings (N.J.A.C. 1:1-9.4). It did not do so. Fourth, neither party contests DEP's jurisdiction. And fifth, as no emergency exists, North Wildwood should undergo the administrative procedure, or complete its individual permit application, (Yoskin Cert. Ex. A 5).

North Wildwood also argues that the court should waive exhaustion because it pleads irreparable harm and that relief is in the public interest. But

as explained below, North Wildwood is mistaken. Because the City has not exhausted its necessary administrative remedies, the court should deny the emergent relief demanded and dismiss this matter.

POINT II

NORTH WILDWOOD DOES NOT DEMONSTRATE THAT IT IS ENTITLED TO THE EXTRAORDINARY REMEDY OF INJUNCTIVE RELIEF

Even if the court accepts jurisdiction of this matter, North Wildwood must show it has satisfied the requirements of Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982), to obtain injunctive relief. A party seeking a stay must demonstrate that (1) its claim rests on settled law and has a reasonable probability of succeeding on the merits; (2) relief is needed to prevent irreparable harm; and (3) balancing the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013). Additionally, "[w]hen a case presents an issue of 'significant public importance,' a court must consider the public interest in addition to the traditional Crowe factors." Garden State Equal., 216 N.J. at 321 (quoting McNeil v. Leg. Apportionment Comm'n of N.J., 176 N.J. 484, 484 (2003)). Because injunctive relief is "an extraordinary equitable remedy utilized primarily to forbid and prevent irreparable injury," Zoning Bd. of Adjustment v. Serv. Elec. Cable Television, 198 N.J. Super. 370, 379 (App. Div. 1985)

(citations omitted), each Crowe factor must be proven by clear and convincing evidence. Garden State Equal., 216 N.J. at 320. North Wildwood does not satisfy any of the factors, let alone all of them.

A. North Wildwood Fails to Demonstrate a Reasonable Probability of Success on the Merits (Responding to North Wildwood's Point II.B)

To succeed on the merits of an appeal from an agency decision, the challenger must make "a clear showing" that the agency's action "is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Hermann, 192 N.J. 19, 28 (2007); In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 642 (App. Div. 2008). A decision is considered arbitrary and capricious where there is "no rational basis" or the decision is a "willful and unreasoning action without consideration and in disregard of circumstances." Xanadu, 402 N.J. Super. at 642 (internal citations omitted). A final agency decision is entitled to "substantial deference" and should not be overturned unless, "(1) it was arbitrary, capricious, or unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings on which it was based were not supported by substantial, credible evidence in the record." Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env't Prot., 191 N.J. 38, 48 (2007) (citing In re Taylor, 158 N.J. 644, 656 (1999)).

The court defers to an agency's interpretation of rules within its sphere of authority, unless the interpretation is "plainly unreasonable." In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 541 (2016). This deference is "even stronger when the agency [] has been delegated discretion to determine the specialized and technical procedures for its tasks." In re Thomas Orban/Square Props., LLC, 461 N.J. Super. 57, 72 (App. Div. 2019) (internal citation omitted). This is because "the agency that drafted and promulgated the rule should know the meaning of that rule." Ibid. So, when DEP's expertise is a factor, as here, the court defers to that expertise. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004). Here, DEP's decision is reasonable and supported by substantial evidence in the record developed below.

DEP can only approve an EA if a requestor demonstrates an emergency, which is a "threat to life, severe loss of property, or environmental degradation exists or is imminent." N.J.A.C. 7:7-21.1(a). Even then, DEP can only issue the EA if the emergency "[c]an only be prevented or ameliorated through undertaking a regulated activity" and "[i]s likely to occur, persist, or be exacerbated before the Department can issue an authorization under a general permit or an individual permit for the preventive or ameliorative activity." Ibid. The EA requestor must also demonstrate compliance with the CZM rules "maximum extent practicable" or explain why full compliance could not be

achieved. Id. 7:7-21.3(g, h, i). Importantly, as a condition of an EA approval, the applicant must submit a complete application for an individual or general permit to authorize the activities. Id. 7:7- 21.3(e). In other words, even if an emergency exists, any measure approved under an EA must later meet the applicable rules and the EA only temporarily shortcuts the permitting process.

In this proposed project area, North Wildwood fails to demonstrate an emergency. Fundamental to this inquiry is that the proposed bulkhead is on a beach and dune, where the Legislature mandated broad DEP permitting oversight to limit developmental impact on these sensitive coastal resources. See N.J.S.A. 13:19-5(a) ("A permit . . . shall be required for . . . development located in the coastal area on any beach or dune."). If the City seeks to bypass the normal permitting process to install a bulkhead in a dune, it must therefore show there was an emergency. It failed to do so. Even if there were an emergency, North Wildwood did not show that its proposed bulkhead project meets the CZM and freshwater wetlands rules to the "maximum extent practicable." N.J.A.C. 7:7-21.3. The City cannot succeed on the merits here.

1. An emergency does not exist as North Wildwood has not demonstrated an imminent severe loss of property.

North Wildwood argues that an emergency exists because "the City is at risk of irreparable and unnecessary damage to infrastructure and property . . .

considering the existing dune breach, unpredictable nature of coastal storm events, and accelerated erosional conditions of the beaches and dune scarping." (Yoskin Cert. Ex. B 5). However, contrary to North Wildwood's claims, DEP reviewed the field conditions and verified that no "imminent threat" exists or is imminent that would create a "severe loss of property." (Id. at Ex. A 3-4).

First, DEP determined that "a vegetated dune system and wetlands remain on site." (Id. at 4). These features are readily apparent in the photos North Wildwood submitted (id. at Ex. B 15-19) and DEP's site inspections, (Keller Cert. at Exs. B 30-42, 44-46, 48, 73-77, C 10-30 42-54, & D 12-30). DEP used its expertise in evaluating coastal resources to note that "[d]unes and dune vegetation provide substantial protection from storm-induced erosion, and there is a significant distance to the stormwater infrastructure from the eastern edge of the dune system, which is currently functioning as effective, non-structural natural shore protection for this area." (Yoskin Cert. Ex. A 4). DEP and federal agencies including FEMA have noted that dunes and wetlands serve as critical shore protection measures. See N.J.A.C. 7:7-9.16(e) (Dunes); N.J.A.C. 7:7-15.11(h) (Coastal Engineering); N.J.A.C. 7:7-9.27(j) (Wetlands).

DEP determined that North Wildwood did not demonstrate that "there is an immediate or imminent threat of direct wave attack, or water or sand overwash reaching the area located west of this dune system where the municipal

infrastructure is located." (Yoskin Cert. Ex. A 4). DEP observed "small areas of sediment deposition along the immediate, waterward side of the dune system" but these were "located substantially waterward (100 to 160 feet) of the municipal infrastructure" on the City's EA Site Plan. Ibid. These sediment depositions were apparent on DEP's photos. (Keller Cert. Ex. B 25, 30-33, 35-36, 38-39, C 19, 21-22, 24, 44-46, 49-51, & D 12, 14-15, 19, 22-23. Again using its expertise, DEP found that this sand deposition "is part of a dynamic beach and dune system experiencing the natural exchange of sand" and as the exchange occurred "without [a] breach into the street" it demonstrates "that the dune system still is functioning as non-structural natural shore protection for this area." (Yoskin Cert. Ex. A 4).

In its brief, North Wildwood argues that there is a "real, substantial and immediate" threat to severe loss of property and thus an emergency. (Mb25). North Wildwood uses the Verna and Farrell certifications, generated after DEP's January 31, 2024 decision, to support its argument. They allege that there "remains only a few feet left of dune protections between the ocean and North Wildwood's critical infrastructure, and what little beach and dune system that remains will be unable to withstand even a moderate storm." (Mb25; Verna Cert. ¶11). But this is contrary to reality, as DEP assessed that the dune system is "approximately 100 to 160 feet" wide. (Yoskin Cert. Ex. A 4). This wide

expanse between the dune and the landward infrastructure can be seen on DEP's and North Wildwood's own photos. (Yoskin Cert. Ex. B 15-19; Keller Cert. Exs. B 30-43, C 18-25, 46-54, & D 12-23, 29-30).

North Wildwood also states that DEP's denial is arbitrary because it granted North Wildwood's October, 2022 EA and September 26, 2023 EA. (Mb32-33). The City ignores that for both of those EAs, DEP determined that an emergency existed requiring immediate shore protection other than dunes around North Wildwood's beach patrol building because it is "situated as the most waterward structure on the beach, with little to no setback from the eastern limit of the dune, unlike the 100-200 foot setback that exists in the area subject to the current EA request." (Yoskin Cert. Exs. A 5, B 14). The facts here differ. Thus, DEP found based on the substantial evidence in the permitting record combined with its expertise that North Wildwood did not demonstrate that landward infrastructure is "experiencing or are at significant risk of erosion/storm induced direct wave attack" and no emergency requiring bypassing normal permitting procedures existed. (Id. at Ex. A 4).

Because North Wildwood did not demonstrate an emergency, DEP did not need to analyze the remainder of the EA rule. Nonetheless, the EA denial noted that North Wildwood has a pending CAFRA individual permit that also proposes a bulkhead between 12th and 13th Avenues and 15th Avenue. (Yoskin Cert. Ex.

A 5). This, combined with the existing dune system, demonstrates that any alleged emergency is not "likely to occur, persist, or be exacerbated before the Department can issue an authorization under a general permit or an individual permit for the preventive or ameliorative activity." N.J.A.C 7:7-21.1(a). Accordingly, DEP recommended that North Wildwood complete the permit application process. (Yoskin Cert. Ex. A 5).

2. North Wildwood does not adequately demonstrate that its project complies with the Coastal Engineering Rule, N.J.A.C. 7:7-15.11 and improperly proposes wetlands destruction.

Notably missing from North Wildwood's January 19, 2024 EA request and its brief is any analysis of DEP's rules, including its Coastal Engineering Rule at N.J.A.C. 7:7-15.11. The lack of analysis to determine compliance with this rule pursuant to N.J.A.C. 7:7-21.3(h) and (i) alone should result in affirming DEP's denial.

The Coastal Engineering Rule requires that when proposing structural shore protection or storm damage management measures, such as a bulkhead, applicants must demonstrate that nonstructural or hybrid alternatives are not feasible through an exercise known as a "hierarchy analysis" before DEP can approve such measures. N.J.A.C. 7:7-15.11(b). Nonstructural methods "shall be used" unless they are shown to be not feasible or impracticable, in which case hybrid methods that allow for vegetation growth, such as stone, rip-rap, sloped

concrete articulated blocks, gabion revetments, or similar structures shall be used. Id. 7:7-15.11(b)(2). Only if nonstructural and hybrid measures are not feasible or practicable may structural methods and/or storm damage reduction measures such as bulkheads, revetments, sea walls, or other retaining structures be used. Id. 7:7-15.11(b)(3). This hierarchy matches with the purposes of CAFRA and, consistent with the general prohibition of development on dunes and in wetlands, the rule's goal to minimize the construction of "hard" shore protection measures where feasible and practicable.

Despite its failure to address this CZM rule, North Wildwood now contends that a bulkhead is the only feasible shore protection measure and must be granted through an EA. (Mb26-30). But without North Wildwood's analysis, DEP and the court cannot effectively review rule compliance. Also problematic is North Wildwood's request to reclassify and disturb established wetlands. (Yoskin Cert. Ex. B 5-8). North Wildwood attempts to do this without applying for an EA under the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-14.1 to -14.3. As the Freshwater Wetlands Protection Act is a separate permitting regime, DEP would not have jurisdiction to authorize a project without an EA application addressing those rules. N.J.S.A. 13:9B-2, -9, -24.

The City fails to demonstrate it is likely to succeed on the merits of its claim, so its extraordinary injunctive relief must be denied.

B. North Wildwood Has Not Demonstrated by Clear and Convincing Evidence That It Will Suffer Irreparable Harm (Responding to North Wildwood's Point II.A)

North Wildwood also fails to show that it will suffer irreparable harm. A stay may be granted only when necessary to prevent immediate, irreparable harm demonstrated by clear and convincing evidence. Garden State Equal., 216 N.J. at 320; Crowe, 90 N.J. at 132. Monetary damages are insufficient to demonstrate irreparable harm. Crowe, 90 N.J. at 132-33; Zoning Bd. of Adjustment v. Serv. Elec. Cable Television, 198 N.J. Super. 370, 381 (App. Div. 1985).

In addition, "where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." In re Resolution of State Comm'n of Investigation, 108 N.J. 35, 46 (1987) (quoting Eccles v. Peoples Bank, 33 U.S. 426, 431 (1948)). North Wildwood's "fear of flooding" is too speculative to warrant injunctive relief, In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 456 (2006), even when supported by expert testimony, Orban/Square Props., 461 N.J. Super. at 62-70.

North Wildwood argues that irreparable harm here "is real, substantial and immediate" without emergent relief. Yet, North Wildwood's brief does not demonstrate any new potential harm that differs from what DEP already explained is not an emergency in its January 31, 2024 decision. See supra Point II(A)(1). Failing to show sufficient facts, the City cites two irrelevant cases in

support of its argument that "the risk of harm to the North Wildwood community would be immediate and irreparable." (Mb30). First, it cites Scherman v. Stern, 93 N.J. Eq. 626, 631 (N.J. 1922), for the proposition that "destroying a business" would be irreparable injury. (Mb30). But that case did not concern property damage; it concerned a contract not to engage in a competing business, Scherman, 93 N.J. Eq. at 627-28, and the City cannot name a single business that would be injured here. North Wildwood also cites the unpublished Cleef v. P. Serelis Corp. that a "loss of real property constitutes irreparable harm." WRN-C-160005-05 (Ch. Div. Apr. 8, 2005) (slip op. at 4).[3] Not so. The harm alleged there was property potentially being sold in breach of a contract. Id. (slip op. at 1). That case has nothing to do with property damage.

Instead, case law is clear that property damage does not constitute irreparable harm. See Roseberg v. Am. Hotel & Garden Co., 121 A. 9, 13 (N.J. Ch. 1923) (irreparable injury is "of such a nature that . . . the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money).

Thus, the court should not grant equitable relief as North Wildwood has not demonstrated irreparable harm as it did not show that any property will be

[3] North Wildwood cited Cleef in its moving papers (Mb24), but it was not served upon DEP. It is attached to this brief as an appendix.

imminently damaged because water and sand is not overwashing onto North Wildwood's infrastructure, and even if it did, those damages could be resolved by monetary means.

C. North Wildwood Fails to Demonstrate That a Balancing of Hardships Favors Relief as Relief Would Negatively Impact the Public Interest and Outweigh Any Potential Benefit to the City (Responding to North Wildwood's Point II.C & D)

North Wildwood fails to demonstrate that any hardship to it would outweigh hardship to the State and public if the court granted relief. Garden State Equal., 216 N.J. at 327. Even if the court finds irreparable injury to North Wildwood, the court may "withhold relief despite a substantial showing of irreparable injury" if the public interest is "greatly affected." Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008) (citing Yakus v. United States, 321 U.S. 414, 440 (1944)).

North Wildwood claims that no equitable relief would "forestall further degradation of the essential dune system" and "expose North Wildwood, its residents and its business to an unacceptable risk of harm in the event that North Wildwood were struck by even a moderate storm." (Mb35). But the harm to the public caused by this proposed bulkhead alignment outweighs North Wildwood's speculative and unfounded harms. Notably, the bulkhead is proposed to be installed right through the existing dune system and wetlands,

which would damage, if not destroy, these resources. (Yoskin Cert. Ex. A 4-5). DEP noted that "singular stretches of bulkhead can have damaging consequences to the overall functioning of the beach and dune system." (Id. at 5). Moreover, a bulkhead experiencing a direct wave attack "is likely to increase erosion to the beach and dune system waterward of the structure . . . and to the north and south of the structure ([due to] end-effect erosion) [and] could exacerbate, rather than alleviate, conditions during future storms." Ibid. This scenario is occurring between 5th and 12th Avenues, where North Wildwood continues to delay legalization of those bulkheads. (Keller Cert. Exs. B 1-25, C 1-11, & D 1-7 ; Lomax Cert. ¶6; Verna Cert. ¶28).

Granting the City's relief would exacerbate a dangerous condition on its beach and create dangerous precedent elsewhere. The equities lie with the State.

CONCLUSION

For these reasons, the court should deny North Wildwood's motion for emergent relief.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Jason Brandon Kane
Jason Brandon Kane
Deputy Attorney General

Dated: February 15, 2024

2005 WL 975682
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Chancery Division.

John H. Van CLEEF, Jr., d/b/a/ Van Cleef Enterprises, Plaintiff,
v.
P. SERELIS CORP., Paul Serelis, Individually and as an Officer of P. Serelis Corp., Full Financial Realty, Mary Alice Kane, Robert T. Dell Elba, and John Does, 1-10, Defendants.

No. WRN-C-16005-05.
|
April 8, 2005.

Attorneys and Law Firms

Bruce C. LiCausi for Plaintiff.

Timothy J. Jaeger (Radom & Wetter) for Defendants, P. Serelis Corp. and Paul Serelis.

Order to Show Cause with Temporary Restraints (Preliminary Injunction Hearing).

WILLIAMS, J.

I. *Background*

***1** Defendant, Paul Serelis contracted with Full Financial to sell Lots 4, 5 and 6, in Block 37 in the Borough of Washington (hereinafter the "Property") for $2,400,000. The property is owned by Defendant, P. Serelis Corp. The listing broker was Defendant, Robert T. Dell Elba and the listing agent was Defendant, Mary Alice Kane. On October 16, 2004 it is alleged an option contract was signed between Defendants and John H. Van Cleef, JR., d/b/a/ Van Cleef Enterprises (hereinafter "Plaintiff") holding the sale of the property open to Plaintiff for 110 days. Plaintiff paid $2,000 for the option contract. Pursuant to the option contract Plaintiff could purchase the property for $2,200,000 within the 110 day period. Plaintiff now moves to enforce the alleged option contract.

II. *Plaintiff's-Movant's Position*

Plaintiff argues that it expended extensive time and money in attempting to obtain variances for the property. On November 15, 2004 Plaintiff informed Defendants that it would exercise the option contract to purchase the property. Plaintiff also informed Defendants of the status of Plaintiff's attempt to obtain variances. On November 18, 2004 Plaintiff tendered a formal contract to purchase the property. Moreover, Plaintiff provided Paul Serelis a Use Variance and Zoning Permit which needed Serelis' signature. The application needed to be presented to the Board of Adjustment by February 2, 2005 to be considered at a February 22, 2005 board meeting. After Paul Serelis learned the board was willing to consider a variance he refused to acknowledge the option contract; accept the contract; sign the application for Use Variance and Zoning Permit; and refused to permit Plaintiff access to the property for environmental studies. Paul Serelis indicated to Plaintiff that he wanted more money and if Plaintiff refused he would wait until the option contract expired and would develop the property or sell it to a third party. Plaintiff informed Defendants that it was ready willing and able to close and that time was of the essence. Paul Serelis responded through his attorney that there was no contract and that the sale price would be $5,000,000. Plaintiff set the time of the essence closing for February 1, 2005. Defendants failed to appear to close on the property. Plaintiff has expended more than $68,000 in connection with the purchase of this property.

Plaintiff's request for a preliminary injunction is governed by the standards established in *Crowe v. DeGioia,* 90 *N.J.* 126, 447 A.2d 173 (1982). Breach of a contract for the sale of real property is irreparable. *Pruitt v. Graziano,* 215 *N.J.Super.* 330, 331, 521 A.2d 1313 (App.Div.1987). Here Defendants have breached the option contract and Plaintiff will suffer irreparable harm if the property is transferred to a third party.

Furthermore, Plaintiff has a reasonable probability of success on the merits. Plaintiff and Paul Serelis entered into a binding option contract. Pursuant to *Black's Law Dictionary* and the court in *Schlein v. Gairoard,* 127 *N.J.L.* 358, 359-60, 22 A.2d 539 (E. & A.1941) the definition of option demonstrates the document signed by both parties is an option contract.

Plaintiff gave $2,000 in consideration for the option and detrimentally relied upon it through expending $68,000 in developmental and investigative costs. An option holder has an irrevocable right to purchase the property so long as it is exercised in accordance with the option agreement. *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates,* 182 *N.J.* 210, 864 A.2d 387 (**2005**). Moreover, the contract on its face indicates an option contract for the sale of real property. The term binder indicates an agreement to purchase property. *Black's Law Dictionary,* (5 th ed.) p. 153. It also includes a recitation of the consideration paid, the term of the option and the amount to be paid for the purchase of the property. Plaintiff attempted to exercise his right to purchase the property within the 110 day period and therefore it has an absolute right to enforcement of the option agreement. *Centex Homes **Corp**. v. Boag,* 128 *N.J.Super.* 385, 320 A.2d 194 (Ch.Div.1974); *Pruitt v. Graziano,* 215 *N.J.Super.* 333, 521 A.2d 1315 (App.Div.1987).

***2** Although Defendants rely upon the statute of frauds, Plaintiff must only prove through clear and convincing evidence a contract existed. *See* *N.J.S.A.* 25:1-13; *see also* *McBarron v. Kipling Woods, L.L.C.,* 365 *N.J.Super.* 114, 115-116, 838 A.2d 490 (App.Div.2004). Furthermore, Plaintiff exercised the option and any negotiations which were taking place did not change the original option. The terms of the option are clear and enforceable. *Barry M. Dechtman, Inc. v. Sidpaul **Corp**.,* 89 *N.J.* 547, 552, 446 A.2d 518 (1982); *Salvatore v. Trace,* 109 *N.J.Super.* 83, 262 A.2d 409 (App.Div.1969), *aff'd* 55 *N.J.* 362, 262 A.2d 385 (1970). Furthermore, Defendants violated the implied covenant of good faith and fair dealing when they refused to sell the property. *See* *Aronsohn v. Mandara,* 98 *N.J.* 92, 100, 484 A.2d 675 (1984); *Onderdonk v. Presbyterian Homes of N.J.,* 85 *N.J.* 171, 182, 425 A.2d 1057 (1981); *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates,* 182 *N.J.* 210, 864 A.2d 387 (**2005**). The court should not permit the law to work an inequity. *Skevofilax v. Quigley,* 586 *F.Supp.* 532 (D.N.J.1984); *Stehr v. Sawyer,* 40 *N.J.* 352, 192 A.2d 569 (1963). Therefore, Plaintiff has a reasonable probability of success on the merits.

Finally, a balancing of the equities favors Plaintiff. Plaintiff informed Paul **Serelis** on eleven separate occasions that it was exercising the option to purchase the property. Paul **Serelis** failed to respond or responded in bad faith. Evasive conduct amounts to a breach of the covenant of good faith. *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates,* 182 *N.J.* 210, 864 A.2d 387 (**2005**). Public policy supports the specific performance of options. *Id.;* *Centex Homes **Corp**. v. Boag,* 128 *N.J.Super.* 385, 320 A.2d 194 (Ch.Div.1974); *Pruitt v. Graziano,* 215 *N.J.Super.* 333, 521 A.2d 1315 (App.Div.1987). Therefore, the equities favor Plaintiff and Defendants should be enjoined from conveying title to the property to a third party.

III. *Defendants'-Opponents' Position*

Defendants argue that it was made clear that if the property was used for something other than commercial purposes the price would increase. Moreover, Defendants never agreed to pay for an environmental clean up which needs to be performed on the property. Defendants received the binder agreement on October 27, 2004, which Paul **Serelis** never signed. The binder provided by Plaintiff is a forgery. The open language contained in the binder was inserted by Plaintiff. This language was never agreed upon and instead Plaintiff left out language regarding increased costs if the property was developed as senior citizen housing. The binder states "the sale price of $2,200,000 with terms and conditions not available at this time." This indicates the parties had never reached an agreement. Both parties knew that the price of the property would increase if it was used for residential purposes.

Paul **Serelis** provided Plaintiff with multiple addresses and fax numbers, one of which was his nephews residence in New York. Plaintiff mailed a copy of the binder to Paul **Serelis**' nephew. The nephew then signed the binder without authorization. The $2,000 check was only to be considered liquidation expenses. The binder only gives Plaintiff the exclusive right to undertake due diligence for 110 days.

***3** Furthermore, an agreement was never reached. A letter from Plaintiff dated November 12, 2004 demonstrates that the terms of the alleged agreement were not agreed upon. On November 22, 2004 Plaintiff sent a proposed contract to Defendants. The proposed contract contains material terms which are not included in the binder, including terms regarding price, due

diligence period, closing dates, liquidated damages and environmental representations. Plaintiff's lawyer wrote a letter to Defendants on December 15, 2004 that he had not received an executed contract or any proposed changes. This indicates the parties were not even in negotiations. Defendants received a letter from Plaintiff dated December 18, 2004 which stated he could not purchase the property and that he had a new proposal which would be incorporated into a contract of sale. As a result Defendants believed the transaction was dead and negotiations had ended. However, further negotiations took place which were fruitless and resulted in this litigation.

Therefore, an enforceable contract does not exist. There must be a meeting of the minds. *Sampson v. Pierson,* 140 *N.J.Eq.* 524, 55 A.2d 218 (1947); *Hardy v. Hansen,* 134 *N.J.Eq.* 176, 34 A.2d 642 (1943). Moreover, specific performance cannot be granted unless the parties' right is clear and definite. *Cooper and Frankel v. Kensil,* 33 *N.J.Super.* 410, 110 A.2d 559 (1954). If negotiations are ongoing concerning material terms a contract does not yet exist. *Cooper River Plaza East, LLC v. Briad Group,* 359 *N.J.Super.* 518, 820 A.2d 690 (2003). Furthermore, it must contain the essential terms of the contract. *Gilbert v. Gilbert,* 66 *N.J.Super.* 246, 168 A.2d 839 (1961).

Here the binder states the parties "may wish" to enter into a formal contract. Moreover, it specifically states "terms and conditions not available." Even assuming the alleged binder was signed by an authorized party it does not contain the essential terms of a contract. Negotiations were ongoing and an agreement was never reached. A meeting of the minds never took place and the subsequent documents and letters demonstrate the parties never came to a mutually acceptable agreement. Specifically, the parties never agreed on how to deal with the environmental clean up costs. This is clearly a material term. The parties were merely attempting to negotiate a firm contract. Plaintiff even stated he could not purchase the property. Therefore, it is clear a contract was never entered into.

Finally, injunctive relief cannot be granted based upon the established evidence. There was no meeting of the minds and any alleged contract is not enforceable. The binder only permits Plaintiff to perform due diligence for 110 days. It then permits the parties to enter into a contract if they wish. For the reasons previously discussed the binder is not an enforceable contract. The facts in this case are controverted and under *Crowe v. DeGioia,* 90 *N.J.* 122 (1982) injunctive relief must be denied.

IV. *Discussion*

***4** As Plaintiffs and Defendants have both pointed out, the determination of an Order to Show Cause seeking temporary relief is procedural in nature, and therefore, the court will implement the standards set forth in New Jersey. An interlocutory "injunction" is an extraordinary equitable remedy utilized primarily to forbid and prevent an irreparable injury and it must be administered with sound discretion and always upon considerations of justice, equity, and morality in a given case. *Zoning Bd. of Adjustment of Sparta Twp. v. Service Elec. Cable Television of New Jersey, Inc.,* 198 *N.J.Super.* 370, 487 A.2d 331 (App.Div.1985). Moreover, a preliminary injunction will never be ordered unless from pressure of an urgent necessity, and damage threatened to be done, and which it is legitimate to prevent, during pendency of suit, must be of an irreparable character. *Board of Health of Medford Twp. v. Jennings,* 129 *N.J.Eq.* 51, 18 A.2d 62 (Ch.1941).

Thus, the determination to authorize preliminary relief summons the most sensitive exercise of judicial discretion. In exercising that discretion, courts have been guided traditionally by certain fundamental principles. *Crowe v. De Gioia,* 90 *N.J.* 126, 132, 447 A.2d 173 (1982). The first principle and, the sine qua non for the granting of temporary restraints, is that a preliminary injunction should not issue except when necessary to prevent irreparable harm. *Id., citing Citizens Coach Co. v. Camden Horse R.R. Co.,* 29 *N.J.Eq.* 299, 303 (E. & A. 1878). Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. *Crowe v. De Gioia,* 90 *N.J.* at 132-133, 447 A.2d 173, *citing Hodge v. Giese,* 43 *N.J.Eq.* 342, 350, 11 A. 484 (Ch. 1887). The loss of real property cannot be redressed by monetary damages and does constitute irreparable harm. *See Pruitt v. Granziano,* 215 *N.J.Super.* 330, 331, 521 A.2d 1313 (App.Div.1987). Here, any monies which

Plaintiff expended could ultimately be addressed through monetary damages. However, Plaintiff argues he is entitled to possession of the property. Therefore, irreparable harm has been demonstrated.

Furthermore, a preliminary injunction should not issue where all material facts are controverted. *Crowe v. De Gioia,* 90 *N.J.* at 133, 447 A.2d 173, *citing* *Citizens Coach Co. v. Camden Horse R.R. Co., supra,* 29 *N.J.Eq.* at 305-06. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. *Crowe v. De Gioia,* 90 *N.J.* at 133, 447 A.2d 173, *citing* *Ideal Laundry Co. v. Gugliemone,* 107 *N.J.Eq.* 108, 115-16, 151 A. 617 (E. & A.1930). Here it is alleged the parties entered into an option contract for the sale of property. Any sale of property must comply with the Statute of Frauds, *N.J.S.A.* 25:1-13, which states:

> ***5** An agreement to transfer an interest in real estate or to hold an interest in real estate for the benefit of another shall not be enforceable unless:
>
> a. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement, and the identity of the transferor and transferee are established in a writing signed by or on behalf of the party against whom enforcement is sought; or
>
> b. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement and the identity of the transferor and the transferee are proved by clear and convincing evidence.

The "Binder Contract of Sale" is alleged to have been signed by Defendants. However, Defendants state that the signature of Paul **Serelis** is a forgery. Moreover, Defendants have provided a letter from an expert which states that on a preliminary basis the signature is a forgery. Therefore, a material fact is controverted and preliminary restraints may not be entered on this basis alone.

However, even if the signature is genuine the contract must be proven through clear and convincing evidence. *Morton v. 4 Orchard Land Trust,* 180 *N.J.* 118, 849 A.2d 164 (2004). "An option contract is a unilateral agreement requiring a party to convey property at a specified price, provided the option holder exercises the option "in strict accordance" with the terms and time requirements of the contract." *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates,* 182 *N.J.* 210, 223, 864 A.2d 387 (**2005**) (*citing* *State By and Through Adams v. New Jersey Zinc Co.,* 40 *N.J.* 560, 576, 193 A.2d 244 (1963).

There are some basic tenents of contract construction the court must use as a guide in deciding this matter. When interpreting a contract the court must give the terms their "plain and ordinary meaning." *Schor v. FMS Financial* ***Corporation****,* 357 *N.J.Super.* 185, 191, 814 A.2d 1108 (App.Div.2002) (*citing* *Kaufman v. Provident Life and Cas. Ins. Co.,* 828 *F.Supp.* 275, 283 (D.N.J.1992), *aff'd,* 993 *F.2d* 877 (3d Cir.1993)). If the terms of the contract are clear the court must enforce the contract as written. *Graziano v. Grant,* 326 *N.J.Super.* 328, 342, 741 A.2d 156 (App.Div.1999). Moreover, only if there is an ambiguity should extrinsic evidence be used. *Schor v. FMS Financial* ***Corporation****, supra,* 357 *N.J.* at 192. When interpreting a contract the court should consider the surrounding circumstances and relationships of the parties in order to determine their intent and give effect to the agreement. *Graziano v. Grant, supra,* 326 *N.J.Super.* at 342, 741 A.2d 156 (*citing* *Schenck v. HJI Associates,* 295 *N.J.Super.* 445, 450-51, 685 A.2d 481 (App.Div.), *certif. denied,* 149 *N.J.* 35, 692 A.2d 48 (1997)).

Furthermore, "the terms of a contract must be definite and certain so that a court may order with precision what the parties must do." *Graziano v. Grant, supra,* 326 *N.J.Super.* at 339, 741 A.2d 156 (*citing* *Barry M. Dechtman, Inc. v. Sidpaul* ***Corp****.,* 89 *N.J.* 547, 552, 446 A.2d 518 (1982). A court cannot supply terms which have not been agreed upon or make a better contract for the parties than the one entered into. *Id.* at 342, 446 A.2d 518 (*citing* *Schenck v. HJI Associates,* 295 *N.J.Super.* 445, 450, 685 A.2d 481 (App.Div.), *certif. denied,* 149 *N.J.* 35, 692 A.2d 48 (1997)). If one or more essential terms are not agreed upon the agreement is unenforceable as the court may not supply those terms. *Id.* at 340, 692 A.2d 48 (*citing* *Weichert Co. Realtors v. Ryan,* 128 *N.J.* 427, 435, 608 A.2d 280 (1992)).

***6** Here, the alleged contract states in relevant part:

BINDER CONTRACT OF SALE

This Binder between P.Serelis **Corp** (seller) and Van **Cleef** Enterprises (buyer) is for the property in Washington Boro N.J. known as Block 37 Lots 4, 5 and 6 on the tax map. The parties agree that: for the sum of $2,000 deposited by buyer, to order of seller, will entitle seller the exclusive right to search, research and do due diligence on the property for 110 days. Seller agrees to provide buyer with all pertinent documents in his possession and allow buyer unlimited access to property.

> On or before the expiration of this Binder the parties *may* wish to enter into a formal contract of sale. (Emphasis Added) The sale price will be $2,200,000 with terms and conditions not available at this time. The parties also agree:at the conclusion of 110 days this Binder becomes null and void, unless mutually extended, the $2,000 deposit is to be considered liquidation expensives and retained by Seller. This represents the entire agreement and can only be changed with approval of both parties. Here, the alleged contract may contain ambiguous and conflicting terms.

Although the document is captioned "Binder Contract of Sale", which could be interpreted as affording a right to purchase the property, the $2,000 was specifically for the right to "search, research and do due diligence on the property for 110 days." *See Black's Law Dictionary,* (5 th ed.) p. 153. The $2,000 payment does not appear to be consideration for an option. Moreover, the document states "the parties *may* wish to enter into a formal contract of sale" and that "the sale price will be $2,200,000 with terms and conditions not available at this time." (emphasis added). The term "may" is defined as:

> An auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency. U.S. v. Lexington Mill & E. Co., 232 U.S. 399, 34 S.Ct. 337, 340, 58 L.Ed. 658. Regardless of the instrument, however, whether constitution, statute, deed, contract or whatever, courts not infrequently construe "may" as "shall" or "must" to the end that justice may not be the slave grammer. However, as a general rule, the word "may" will not be treated as a word of command unless there is something in context or subject matter of act to indicate that it was used in such sense. Bloom v. Texas State Bd. of Examiners of Psychologists, Tex.Civ.App., 475 S.W.2d 374, 377. In construction of statutes and presumably also in construction of federal rules word "may" as opposed to "shall" is indicative of discretion or choice between two or more alternatives, but context in which word appears must be controlling factor. U.S. v. Cook, C.A.Ill., 432 F.2d 1093, 1098.
>
> *See Black's Law Dictionary,* (5 th ed.) p. 883.

Therefore, the contract is conditioned upon the parties wishing to enter into a formal agreement. Evening assuming there were two interpretations of the word "may" an agreement is to be strictly construed against the party who drafted it. *Orange Township v. Empire Mortgage Serv., Inc.,* 341 *N.J.Super.* 216, 775 A.2d 174 (App.Div.2001); *Schor v. FMS Financial* ***Corporation****, supra,* 357 *N.J.* at 193. Here, Plaintiff drafted the agreement which means it must be construed against him. Therefore, the court must view the contract to only require the parties to enter into a contract for the sale of the property if they wish to. Defendants clearly do not wish to sell the property to Plaintiff. Moreover, even if the court did not construe the contract against Plaintiff, he has failed to demonstrate the essential terms of the contract through clear and convincing evidence. *See N.J.S.A.* 25:1-13.

***7** The court would not know what terms and conditions to enforce beyond property and basic price. If essential terms are not agreed upon the agreement is unenforceable. *See Weichert Co. Realtors v. Ryan,* 128 *N.J.* 427, 435, 608 A.2d 280 (1992). Moreover, since the writing does not speak to essential terms the outstanding terms would have been agreed to orally. Oral contracts must be proven through clear and convincing evidence. *See Morton v. 4 Orchard Land Trust,* 180 *N.J.* 118, 849 A.2d 164 (2004); *N.J.S.A.* 25:1-13. Here, Plaintiff has failed to prove through clear and convincing evidence the remaining essential terms of any alleged contract. Significant issues remain outstanding which go to the essence of the agreement. For instance the alleged contract does not discuss who

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

FILED, Clerk of the Appellate Division, February 15, 2024, A-001677-23, M-003068-23

will deal with and pay for the environmental clean up of the property, which may cost more than $1 million dollars. Furthermore, negotiations took place after the alleged execution of this agreement, in which the parties were attempting to create another contract of sale for the property which substantially differs from the alleged agreement before this court. These negotiations indicate to the court that the parties did not intend to be bound by the "Binder Contract of Sale." Therefore, this court cannot specifically enforce any alleged contract for the sale of the property. Accordingly, Plaintiff's case would ultimately fail on the merits and the complaint for specific performance must be dismissed.

The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief. *Id. citing Isolantite Inc. v. United Elect. Radio & Mach. Workers,* 130 *N.J.Eq.* 506, 515, 22 A.2d 796 (Ch.1941). Here, Defendants would simply be prevented from selling or encumbering the property. If the property is sold Plaintiff may be irreparably harmed because land is considered unique. Therefore, the hardships would favor Plaintiff if there were a reasonably probability he would succeed on the merits.

However, considering all factors and applying the appropriate principles, this court concludes that Plaintiff's request for injunctive relief must be denied. In order to obtain injunctive relief a party must satisfy all three requirements set forth in *Crowe.* Although irreparable harm may have been established and the hardships may favor Plaintiff, Plaintiff failed to establish he has a reasonable probability of success on the merits. Furthermore, as previously discussed a review of the merits demonstrates that Plaintiff's complaint for specific performance must be dismissed since there is not clear and convincing evidence of the terms of the contract. All remaining counts deal with monetary damages and are hereby transferred to the Law Division.

VI. *Decision*

Accordingly, Plaintiff's motion for preliminary injunction is hereby Denied. Plaintiff's complaint is hereby Dismissed as to Specific Performance and the matter Transferred to the Law Division for all remaining issues.

All Citations

Not Reported in A.2d, 2005 WL 975682

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.