

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

TODD GOURLEY and
MELISSA GOURLEY, ALICE CONTE
and DANIEL CONTE, and LAURA
SABARERIO,

Plaintiffs,

v.

TOWNSHIP OF MONROE, a
Municipal Corporation,

Defendant,

v.

JEFFERY REITZ, ELIZABETH
LATHROP, MARK F. DELANEY,
MICHELLE S. REITZ,

Third-Party Defendants.

APPELLATE DOCKET NO. A-

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
GLOUCESTER COUNTY

Civil Action

DOCKET NO. GLO-C-60-09

Sat Below:

HONORABLE JAMES E. RAFFERTY,
J.S.C.

BRIEF ON BEHALF OF DEFENDANT TOWNSHIP OF MONROE
IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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PROCEDURAL HISTORY

The defendant agrees with the procedural history contained in plaintiffs' brief with the following additions.

At the hearing on May 5, 2010 as a result of which the trial court entered an order for temporary resolution, discovery was stayed for sixty (60) days from May 5, 2010. (Pa88) During that sixty (60) day period the procedures specified in the order for temporary resolution were followed by the parties.

It was only after the court was notified that the parties were unable to come to an agreement that the court scheduled a hearing on the application for the preliminary injunction as well as the defendant's motion to dismiss pursuant to Rule 4:6-2 for August 25, 2010. (Pa91-Pa94)

The third-party defendants Delaney and Reitz filed an answer and crossclaim on May 13, 2010 "for claims covered under the insurance policy only." (Da1-Da12) On August 4, 2010, the third-party defendants Reitz and Lathrop filed a limited answer to Counts II, III and IV, crossclaim and a counterclaim. (Da13-Da17)

Therefore, discovery has been reopened and the parties have exchanged interrogatories and demands for production of

documents.

COUNTERSTATEMENT OF FACTS

The plaintiffs Todd and Melissa Gourley reside at 868 Newton Avenue, Township of Monroe, New Jersey. They purchased this property on November 30, 2000, claiming that they were not aware of any flooding or any potential flooding to the property. (Pa40)

Over the next couple of years they noticed that after a "good" rainfall some water would start collecting in their side yard. However, they made no complaints to anyone concerning that problem. (Pa40) At some point in late 2005 or early 2006 third-party defendant Jeffrey Reitz, a neighbor, started to clear his lot. After Reitz installed a pole barn the plaintiffs claim that after rains there was more water and more flooding on their property. Furthermore, they knew the source of the water because orange clay would wash into the yard from the third-party defendant Reitz's yard. (Pa41) After Reitz started construction on his new home the flooding became more frequent and severe. Consequently, the plaintiffs claim that they attempted to take matters into their own hands and make repairs to their property. (Pa42) The plaintiffs also

appear to claim that the presence of a curb in front of the third-party defendant Delaney's property contributed to the flooding problem on their property. (Pa42)

The plaintiffs then became involved in disputes with both the Delaneys and the Reitzs over various attempts to correct the flooding on their property as a result of the activities of the third-party defendants. (Pa42-Pa47) The expert report submitted by plaintiffs in support of their application, dated September 29, 2009, also blames private landowners for filling and grading their properties along Newton Avenue as the cause of an increased amount of water flowing down the street towards the Gourleys' property. (Pa16, Pa50)

The plaintiffs who joined the litigation after the filing of the Complaint by the Gourleys; Alice and Daniel Conte and Laura Sabarerio, appear to blame the third-party defendant Mark Delaney for contributing, if not causing, the flooding on their respective properties. .(Pa65-Pa68) However, no proofs have been presented against the Township of Monroe, other than its ownership of Newton Avenue, that the Township has contributed and/or caused flooding on the plaintiffs' property. The proofs presented to the trial

court at this stage of the litigation appear to state that as a result of rainwater flowing off of private landowners' properties the plaintiffs' property floods during heavy rainfall.

STATEMENT OF THE CASE

The plaintiffs are demanding that the trial court order the Township of Monroe to take the following extraordinary steps:

The Court: Okay. What are you proposing that they do in this case?

Mr. Wolfe: I have offered, on behalf of my clients, to have the clients' property be purchased by the town, essentially for the amount of the mortgage, and then they can tear the property down. . .

Mr. Wolfe: But, anyway, the point is that a suitable, acceptable, workable retention basin could be installed.

The Court: On your - - -

Mr. Wolfe: On our property. And we will get out.

(T9, lines 10-24)

The trial court wisely refrained from granting the application for injunctive relief. In response to the argument made by the defendant that such a remedy is

extraordinary, particularly in light of the budgetary constraints facing municipalities, the plaintiffs argue that the Township of Monroe must be forced to find money to meet the plaintiffs' demands. (T11, lines 8-15)

The trial court noted numerous factual issues present which prevented it from entertaining the possibility of granting the application for injunctive relief at this time. There were significant disputed factual questions as to whether or not the Township property at issue, i.e. a municipal road, is in a dangerous condition and that such a dangerous condition is causing problems such as flooding. (T32, lines 10-25; T33, lines 1-25; T34, line 1) Thus, the trial court justifiably stayed its hand and ordered the parties to proceed quickly through discovery. (T34, line 2-14; T35, lines 2-25; T36, lines 1-16)

LEGAL ARGUMENT

I. THE GRANTING OF THE MOTION FOR LEAVE TO APPEAL WOULD VIOLATE THE STRONG POLICY AGAINST PIECEMEAL REVIEW OF TRIAL LEVEL PROCEEDINGS.

The plaintiffs' attempt to seek relief from an interlocutory order of the trial court violates the general policy against piecemeal review of trial level proceedings.

Therefore, the motion for leave to appeal should be denied.

Rule 2:2-4 controls appeals to the Appellate Division for interlocutory orders. It states:

[t]he Appellate Division may grant leave to appeal, in the interest of justice, from an interlocutory order of the court. . .

An interlocutory appeal is not appropriate to "correct minor injustices . . ." Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div.), certif. den. 22 N.J. 574 (1956), cert. den. 353 U.S. 923 (1957). Rather leave should only be granted if there is a possibility of "some grave damage or injustice" resulting from the trial court's order. Id. at 568. Leave to appeal should only be considered if it would resolve a fundamental procedural issue and thereby prevent the court and the parties from embarking on an improper or unnecessary course of litigation. Brundage v. Carambio, 195 N.J. 575, 599 (2008). At times it might be appropriate to grant leave to appeal if the appeal will terminate the litigation and substantially conserve the time and expense of the litigants and the courts. Romano v. Maglio, 41 N.J. Super. at 568. A moving party must establish, at a minimum, that the desire to appeal has merit and that "justice calls for an Appellate Court's interference in the cause." Ibid.

Clearly it is a difficult hurdle for an applicant to successfully obtain appellate consideration of an interlocutory order of the trial court. Novel questions of law, issues of constitutional magnitude or orders that actually or effectively terminate the litigation may justify appellate intervention. Brundage supra. at 961. However, no such issues are presented in the case at hand.

Furthermore, discovery has only begun, the third-party defendants have only recently joined the litigation and there are, as the trial court recognized, issues that have to be resolved through discovery as to the cause of the flooding to the plaintiffs' properties as well as what, if any, municipal involvement contributes to such flooding.

The trial court did not foreclose taking action in support of plaintiffs' application for injunctive relief in the future:

So I am not at this time inclined to grant preliminary injunctive relief. That certainly is not to say that after a trial in this case, the Court will grant some kind of injunctive relief against the municipality to rectify the problems, if, in fact, it's determined that there is liability.

There are significant engineering questions that I have. There are significant facts surrounding this runoff

on the road and how the runoff gets to the property of the plaintiffs. There may or may not be questions about the statute of repose. . .

(T33, lines 11-21)

Thus, the plaintiffs cannot meet the heavy burden necessary to justify appellate intervention at such an early stage of the litigation before the trial court. Therefore, the motion for leave to appeal should be denied.

II. THE PLAINTIFFS' ALLEGATIONS THAT THE DEFENDANT TOWNSHIP OF MONROE IS "SITTING ON THEIR HANDS" (sic) IS UNTRUE, INSTEAD IT IS THE PLAINTIFFS WHO HAVE MADE UNREASONABLE DEMANDS ON THE MUNICIPALITY.

Contrary to the plaintiffs' claims, the Township of Monroe, pursuant to the trial court's order of May 5, 2010, did provide alternative solutions as required by that order in an effort to resolve the matter. The alternative solutions involved extensive actions on the part of the defendant. (T15, lines 8-25; T16, lines 1-3) Needless to say the Township's efforts failed.

It is important to note that the plaintiffs, along with demanding injunctive relief, have demanded damages and attorney's fees. Even if this Court granted leave to appeal the application for injunctive relief and, in fact, such

relief was granted at this time, the litigation would continue as the plaintiffs are demanding compensation from a municipality for flooding which the plaintiffs claim is caused by the third-party defendants and other landowners in the area. To argue therefore that somehow the Township, in light of these facts, is "sitting on their hands" (sic) is quite simply incorrect. The matter should be allowed to proceed through discovery and to a trial, if necessary, to ascertain the facts as opposed to relying on mere allegations on the part of the plaintiffs.

It is not the Township of Monroe that is the only party that can alleviate the alleged flooding of the plaintiffs' properties. Presumably actions could be taken by the third-party defendants as well as others that would alleviate the alleged flooding problem. Therefore it is essential that the parties proceed with discovery and, if necessary, a trial to determine the merits of the plaintiffs' claims.

**III. SINCE THE PLAINTIFFS HAVE NOT MET THE
STANDARDS NECESSARY FOR GRANTING A
PRELIMINARY INJUNCTION, THE TRIAL COURT
PROPERLY DENIED PLAINTIFFS' APPLICATION
FOR INJUNCTIVE RELIEF.**

The plaintiffs failed to meet the heavy burden placed on one seeking a preliminary injunction against a

municipality. It is axiomatic that the preliminary injunction should not issue except when necessary to prevent irreparable harm. Crowe v. De Gioia, 90 N.J. 126, 132 (1982). Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. Id. at 133.

A second principle is that temporary relief should be withheld when the legal right underlying plaintiffs' claim is unsettled. Ibid. The third principle is that a preliminary injunction should not issue where all material facts are controverted. Ibid. And the final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief. Id. at 134. See also, B & S Ltd., Inc. v. Elephant & Castle International, Inc., 388 N.J. Super. 160 (Ch. Div. 2006). As the trial court noted the plaintiffs have failed to demonstrate several of the principles necessary for the granting of injunctive relief. Clearly there is a dispute as to the legal right of the plaintiffs' claims against the Township.

There are issues present concerning the actual cause of the flooding allegedly afflicting plaintiffs' property. The

plaintiffs seem to acknowledge that a major cause in the increase of water coming on their property has to do with actions taken by the third-party defendants in building up their property and placing an allegedly illegal curb along the roadway. (Pa41; Pa57) There are issues involving the Township's immunities under the Tort Claims Act for conditions on private as opposed to public property. (T33, lines 5-10)

The trial court found that there were significant controverted facts present which prevented the court from exercising the extreme power of issuing an injunction against the Township of Monroe. (T32, lines 16-22) Finally, there is the added factor which any trial court must take into account, the plaintiffs are not asking merely for an injunction preventing the Township from doing something, they are requesting that the Township actually expend money on a major construction project. Certainly no court should become involved in supervising a construction project on the bare record that has been presented so far in this litigation.

Therefore, because of the failure on the part of the plaintiffs to demonstrate that they will be successful in

the litigation against the Township of Monroe, the trial court correctly denied the application for a preliminary injunction.

CONCLUSION

For all the above reasons, this Court should deny the plaintiffs' motion for leave to appeal the trial court's denial of their application for a preliminary injunction.

Respectfully submitted,

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