

RULS - AD - 1985 - 330

10/29/85

Letter to Judge Serpentelli requesting that Township's app be denied in Hills Dev. Co. v. Bernards

Pgs - 8

RECEIVED

OCT 30 1985

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October 29, 1985

FILE NO. 3000-04-02

The Honorable Eugene D. Serpentelli
Judge, Superior Court of New Jersey
Ocean County Court House
Toms River, NJ 08753

RE: Hills Development Co. v. Tp. of Bernards Docket No: L-030039-84 PW

Dear Judge Serpentelli:

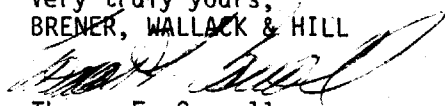
Enclosed herewith please find the following documents in regard to the above referenced matter:

- | | |
|--|--|
| <input type="checkbox"/> Complaint | <input type="checkbox"/> Request for Enter Default & Certification |
| <input type="checkbox"/> Complaint/Jury Demand | <input type="checkbox"/> Interrogatories |
| <input type="checkbox"/> Proof of Filing/Mailing | <input type="checkbox"/> Release |
| <input type="checkbox"/> Answer/Counterclaims | <input type="checkbox"/> Notice to Take Oral Depositions |
| <input type="checkbox"/> Notice of Motion | <input type="checkbox"/> Notice to Produce Documents |
| <input type="checkbox"/> Order | <input type="checkbox"/> Judgment |
| <input checked="" type="checkbox"/> Proposed Order | <input type="checkbox"/> Acknowledgment of Service |
| <input type="checkbox"/> Affidavit | <input type="checkbox"/> Certification |
| <input type="checkbox"/> Stipulation | <input type="checkbox"/> Check in the amount of \$30.00 |
| <input type="checkbox"/> Third Party Complaint | <input checked="" type="checkbox"/> Letter Memorandum |
| | <input checked="" type="checkbox"/> Slip Opinion |

Would you kindly:

- File and return a filed copy to us with the messenger.
- Sign and return to us in the envelope provided.
- Have signed by the appropriate judge and return to us in the envelope provided.
- Serve.
- Have answered and return to us within the time provided by the Rules.

Very truly yours,
BRENER, WALLACK & HILL


Thomas F. Carroll

TFC:klp
enclosures
cc: James E. Davidson, Esq. (w/enclosures)
Arthur H. Garvin, III, Esq. (w/enclosures)

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October 29, 1985

FILE NO.

Honorable Eugene D. Serpentelli
Judge, Superior Court of New Jersey
Ocean County Courthouse
Toms River, New Jersey 08753Re: Hills Development Company v. Township of Bernards, et al;
Docket No. L-030039 - P.W.

Dear Judge Serpentelli:

Plaintiff, The Hills Development Company ("Hills"), is in receipt of a Notice of Motion filed by the Defendants in this matter wherein Defendants seek a stay of all trial court proceedings and immunity from builder's remedies. Please accept this letter memorandum in lieu of a formal brief in opposition to said Motion.

**DEFENDANTS HAVE NOT DEMONSTRATED
ENTITLEMENT TO A STAY OF ALL TRIAL COURT
PROCEEDINGS AND THE REQUEST FOR A STAY
SHOULD THEREFORE BE DENIED.**

Pursuant to this Court's oral opinion of October 4, 1985 (a copy of the transcript of which was served by Defendants along with their motion for a stay), an Order was entered by this Court on October 16, 1985 wherein the Court memorialized its decision to deny the Defendants' motion to transfer this

litigation to the Affordable Housing Council. Defendants certify that they will file an application seeking leave to appeal from said interlocutory Order.

Rule 2:9-5 provides in pertinent part that:

[n]either an appeal, nor motion for leave to appeal, nor a proceeding for certification, nor any other proceeding in the matter shall stay the proceedings in any court in a civil action or summary contempt proceeding, but a stay with or without terms may be ordered in any such action or proceeding in accordance with R. 2:9-5(b).

Rule 2:5-6, which governs appeals from interlocutory orders, provides in pertinent part that:

[t]he filing of a motion for leave to appeal shall not stay the proceedings in the trial court or agency except on motion made to the court or agency which entered the order or if denied by it, to the appellate court.

The question of whether to grant a request for a stay rests within the sound discretion of the court. Doughty v. Somerville & Easton R.R. Co., 7 N.J. Eq., 629, 632 (E. & A. 1848); Ratzer v. Ratzer, 29 N.J. Eq. 162 (Ch. 1878); Jewett v. Dringer, 29 N.J. Eq., 199, 200 (Ch. 1878), rev'd on other grounds, 30 N.J. Eq. 291 (E. & A. 1878). As noted by the court in Jewett:

Such applications are always addressed to the sound discretion of the court. And while it is quite manifest this power is indispensable to an efficacious administration of justice, yet it is also quite obvious, unless it is exercised with the utmost caution and discrimination, it may be made the instrument of wrong and ruin. Id. at 200.

"The rule of discretion in these matters is to determine whether or not the refusal of a stay will operate to defeat the object of the appeal". Grausman v. Porto Rican - Am. Tobacco Co., 95 N.J. Eq. 155, 167 (Ch. Div. 1923) aff'd 95 N.J. Eq. 223 (E. & A. 1923). An order should not be stayed if the

effect of the stay would be to destroy the right established or protected by the order. In re Hudson County Newspaper Guild, 61 N.J.L.J. 37 (Ch. Div. 1938).

It is incumbent upon the moving party to demonstrate a need to maintain the status quo and a reasonable possibility of success on appeal. Grausman, supra, 95 N.J.Eq. at 167-168. See also Mc Michael v. Barefoot, 85 N.J. Eq. 139 (E.&A. 1915). The moving party is also required to demonstrate that operation of the order or judgment below pending appeal will cause irreparable injury to the appellant. Grausman, supra, 95 N.J.Eq. at 167. Mere inconvenience and annoyance do not justify granting the extraordinary relief of a stay. Riehle v. Heulings, 38 N.J. Eq. 83, 85 (Ch. 1884) aff'd 38 N.J. Eq. 652 (E.&A. 1884).

Defendants' moving papers on this application are absolutely devoid of any demonstration of the need to maintain the status quo, a reasonable possibility of success on the merits or irreparable injury should the stay not be granted. Indeed, the Defendants would be unable to offer any such demonstration.

With respect to the need to preserve the status quo, Defendants are asking this Court to: (1) allow this case to lie dormant; and (2) immunize the Defendant Township from builder's remedy lawsuits. Allowing this case to lie dormant pending appeal would result in the very harm sought to be avoided by this Court when it denied Defendants' transfer application, that is, delay in the resolution of this matter. There is no need to preserve the status quo in this matter. To the contrary, there is a constitutional imperative underlying this Court's desire to hold a compliance hearing and adjudicate this matter to its conclusion.

As to Defendants' request for immunity from builder's remedy lawsuits, Hills takes no substantive position since said requested relief does not appear to be directed at Hills. By way of comment, however, Hills notes that there is some question as to whether this Court's prior grant of such immunity is still in effect. If not, the Defendant Township would not appear entitled to such relief at this juncture. The essential justification underlying this Court's granting of builder's remedy immunity is a municipality's desire to voluntarily comply with the Mount Laurel mandate. Apparently, the Defendant Township no longer wishes to voluntarily comply in the judicial arena. If this matter had been transferred, the Township would not be immune from builder's lawsuits. See e.g. Fair Housing Act, Section 16(b). Since this matter is to be resolved in this Court, it would seem that the Township may acquire additional immunity only if it decides to voluntarily comply.¹

With respect to Defendants' probability of success on appeal, it should first be noted that the likelihood of the Appellate Division granting leave to appeal the interlocutory Order of October 16, 1985 is quite remote. Our Supreme Court has strongly stated its position as to interlocutory appeals in Mount Laurel litigation:

¹ Section 28 of the Fair Housing Act purports to impose a "moratorium" on the award of builder's remedies by the Superior Court. Defendant Bernards Township appears to be requesting a proscriptive judicial directive against the seeking of builder's remedies. Nevertheless, it should be noted that the constitutionality of Section 28 is extremely doubtful. See Morris County Fair Housing Council, et al v. Boonton Township, et al (and consolidated cases), No. L-6001-78 P.W., et al. (Law Div. Morris/Middlesex, October 28, 1985), slip op. at 20-26 (copy of said unreported opinion submitted herewith); Fischer v. Bedminster Tp., 5 N.J. 534, 541 (1950).

The municipality may elect to revise its land use regulations and implement affirmative remedies "under protest." If so, it may file an appeal when the trial court enters final judgment of compliance. Until that time there shall be no right of appeal, as the trial court's determination of fair share and non-compliance is interlocutory. Stay of the effectiveness of an ordinance that is the basis for a judgment of compliance where the ordinance was adopted "under protest" shall be determined in accordance with the usual rules. Proceedings as ordered herein (including the obligation of the municipality to revise its zoning ordinance with the assistance of the special master) will continue despite the pendency of any attempted interlocutory appeals by the municipality.

Southern Burlington County N.A.A.C.P v. Township of Mount Laurel ("Mount Laurel II"), 92 N.J. 158, 285 (1983)(emphasis added).

While the above proscription may not be absolute, the holding clearly indicates that it is highly unlikely that the Township's appeal will be heard prior to entry of a judgment of compliance. Moreover, Hills is aware of no instance in which the Appellate Division has granted any Mount Laurel II litigant's request for leave to file an interlocutory appeal.

Even if the Appellate Division granted the Defendants' application for leave, Defendants' probability of success on the merits would indeed be remote. The standard on appeal would be whether this Court's denial of the Township's transfer application amounted to an abuse of discretion. As this Court's well-reasoned and thorough 43 page opinion concluded, evidence of the injustice to lower income people and Hills which would occur upon transfer was indeed evident and manifest. (Transcript of October 4, 1985 oral opinion at 41-42). The probability of the Defendants' ability to demonstrate this Court's abuse of its discretion is negligible.

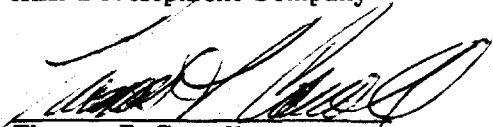
Finally, there is nothing to indicate that the Defendants will suffer any irreparable injury if their request for a stay is denied. The trial court proceedings which Defendants seek to stay would entail a compliance hearing and, ultimately, the entry of a judgment of compliance. A finding that the Defendant Township's revised ordinance is constitutional would certainly not be injurious to the Township. Denial of the instant stay application will result in no injury, irreparable or otherwise, to the Township. On the other hand, if the stay were issued, this matter would lie dormant and the injury to plaintiffs sought to be avoided by this Court on October 4, 1985 would result.

For the foregoing reasons, Hills submits that the Defendants have not and cannot demonstrate entitlement to the extraordinary relief of a stay. Hills, therefore, respectfully requests that the Township's application be denied in all respects. A proposed form of Order reflecting said request is enclosed herewith.

Respectfully submitted,

BRENER, WALLACK & HILL
Attorneys for Plaintiff-
The Hills Development Company

By:


Thomas F. Carroll

Dated: October 29, 1985

01/07
10/29/85

BRENER, WALLACK & HILL

24 Chambers Street
Princeton, New Jersey 08540
(609) 924-0808
Attorneys for Plaintiff

THE HILLS DEVELOPMENT COMPANY :	SUPERIOR COURT OF
Plaintiff :	NEW JERSEY
vs. :	LAW DIVISION-
THE TOWNSHIP OF BERNARDS in the :	SOMERSET COUNTY/OCEAN COUNTY
COUNTY OF SOMERSET, a municipal :	(Mt. Laurel II)
corporation of the State of New Jersey, :	Docket No. L-030039-84 P.W.
THE TOWNSHIP COMMITTEE OF THE :	CIVIL ACTION
TOWNSHIP OF BERNARDS, THE :	ORDER
PLANNING BOARD OF THE TOWNSHIP :	
OF BERNARDS and the SEWERAGE :	
AUTHORITY OF THE TOWNSHIP :	
OF BERNARDS :	
Defendants :	

This matter having been opened to the Court by Farrell, Curtis, Carlin & Davidson, attorneys for Defendants, Township of Bernards, Township Committee of the Township of Bernards and the Sewerage Authority of the Township of Bernards, James E. Davidson, Esq. appearing, and Kerby, Cooper, Schaul & Garvin, attorneys for Defendant Planning Board of the Township of Bernards, Arthur H. Garvin, III, Esq. appearing, in the presence of Brener, Wallack & Hill, attorneys for Plaintiff -The Hills Development Company, Thomas F. Carroll, Esq. appearing, and the Court having reviewed the Defendants' motion for a stay of all trial court proceedings and the