NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2536-09T1

SEAVEY CONSTRUCTION, INC.,

Plaintiff-Respondent,

v.

CHRISTINE ST. PETER and ADAM LEVINSOHN,

Defendants-Appellants,

and

BOILING SPRINGS SAVINGS BANK and AMBOY BANK,

Defendants.

Argued October 20, 2010 - Decided September 19, 2011

Before Judges Fuentes, Gilroy and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-605-09.

Michael D. Mezzacca argued the cause for appellants (Hartlaub, Dotten, Mezzacca & Ko, P.C., attorneys; Mr. Mezzacca, of counsel and on the briefs; Michael J. Gilligan, on the briefs).

Adam M. Smith argued the cause for respondent (Coughlin Duffy, L.L.P., attorneys; Mr. Smith, of counsel and on the brief; Lori A. Patrick, on the brief).

PER CURIAM

Defendants, Christine St. Peter and Adam Levinsohn, appeal from several Law Division orders that entered judgment on a residential construction lien arbitration award validating plaintiff, Seavey Construction, Inc.'s, residential construction lien; entered partial summary judgment on liability against defendants on plaintiff's breach of contract and unjust enrichment claims; dismissed defendants' counterclaims; entered a partial money judgment against defendants; and denied defendants' motion for reconsideration.

This action arose out of a home-improvement contract and a residential construction lien claim filed under the Construction Lien Law, N.J.S.A. 2A:44A-1 to -38 (the CLL).[1] Here, a CLL arbitrator determined that a residential lien claimant had a valid lien that attached to the improvement, and rejected the setoffs asserted by the homeowner. In this light, we must decide whether these determinations: (1) entitle the contractor to a money judgment on its substantive claims against the homeowner; and (2) bar litigation of the homeowner's counterclaims. We conclude that the arbitrator's determination establishes only a prejudgment lien that must be confirmed in litigation. The arbitrator's award does not entitle the

[1] The references to the provisions of the CLL are to the Act as it existed at the time the motions were filed, that is, before its amendment, L. 2010, c. 119, effective January 5, 2011.

contractor to a money judgment on the merits nor dismissal of defendants' affirmative counterclaims. Because the trial court decided otherwise, we reverse and remand.

I.

On November 28, 2007, the parties signed a "Cost Plus Percentage" agreement for construction of renovations to defendants' residence in Morris Township, New Jersey. The agreement included a "pre-construction estimate[]" or "target price" of $1,140,000, and the following arbitration clause:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by binding arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. This shall only be resolved in this manner if first the owner and contractor consult with a non-biased third party (Kahn Architects) or other NJ licensed architect and cannot agree to terms negotiated between the parties.

Plaintiff performed work at defendants' residence from November 2007 through October 24, 2008. The parties disagree on the reason plaintiff stopped working, but they had become involved in various disputes, including changes in the scope of the work, cost overruns, and defendants' refusal to pay plaintiff's outstanding invoices.

After stopping work, plaintiff filed on December 8, 2008, a "Notice of Unpaid Balance and Right to File Lien" (NUB) under the CLL. Plaintiff also filed a demand for arbitration to confirm its lien "in accordance with the [CLL] and the [American Arbitration Association (AAA)] [N]ew Jersey Residential Construction Lien Arbitration Rules." Plaintiff's demand for arbitration was received by the AAA on December 10, 2008.

Defendants filed an answering statement and counterclaim on December 31, 2008, and asserted that the contract between the parties was "governed by the New Jersey Consumer Fraud Act and the Home Improvement Practices Regulations." Defendants also alleged that plaintiff calculated the lien claim by taking the "target price" of $1,140,000 and deducting $940,264.13, the money already paid, resulting in the lien claim of $199,735.87, which ignored cost overruns. Plaintiff filed a reply on January 8, 2009.

On January 9, 2009, the arbitrator rendered his decision. He checked off lines on a form indicating that the NUB was filed and served in compliance with the CLL, that the lien claim was valid in the amount of $199,735.87, and that no liquidated or unliquidated setoffs or counterclaims to the lien claim were submitted for determination.

On January 13, 2009, defendants submitted an amended answering statement and counterclaim asserting a $340,000 claim representing the difference between the $1,140,000 target contract price and plaintiff's estimated cost to complete the work. On February 17, 2009, the arbitrator prepared a supplemental statement:

> I revisited the Award. Item 9b should have been checked as opposed to 9a. This was my clerical error. The counterclaim was in fact considered, but found to be not valid. The result remains unchanged: the lien claim is valid in the amount of $199,735.87.

On February 23, 2009, plaintiff filed a four count complaint in the Law Division, alleging causes of action for breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, and foreclosure of the construction lien claim. Defendants answered on May 26, 2009, and asserted counterclaims for violations of the Consumer Fraud Act and Home Improvement Practices Regulations, breach of contract, negligence, and filing an invalid lien.

On June 19, 2009, plaintiff filed a motion seeking: (1) confirmation of the arbitration award, (2) dismissal of defendants' counterclaims, and (3) the entry of an order granting partial summary judgment on liability on its breach of contract and unjust enrichment claims. In support of the motion, plaintiff submitted a certification, the contract,

invoices, the NUB, and various documents submitted in connection with the construction lien arbitration, including the award and amended award. Plaintiff also included a copy of its complaint and defendants' answer and counterclaim.

In opposition to the motion, defendants submitted the certification of Levinsohn, attesting to cost overruns, defects in the work performed by plaintiff, and his being misled by plaintiff about various aspects of the job. Defendants also submitted email communications among the parties.

Following oral argument on October 23, 2009, the court delivered an opinion from the bench. The court limited its review of the arbitration award to "the procedural requirements under the [CLL], or under the other statute, which allows an arbitrator's award to be set aside if there is fraud, corruption or undue means, or things in that category, which is a limited right that the Court has to review any arbitration." Finding that plaintiff had complied with the CLL procedures, the court entered summary judgment on plaintiff's lien claim, breach of contract claim, and unjust enrichment claim. The court also dismissed with prejudice defendants' counterclaims "because the arbitrator found that those counterclaims had no validity. . . ." Defendants moved for reconsideration.

On plaintiff's motion, the court entered an order of judgment against defendants for $199,735.87, certified the judgment as final, and denied defendants' motion for reconsideration.

II.

We review the trial judge's summary judgment order de novo, using the standard set forth in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). That standard requires that the court determine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. "[H]owever, . . . if the summary judgment turns on a question of law, or if further factual development is unnecessary in light of the issues presented, then summary judgment need not be delayed." United Sav. Bank v. N.J. Dep't of Envtl. Prot., 360 N.J. Super. 520, 525 (App. Div.), certif. denied, 177 N.J. 574 (2003).

The CLL includes separate and distinct sections for residential and commercial projects to accommodate, on one hand, the protection of the value of work contractors have provided,

and, on the other hand, the need for a stable marketplace for the purchase, sale, and financing of residential housing. N.J.S.A. 2A:44A-21(a); Schadrack v. K.P. Burke Builder, LLC, 407 N.J. Super. 153, 162 (App. Div. 2009). For residential projects, as a condition precedent to filing a lien claim, the lien claimant must file and serve a NUB. N.J.S.A. 2A:44A-21(b)(1) and (2). Additionally, the lien claimant must "serve a demand for arbitration and fulfill all the requirements and procedures of the [AAA] to institute an expedited proceeding before a single arbitrator designated by the [AAA]." N.J.S.A. 2A:44A-21(b)(3). The parties must participate in arbitration within thirty days of receipt of the arbitration demand, unless extended by consent. N.J.S.A. 2A:44A-21(b)(6).

The arbitrator must make the following determinations: (1) whether the NUB was in compliance with N.J.S.A. 2A:44A-20 and whether service was proper under N.J.S.A. 2A:44A-7; (2) the validity and amount of any lien claim which may be filed pursuant to the NUB; (3) the validity and amount of any liquidated or unliquidated setoffs or counterclaims to any lien claim which may be filed; and (4) the allocation of costs of the arbitration among the parties. N.J.S.A. 2A:44A-21(b)(4). The CLL requires that the arbitrator's decision be made within thirty days of the demand for arbitration. N.J.S.A. 2A:44A-

21(b)(6). The decision is subject to review by the Superior Court, Law Division, if either the lien claimant or the owner is aggrieved by the arbitrator's determination. N.J.S.A. 2A:44A-21(b)(10). "The arbitrator's determination shall be confirmed unless it is vacated, modified or corrected by the court." Ibid.

Defendants contend that the trial court erred by determining that the arbitrator's decision, and implicit factual determinations, were binding on the parties. Defendants argue that, under Schadrack, the arbitrator's determination was, in essence, a prejudgment lien that plaintiff must confirm in subsequent litigation. Plaintiff disagrees, arguing that the arbitrator's factual findings are binding and entitle it to a money judgment.

The arbitrator's determination, "[i]n essence, . . . comprises, . . . the establishment of a 'prejudgment lien' that must be confirmed thereafter in litigation subsequently brought pursuant to N.J.S.A. 2A:44A-14." Schadrack, supra, 407 N.J. Super. at 166-67. The arbitrator's decision does not relieve the claimant from proving the amount of the lien claim. Rather, it prevents a contractor from filing a meritless lien claim against the property. "Except for the arbitrator's determination itself, any such determination shall not be considered final in

any legal action or proceeding, and shall not be used for purposes of collateral estoppel, res judicata, or law of the case to the extent applicable." N.J.S.A. 2A:44A-21(b)(9). "Any finding of the arbitrator pursuant to [the CLL] shall not be admissible for any purpose in any other action or proceeding." Ibid.

The arbitrator's determination "is not, as a matter of law, a final merits disposition entitling [the lien claimant] to a money judgment from [the homeowner]." Schadrack, supra, 407 N.J. Super. at 170. "Even with an approved lien on file for a sum certain, [the lien claimant] must still prove its entitlement to recovery on the merits, in a postarbitration judicial proceeding." Ibid.

Were we to construe the CLL in the manner urged by plaintiff, the lien claimant could effectively preclude the other party from taking discovery on all claims arising out of a residential construction contract. Cf. Kvaerner Process, Inc. v. Barham-McBride Joint Venture, 368 N.J. Super. 190, 202 (App. Div. 2004). The case before us illustrates the point. Plaintiff filed a NUB on December 8, 2008, and its demand for CLL arbitration was received by the AAA two days later. The arbitrator rendered the award on January 9, 2009, within the thirty-day period mandated by statute. Under the decision

reached by the trial court, the parties were required to have completed discovery for all non-lien causes of action within the same thirty-day period. There is no regulatory or statutory authority for this impractical and truncated approach to discovery. More importantly, plaintiff had not asserted these common law causes of action until after the arbitrator decided the validity of the statutory lien claim.

Our decision in Schadrack is consistent with the statutory language in N.J.S.A. 2A:44A-21(b)(9). The "determination" in N.J.S.A. 2A:44A-21(b)(9) refers to the immediately preceding paragraph, N.J.S.A. 2A:44A-21(b)(8), that provides in part: "Upon determination by the arbitrator that there is an amount which, pursuant to a valid lien shall attach to the improvement, the lien claimant shall, within 10 days of the lien claimant's receipt of the determination, file such lien claim . . . ."

Plaintiff argues that the reference to "determination" in N.J.S.A. 2A:44A-21(b)(9) refers not to the immediately preceding paragraph, N.J.S.A. 2A:44A-21(b)(8), but instead to the "determinations" that the arbitrator must make under N.J.S.A. 2A:44A-21(b)(4). We disagree. N.J.S.A. 2A:44A-21(b)(9) refers to "determination" in the singular, which corresponds to the immediately preceding paragraph. Additionally, the statute is clear: "Except for the arbitrator's determination itself, . . .

[the] determination shall not be considered final in any legal action or proceeding, . . . [and] shall not be admissible for any purpose in any other action or proceeding." N.J.S.A. 2A:44A-21(b)(9) (emphasis added). "If the [statutory] language is 'clear on its face,' courts should 'enforce [the statute] according to its terms.'" Perrelli v. Pastorelle, 206 N.J. 193, 200 (2011) (quoting Hubbard v. Reed, 168 N.J. 387, 392 (2001)).

Here, the trial court entered a partial judgment in favor of plaintiff not only on the lien claim, but also on the breach of contract and unjust enrichment claims alleged in plaintiff's complaint, which was filed after the arbitrator's decision. The court also dismissed defendants' counterclaims. The court based its decisions on the arbitrator's award and determined that plaintiff had complied with the procedural requirements of the CLL. The trial court erroneously treated the arbitrator's decision as one entitling plaintiff to a money judgment. See Schadrack, supra, 407 N.J. Super. at 170.

Plaintiff also contends that defendants contractually committed themselves to arbitrate disputes arising under the contract, apparently suggesting that the CLL residential lien arbitration fulfilled that contractual duty. However, plaintiff did not file its lien claim under the contractual arbitration clause; it filed the claim under the CLL. Significantly,

plaintiff did not assert its claims for breach of contract, unjust enrichment, and breach of the implied covenant of good faith and fair dealing, in its residential construction lien arbitration demand, or in any other arbitration demand. Instead, plaintiff asserted those claims in a complaint filed in the Law Division.[2]

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

[2] Inexplicably, the parties did not invoke the contractual arbitration clause requiring them to resolve disputes arising out of or relating to the contract in arbitration administered by the AAA under its Construction Industry Arbitration Rules.