NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2113-12T2

WA GOLF COMPANY, LLC,

Plaintiff-Appellant,

v.

ARMORED, INC.,

Defendant-Respondent.

Argued November 14, 2013 – Decided August 6, 2014

Before Judges Waugh, Nugent, and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3063-11.

Peter J. Pizzi argued the cause for appellant (Connell Foley LLP, attorneys; Mr. Pizzi, of counsel; Robert A. Verdibello, on the briefs).

Lawrence P. Maher argued the cause for respondent (Greenbaum, Rowe, Smith, and Davis LLP, attorneys; Mr. Maher, on the brief).

PER CURIAM

Plaintiff WA Golf Company, LLC (Golf), appeals the Law Division's November 27, 2012 order entering judgment in favor of Armored, Inc. (Armored), and dismissing Golf's complaint with

prejudice. We affirm in part and reverse in part, and remand for further proceedings consistent with this opinion.

I.

Armored is engaged in the business of stone crushing and construction. In 1997, Applied Companies (Applied), Golf's predecessor in interest, contracted with Armored to perform work at Port Liberte, a residential development near the waterfront in Jersey City, and Liberty National Golf Course. The work included construction and supplying "clean fill material" for the residential project and the golf course. Armored billed material "by ton" and laborers and equipment by the hour. Golf acquired Applied's interest in the golf course in 2004, while Armored was still working on the projects. This acquisition did not include Applied's interest in Port Liberte.

Armored staged its equipment on a site next to the tenth hole on the golf course "[d]ue to the massive scope and nature of the construction work being performed." There was no written understanding in any document regarding the terms of Armored's placement of its equipment and operations on the golf course property.

In 2006, Armored moved its equipment and operations to "lot 36," which was further away from the golf course. According to Armored, it was required to obtain a Class B Recycling Permit

from the New Jersey Department of Environmental Protection (DEP) to operate its machinery and crush stone on lot 36. As part of the application for the permit, Armored was required to submit a lease agreement as evidence that the concrete-and-brick-crushing operation was permitted by the property owner.[1] Golf, however, asserts that the "parties began negotiations regarding [Armored]'s lease of an undeveloped, physically separated portion of property owned by [Golf] upon which [Armored] could establish permanent operations to work on third party contracts," and signed the lease as a result of those negotiations. Golf and Armored signed the lease on September 14, 2006. Its six-month term ran almost contemporaneously with the beginning of Armored's operation on lot 36.

As part of the lease, Armored agreed to place eighteen inches of clean fill material over the lot 36 property at a time to be determined by Golf and at Armored's expense. The lease contains the following provision concerning continued occupation of the property by Armored at the conclusion of the lease period:

---

[1] DEP did not issue the permit until 2008. Armored only sought a six month temporary permit, which included the option of a three-month extension. The permit period was from September 14, 2006 to March 31, 2007. Armored could have, but did not seek a five-year permit because it concluded that a longer permit was not necessary.

> 32. Holding Over. If Tenant holds over in possession after the expiration of the term of this Lease, such holding over shall not be deemed to extend the term or renew this Lease, but the tenancy thereafter shall continue as a tenancy at sufferance whereupon Landlord in addition to all other remedies available to it under this Lease or at law shall be entitled to receive as liquidated damages, not as a penalty, an amount equal to [Twelve Thousand Dollars per month], as applied to such holdover period, together with the additional rent required under this Lease. If Tenant holds over for a partial month, then such holding over shall be deemed to be for a full month for the purpose of determining holdover rent pursuant to this Article. In addition to any other liabilities to Landlord accruing from Tenant's failure to surrender the Property, Tenant shall defend, indemnify and hold Landlord harmless from loss and liability resulting from such failure, including, without limitation, any claims made by any succeeding tenant founded upon such failure.
>
> [(Brackets in original).]

Armored never performed the work in lieu of rent. Golf did not demand completion of the work or demand payment of rent after expiration of the lease on April 1, 2007. It appears from the record that the parties never discussed the lease, its expiration, or an extension after it was executed.

According to Golf, the only work Armored completed for it during the period after expiration of the lease was in April and May 2010, when Armored repaired a sinkhole on the golf course. Armored asserts that, because of the tight timeframe for that

project, it "didn't quibble about the price" and told Golf to pay only the cost of the materials. Armored billed Golf $9000 for the "material cost."

While utilizing lot 36, Armored provided work as a subcontractor to other entities working on the golf course. That work included work for (1) Bovis Lend Lease for the site work of the clubhouse building foundation at a cost of $6,041,500; (2) the Professional Golf Association (PGA) in advance of the Barclays Golf Tournament in 2009 at a cost of approximately $100,000, for which Armored was not reimbursed; and (3) Heritage Links for repairs to the eighteenth hole of the golf course in 2010 at a cost of $187,500.[2] Armored also contends that it worked on the golf course, including providing fill material. Armored also used the site for work on projects unrelated to the golf course.

On January 6, 2011, Golf served Armored with a notice to vacate lot 36. When Armored did not comply, Golf initiated a summary dispossess action on June 1. It also filed a verified complaint, along with an application for an order to show cause

---

[2] Armored asserts that the Heritage Links project was at a reduced cost "in response to a demand by the owner of [Golf]."

with temporary restraints, in the Chancery Division.[3] The verified complaint contained three counts seeking injunctive relief, attorney's fees, and payment of approximately $600,000 in rent.

The General Equity judge denied the application for temporary restraints on June 9, and transferred the case to the Law Division. Golf filed an amended complaint on August 24, asserting counts for breach of contract for holdover rent, breach of contract for failure to complete the tenant's work, landlord lien and distraint, and a breach of the implied covenant of good faith and fair dealing.

A non-jury trial took place on November 13, 2012. The trial judge issued an oral decision the next day, dismissing all counts in the amended complaint with prejudice. The judge found that there had been an oral lease for the use of the property starting in 1997, and that the September 2006 written lease was an attempt to modify that oral lease. He then determined that the written lease was invalid because "no additional consideration was furnished" by Golf in exchange for new obligations under the written terms. The judge further held that Armored was a tenant at will rather than a tenant at

[3] When Armored vacated the premises on June 30, Golf voluntarily dismissed the summary dispossess action.

sufferance, and that Golf was not entitled to any liquidated damages.

The trial judge entered a final order memorializing his findings on November 27. Golf moved for reconsideration on December 24. On January 10, 2013, Golf filed its notice of appeal. The trial judge then denied the motion for reconsideration on January 25, on the grounds that he no longer had jurisdiction to consider it, citing Rule 2:9-1(a).

II.

On appeal, Golf challenges the trial judge's finding that there was an oral lease between Armored and Applied, and then Golf as its successor, beginning in 1997. Golf also argues that the judge erred, as a matter of law, in finding that the September 2006 written lease was an unsuccessful attempt to modify the existing oral lease, instead contending that the agreement was a valid, new lease. On the basis of these arguments, Golf asserts that Armored was a tenant at sufferance by operation of law at the conclusion of the six-month term of the lease in April 2007, and that it is entitled to receive $12,000 for each month during which Armored stayed on the property beyond the end of the lease term.

A.

When reviewing a decision resulting from a bench trial, "[t]he general rule is that [factual] findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). We do not disturb the factual findings of the trial judge unless we are "'convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Id. at 412 (quoting Rova Farms, supra, 65 N.J. at 484); see also Beck v. Beck, 86 N.J. 480, 496 (1981). Our review of a "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

B.

We first address the nature of the relationship between Armored and Applied, and Golf as Applied's successor in interest, between 1997, when Armored moved its operations onto the property, and September 2006, when the written lease was signed.

As noted, when Armored started work on the projects, Applied and Armored did not enter into a written agreement with respect to the status of Armored's use of the property for storing equipment and material, and performing work. Although the trial judge refers to an "oral" lease, there is no support in the record for the existence of an oral agreement. It is significant in that regard that Applied, although it uses the term "oral lease" in its brief, tacitly concedes that there was no oral understanding by citing cases concerning the creation of an implied lease based on the conduct of the parties.

Absent a clear articulation of the parties' intention, we look to the circumstances surrounding the making of the relationship and the parties' "course of operation." Thiokol Chem. Corp. v. Morris Cnty. Bd. of Taxation, 41 N.J. 405, 417 (1964). In this case, we must determine whether there was an implied lease or a license.

Absent an express agreement, a landlord-tenant relationship giving rise to a leasehold interest may be implied if a party occupies land under an agreement with the owner to pay rent or the occupancy is accompanied by paying rent. Hous. Auth. of E. Orange v. Leff, 125 N.J. Super. 425, 435 (Law Div. 1973) (citations omitted). That a definite agreement does not exist is of no moment as long as the occupier is on the property with

"the owner's permission and with the understanding that rent would be demanded." Ibid. (citations and internal quotation marks omitted). "'The law will imply a contract to pay rent from the mere fact of occupation, unless the character of the occupancy be such as to negative the existence of a tenancy.'" Id. at 434 (quoting Chambers v. Ross, 25 N.J.L. 293, 295 (Sup. Ct. 1855)).

However, a person or entity can also occupy land lawfully without a leasehold interest. Thiokol, supra, 41 N.J. at 416. In Thiokol, the Supreme Court outlined the differences between the nature of a leasehold interest and a license:

> Unquestionably agreements respecting the use of land can be made by an owner which fall short of a leasehold. License, permit, privilege and limited custodial use are open to consensual arrangements. The difference between a lease and license or similar limited status, although difficult to distinguish at times, is that a lease gives exclusive possession of the premises against all the world, including the owner, while a license confers a privilege to occupy under the owner. A license or similar status is generally revocable at the pleasure of the owner and gives occupancy so far as necessary to engage in the agreed acts or the performance of agreed services and no further; a lease gives the right of exclusive possession for all purposes not prohibited by its terms.
>
> In the final analysis whether a particular agreement is a lease depends upon the intention of the parties as revealed by the language employed in establishing their

> relationship, and, where doubt exists, by the circumstances surrounding its making as well as by their course of operation under it. And, in situations where the ambiguity or doubt gives rise to a factual question as to the intention of the parties, the burden is on the party asserting it to demonstrate existence of the lessor-lessee relationship. Moreover, in the resolution of ambiguity or doubt, absence of (1) a stipulation for rent as such, or other consideration regarded by the parties as constituting payment for the transfer of possession, and (2) a term; and presence of (1) limitations on exclusive possession and control of the premises, and (2) a right in the owner to revoke the permit to use at any time, are factors militating against the existence of a lease. In this connection, as an early case said:
>
> > ". . . [R]ent is not essential to a lease; for, from favor, or valuable consideration, the tenant may have a lease without any render. Yet that must be in a case where a lease was clearly intended. When, upon construction, it be doubtful whether a lease was intended or not, then it constitutes a very important circumstance, that rent was not reserved, eo nomine or substantially."
>
> [Id. at 416-18 (alterations in original) (citations omitted).]

Our review of the record and the judge's factual findings convince us that, beginning in 1997, Armored was a licensee rather than a tenant. It is undisputed that Armored had permission to occupy the land in question so that it could crush stone and provide fill material in an efficient manner in

connection with its work for Applied, and then Golf. Its occupancy was not exclusive, because there were other on-site contractors and subcontractors also performing services for those projects.

In addition, there was no requirement that Armored pay rent in cash or in kind. There is also no assertion by Golf that the parties had an understanding that Applied or Golf would receive a discount for the work on the projects in lieu of rent. We will not imply in-kind rent absent a showing of a clear intent to enter into a lease. Id. at 418-19. Lack of an expectation of rent in any form "negative[s] the existence of a tenancy." Chambers, supra, 25 N.J.L. at 295.

Consequently, we reverse the trial judge's finding that there was an oral lease beginning in 1997. We also reject Golf's argument that there was an implied lease.

C.

We next address the validity of the September 2006 written lease.

A leasehold agreement is a contract. WG Assocs. v. Estate of Roman, 332 N.J. Super. 555, 560 (App. Div. 2000). Standard contract formation requires offer, acceptance, and consideration. Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526, 539 (1953). Consideration is a bargained for exchanged

that "may take the form of either a detriment incurred by the promisee or a benefit received by the promisor." Cont'l Bank of Pa. v. Barclay Riding Acad., 93 N.J. 153, 170, cert. denied, 464 U.S. 994, 104 S. Ct. 488, 78 L. Ed. 2d 684 (1983). Parties may modify a contract by mutual assent, but the modification "must be based upon new or additional consideration." Cnty. of Morris v. Fauver, 153 N.J. 80, 99-100 (1998).

Armored and Golf bargained over the agreement and its provisions. There was a clear offer and acceptance between the parties, as signified by their signatures. See Johnson & Johnson, supra, 11 N.J. at 539. Each party furnished adequate consideration, with Golf providing a parcel of land for Armored's use, and Armored agreeing to pay in-kind rent for the use of the land. See Cont'l Bank, supra, 93 N.J. at 170.

For these reasons, we reverse the trial judge's finding that the 2006 lease was invalid.

D.

Finally, we address Armored's status after the end of the lease's six-month term on March 31, 2007. Golf contends that, as a tenant by sufferance, Armored owes it $12,000 for each holdover month, while Armored contends that Golf had no right to such rent and, in any event, waived any right it had.

As noted above, it appears from the record that both Golf and Armored simply ignored the lease and its terms after the six-month term expired. Golf never told Armored to leave and never demanded payment of holdover rent for the months between the end of the lease and January 2011, when it gave notice to quit. Armored continued to provide services to other contractors working on the Golf projects, and on at least one occasion, it supplied services directly to Golf. The question becomes whether Armored was a tenant at sufferance, as provided in the lease, or a holdover tenant based on Golf's implied consent to Armored maintaining the status quo on lot 36 for almost four-and-one-half years.

We have found that a tenant at sufferance is "'one who comes into possession of land by lawful title, usually by virtue of a lease for a definite period, and after the expiration of the period of the lease holds over without any fresh leave from the owner.'" Xerox Corp. v. Listmark Computer Sys., 142 N.J. Super. 232, 240 (App. Div. 1976) (citing Standard Realty Co. v. Gates, 99 N.J. Eq. 271, 275 (Ch. 1926)).

However, if a landlord consents to a holdover on its premises, then that consent creates a periodic tenancy. See State v. Smith, 56 N.J.L. 446, 447-48 (Sup. Ct. 1894); see also Baker v. Kenny, 69 N.J.L. 180, 181 (Sup. Ct. 1903). The burden

is on the holdover tenant to prove the landowner's consent. Smith, supra, 56 N.J.L. at 448 ("The mere unbroken silence or inaction of the owner will not improve or enlarge the character of a hold-over tenant's possession."). The consent "may be either express or implied, actual or constructive; by words or some act treating him as a tenant." State v. Moore, 41 N.J.L. 515, 517 (Sup. Ct. 1879). There must be a showing of "some agreement or recognition of the relation of landlord and tenant, the landlord has assented to a continuation or renewal of the same relation." Smith, supra, 56 N.J.L. at 448.

In Smith, the former Supreme Court found no presumption of consent to the holdover tenant for a time period of three-and-one-half months. Id. at 447-48. In Beach Realty Co. v. Wildwood, 105 N.J.L. 317, 318-20 (E. & A. 1929), the Court of Errors and Appeals determined that "[t]wo months and two days after expiration of lease before ejectment brought is not of itself evidence of consent by owner to former tenant holding over." Our courts have also found the existence of a tenancy at sufferance, rather than consent, where a landlord demands the tenant quit the premises immediately upon the expiration of the lease and refuses to accept rent in any form, even if proffered. Standard Realty, supra, 99 N.J. Eq. at 272-76; Mintz v. Metro.

Life Ins. Co., 153 N.J. Super. 329, 333-34 (Morris Cty. Dist. Ct. 1977).

Based upon the facts in the record, we agree with the trial judge's alternative finding that Golf impliedly consented to Armored's continued use of the property over a period of years. As a consequence, Armored was not a tenant at sufferance under this relationship.

We reject Golf's argument that the non-waiver clause in the 2006 lease permits its complete silence and inaction, as well as continued acceptance of work under the parties' established course of conduct, without altering its rights under the lease. The pertinent clause states the following:

> 24. Non-Waiver by Landlord. The various rights, remedies, options and elections of the Landlord, expressed herein, are cumulative, and the failure of the Landlord to enforce strict performance by the Tenant of the conditions and covenants of this Lease or to exercise any election or option or to resort or have recourse to any remedy herein conferred or the acceptance by the Landlord of any installment of rent after any breach by the Tenant, in any one or more instances, will not be construed or deemed to be a waiver or a relinquishment for the future by the Landlord of any such conditions and covenants, options, elections or remedies, but the same shall continue in full force and effect.

Any contract term may be waived if there is clear proof of the intent to waive by the party against whom the waiver is

asserted, and if the waiver is voluntary. Cf. W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152-53 (1958). We are satisfied that Golf's course of conduct, including its implied consent to Armored's holdover status, amounted to a clear waiver of its right to receive the $12,000 monthly rent up until the time it served the notice to quit.

However, Golf did not waive its right to demand that Armored leave the property after the lease expired. Once it asserted that right on January 6, 2011, Armored had one month to quit the premises. See N.J.S.A. 2A:18-56(b). Because Armored did not leave until June 30, it was responsible to Golf for liquidated damages from the moment the notice period was over until the date it left, i.e., February 7 through June 30.

E.

In summary, we reverse the trial judge's finding that there was an oral lease, or an implied lease, from 1997 until September 2006, and find instead that Armored was a licensee during that period. We further find that the September 2006 agreement was a valid contract between the parties and reverse the trial judge's finding to the contrary. With respect to the nature of Armored and Golf's relationship after the expiration of the September 2006 lease, we agree with the trial judge's alternative determination that Golf impliedly consented to

Armored remaining on the property and continuing to provide work for the benefit of its projects and waived its right to claim liquidated damages in the form of $12,000 per month.

However, upon the expiration of the one-month grace period from Golf's notice to quit, Armored became a tenant at sufferance and liable to pay Golf the appropriate amount of liquidated damages for the period before it left the property. We remand to the Law Division for entry of judgment in an amount consistent with the terms of the 2006 lease and this opinion.

Affirmed in part, reversed in part, and remanded.

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

CLERK OF THE APPELLATE DIVISION