SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2951-20

ANTHONY ANNESE,

Plaintiff-Appellant,

v.

BERTOIA AUCTIONS AND APPRAISALS, LLC, and JEANNE BERTOIA,

Defendants-Respondents.

Argued March 28, 2022 – Decided May 23, 2022

Before Judges Firko and Petrillo.

On appeal from the Superior Court of New Jersey, Chancery Division, Cumberland County, Docket No. C-000005-21.

Robert S. Raymar argued the cause for appellant (Hellring Lindeman Goldstein & Siegal, LLP, attorneys; Matthew E. Moloshok, of counsel; Robert S. Raymar, on the briefs).

Louis M. Barbone argued the cause for respondents (Jacobs & Barbone, PA, attorneys; Louis M. Barbone, on the brief).

PER CURIAM

Plaintiff Anthony Annese appeals from a May 14, 2021, Chancery Division order granting defendant's motion to dismiss his complaint with prejudice pursuant to Rule 4:6-2(e). The trial court considered the terms of the written, two-page consignment agreement (the agreement or the contract) entered between the parties and determined that the terms of the agreement were unambiguous warranting dismissal of the complaint. We disagree and reverse.

I.

On March 5, 2019, plaintiff entered into the agreement with defendants Bertoia Auctions and Appraisals and Jeanne Bertoia (collectively defendants) for the purpose of selling plaintiff's toys and collectibles. The agreement was a total of twelve paragraphs spanning two pages. The agreement provided that the auction would be conducted later that year, specifically in October of 2019. In advance of the auction, defendants agreed to publicize and promote the event.

Defendants' compensation for the sale of plaintiff's collection was set forth in paragraph 3 of the agreement, a section entitled "COMMISSIONS." The section states that defendants would be paid "10% of the value of the property sold at auction." This section further states a "buyer's premium of 20% of the final bid" would be collected by defendants from each successful bidder.

Plaintiff argues that the buyer's premium was not a commission exclusively for the benefit of the defendants; defendants disagree, arguing that the buyer's premium was solely theirs to keep. Both cite the plain language of the agreement in support of their respective positions.

As was agreed, defendants advertised and promoted the event. The global marketing effort involved, among other things, the creation and distribution of a color brochure, which described and provided illustrations of the collection. The brochure disclosed the existence of the buyer's premium and other particulars regarding the terms, which would apply to all prospective bidders. In addition to circulating the color brochure, defendants also previewed the auction at other special events they hosted or were otherwise involved in.

The auction went forward on October 11, 2019, yielding successful bids totaling $1,478,040. The first part of defendants' claimed commission, 10% of the auction's proceeds, was $147,804 and was deducted from the sale proceeds as per the agreement. In addition to the percentage of sales, defendants also collected, as the second claimed element of compensation, a 20% buyer's premium from each of the successful bidders. The total buyers' premiums collected by defendants was $295,608. Thus, defendants claim entitlement to a

total of $443,412 from the sale of plaintiff's collection.[1] A portion of the amount, $147,804, was paid by plaintiff and deducted from the sales price, the other portion, $295,608, was paid by the purchasers as a premium over and above the sales price directly to defendants.

Following the auction, as required by sections 2 and 9 of the agreement, defendants provided plaintiff with an accounting of the total sales, expenses, and deducted commissions (the net proceeds figure). The accounting showed a net return to plaintiff of $1,330,236 ($1,478,040 less $147,804) before the deduction of certain allowed expenses. This accounting included an itemized list of each item sold, which included the sale price for each item. The 10% deduction was included in this accounting. The buyers' premiums paid to defendants were not shown in the accounting.

Although the events precipitating the lawsuit are not evident from the record, what is clear is that at some point after receipt of the accounting, plaintiff took issue with defendants' retention of the buyers' premiums. On December 29, 2020, plaintiff demanded an accounting of the buyers' premiums paid and

[1] The 10% of the proceeds ($147,804) plus the 20% buyers' premiums ($295,608) from each successful bid equals to the $443,412 amount.

collected and demanded that these funds be turned over to plaintiff; defendants did not comply.

II.

On March 8, 2021, plaintiff filed an eight-count complaint alleging breach of contract for breach of the consignment agreement (count one); breach of fiduciary duty for violating agency duties and for disloyalty (count two); violation of the New Jersey Consumer Fraud Act[2] for deceptive and unconscionable practices in obtaining and performing the consignment agreement (count three); breach of the implied covenant of good faith and fair dealing (count four); unjust enrichment (count five); conversion (count six); a request for an equitable accounting (count seven); and imposition of personal liability on the individual defendant, Bertoia, for continuing to operate under the dissolved LLC,[3] and for personally participating in the breaches alleged (count eight). The essence of plaintiff's complaint is distilled simply: defendants were only entitled to collect buyers' premiums but not to retain them and, in keeping them, have breached the contract and violated the law.

[2] N.J.S.A. 56:8-1 to -224.

[3] Although not relevant to the order on appeal, the LLC defendant appears to have been dissolved on May 16, 2016, four years before the agreement in this case was ever entered into.

On April 17, 2021, in lieu of filing an answer, defendants filed a motion to dismiss for a failure to state a claim upon which relief can be granted under Rule 4:6-2(e). Following oral argument on May 14, 2021, the trial court granted the motion in an oral decision and dismissed all counts of the complaint. The trial court found there was only one reasonable interpretation of the agreement's terms and plaintiff's argument that defendants were to collect and hold the buyer's commission but not retain it was unreasonable. The court also determined that since the remaining counts of the complaint were predicated upon plaintiff's contention that he was entitled to share in the buyer's premium, those counts could not be sustained.

The trial court held that the language of the agreement authorized the defendants to "collect" the buyers' premiums, which in its view also authorized the defendants to retain them, even though the agreement was silent as to what was to become of the premiums once collected. The court reached this conclusion on the face of the agreement alone, in a motion on the pleadings, without consideration of anything else. This limited review apparently satisfied the court that the relationship between the parties, what they meant by what they agreed to, common industry practice, and grammatical and textual ambiguities did not matter. We disagree.

While it is indeed possible that this breach of contract dispute may at some point be disposed of by summary judgment, one way or the other, dismissal at this juncture, on this record, under a motion to dismiss standard, is error. In its opinion, the trial court used language describing its analysis requiring it to "[view] the facts in the light most favorable to the non-moving party." That analytical framework, more akin to a summary judgment analysis, was not the way to consider the motion. The court gave further short shrift to the plaintiff's allegations, stating that plaintiff's contention that "the definition of retain and collect must be different is an unreasonable inference." We do not agree that viewing this complaint through such a narrow lens, at this point, is the correct means of considering the motion. Instead, the plaintiff's complaint should have been assumed to be true in all respects as to the facts alleged and then, with that benefit intact, examined to determine if the truthful allegations gave rise to one or more viable causes of action as set forth therein. Had the complaint been evaluated in light of this very indulgent standard, as it should have been, the motion would have been denied.

On appeal plaintiff argues that the motion court erred in ruling that the contract claim contained in his first cause of action failed to state a claim for

breach of contract and further erred by concluding that dismissal of the breach of contract claim required dismissal of all subsequent counts.

III.

We review de novo a trial court's order granting a motion pursuant to Rule 4:6-2(e). Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). In doing so we, like the trial court, must canvass the legal adequacy of all the facts alleged and give plaintiff the benefit of every inference. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Notwithstanding this indulgent standard, if a complaint states no claim that supports relief, the action should be dismissed. Dimitrakopoulos, 237 N.J at 107. The entirety of the parties' relationship turns on the written agreement between them. The interpretation of that agreement is a matter of law for the court, and, as with a review of trial court decision on a motion to dismiss for failure to state a claim, we review de novo a trial court's interpretation of a contract. Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998).

The starting point for contract construction is always the language of the contract. Commc'ns Workers of Am., Loc. 1087 v. Monmouth Cnty. Bd. of Soc. Servs., 96 N.J. 442, 452 (1984). Generally, contract terms are to be given their

"plain and ordinary meaning." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002) (citing Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997)).

The "polestar" of contract construction is "the intention of the parties . . . as revealed by the language used, taken as an entirety." Atl. N. Airlines v. Schwimmer, 12 N.J. 293, 301 (1953); see also Jacobs v. Great Pac. Century Corp., 104 N.J. 580, 582 (1986). "[I]n the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded." Atl. N. Airlines, 12 N.J. at 301.

When presented with a dispute as to what a contract means, as is precisely the issue in this case, the court's aim is to determine the intentions of the parties to the contract, as revealed by the language used, the relations of the parties, the attendant circumstances, and the objects the parties were trying to attain. Driscoll Constr. Co. v. State Dep't of Transp., 371 N.J. Super. 304, 313 (App. Div. 2004) (citation omitted). "If the terms of a contract are clear, they are to be enforced as written." Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182, 187 (App. Div. 2008) (citing Cnty. of Morris v. Fauver, 153 N.J. 80, 103 (1998)).

Here, it is argued, indeed it is the very substance of the lawsuit, that the terms of the contract are not clear but ambiguous and the intention of the parties is not obviously manifest in the writing. Thus, plaintiff has filed a lawsuit alleging the agreement has been breached and that he has been damaged; the defendant says, in essence, not so. Based on what the lawsuit says, it is not at all clear what the parties intended.

Considering the allegations and competing arguments offered at this stage of the litigation, the pleadings stage, the court cannot, on this record, decide that issue with certainty. "The determination of whether a contract term is clear or ambiguous is a pure question of law requiring plenary review." In re Teamsters Indus. Emps. Welfare Fund, 989 F.2d 132, 135 (3d Cir. 1993). A plenary review standard, even if limited to a legal determination, requires a full record or at least one more robust than what we have here.

To discover the intention of the parties, and to determine whether a contract is ambiguous, courts may consider extrinsic evidence offered in support of conflicting interpretations. Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 268-69 (2006). See also In re Teamsters Indus. Emps. Welfare Fund, 989 F.2d at 135. "Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement, even where the contract is free from

ambiguity, not for the purpose of changing the writing, but to secure light by which its actual significance may be measured." Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 427 (1956); Atl. N. Airlines, 12 N.J. at 301-02.

Not every contract dispute can be disposed of as a matter of law. Resolution of ambiguity, if found, is a fact issue. Michaels v. Brookchester, Inc., 26 N.J. 379, 388 (1958); Deerhurst Ests. v. Meadow Homes, Inc., 64 N.J. Super. 134, 152-53 (App. Div. 1960). A contract is ambiguous if it is susceptible to two reasonable alternative interpretations. Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008); M.J. Paquet v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). However, a plenary hearing is required to resolve an ambiguous contract only if, after considering all relevant materials, a genuine issue of fact remains. In re Teamsters Indus. Emps. Welfare Fund, 989 F.2d at 135 n.2. Absent such a dispute of fact, or if such a dispute is immaterial or not germane, and provided there is only one reasonable outcome, disposition on summary judgment may be appropriate. Driscoll Constr. Co., 371 N.J. at 313-14.

It is against this backdrop of well-established law that we conclude that "all relevant materials" could not have possibly been considered on this motion.

In re Teamsters Indus. Emps. Welfare Fund, 989 F.2d at 135 n.2. As such reversal is required to allow for the development of a record to include those materials needed to address the question presented.

IV.

Paragraph 3 of the agreement, entitled "COMMISSIONS," states as follows:

> For services rendered herein, BERTOIA shall receive and retain from the proceeds of the sale of the Property, as a commission from the Seller, an amount equal to 10% of the Property sold at auction. A buyer's premium of 20% of the final bid to be collected by BERTOIA from the Buyer.

To begin, we note that the title of the paragraph at issue is the plural form of the word. Simple grammatical construction thus makes clear that more than one form of commission may be included in the provision. This paragraph could indeed be read to provide that the two types of commissions were to be earned by defendants: "10% of the Property sold at auction" and "[a] buyer's premium of 20% of the final bid." The paragraph is also susceptible to a different reading. That alternate reading is at the crux of the complaint.

On appeal, plaintiff argues that the trial court expressed the Rule 4:6-2(e) standard correctly but misapplied it. We agree. The trial court gave particular attention to the words "retain" and "collect" as used to differentiate the conduct

of defendants in gathering or receiving the monies owed to them. The court recited the provision, putting its interpretation of the meaning in context:

> Under the COMMISSIONS section of that contract, there are two separate terms which read as follows -- and again, I'm looking at paragraph 3, "COMMISSIONS". "For services rendered, Bertoia shall receive and retain from the proceeds of the sale of the property as a commission from the seller an amount equal to 10% of the property sold at auction. A buyer's premium of 20% of the final bid collected by Bertoia from the buyer". The question is whether collected means share or whether it's his buyer's commission -- buyer's premium, 20%.
>
> [(Emphasis added).]

The court went on to specifically find what this language meant, again in the context of the overall agreement:

> This court finds that all sentences were meant to signal to the parties of the contract that Bertoia would be taking the named fee. The first sentence is the percentage taken from the seller. The second is the percentage taken from the buyer. The terms used are different. The seller portion states Bertoia will retain 10% commission, and the buyers say that Bertoia will collect 20%. However, being that . . . these are both under the Commission paragraph, the court finds that the only reasonable interpretation would be that those terms mean the same thing. Bertoia was enumerating commission fees and would be taking those portions of proceeds.
>
> [(Emphasis added).]

This finding of "only [one] reasonable interpretation" fails to give the necessary deference to the plaintiff's allegations. Plaintiff's suit maintains that defendants would generate some of the proceeds by charging a "buyer's premium" those defendants would collect but not retain and would then calculate its commission as 10% of the total proceeds which plaintiff argues should have included the buyer's premium. Plaintiff insists the use of the word "retain" regarding the 10% but not with regard to the buyer's premium is proof positive that defendants had no right to claim the buyers' premiums as its own.

The trial court rejected the argument advanced by plaintiff that the use of the word "retain" as regards one form of compensation versus the use of "collect" as regards another, somehow should be construed to mean that the latter form of commission, the buyer's premium, was not a commission at all but something to be collected from the buyer and distributed to the seller with defendants having no claim to the premium at all. We agree with the plaintiff that such a cramped reading on a motion to dismiss fails to give the plaintiff the benefit of every inference. The trial court stated:

> Plaintiff alleges that the term Bertoia -- the term means Bertoia was to only take and hold the monies for the seller but based on the -- upon the construction of the contract, this court finds this interpretation to be unreasonable. . . . Plaintiff's claims are based upon an unreasonable separation of collect from the rest of the

> commission paragraph. Plaintiff's definition of collect in the context of the contract is unsupported and unsupportable.
>
> [(Emphasis added).]

The trial court grounded its decision in "reasonableness," which is, at the right time, a sensible measure. This conclusion, however, is, at best, premature. The agreement provided for "commissions" using internally inconsistent language and a structure that can be read more than one way. This is more than ample basis to have denied the motion. The court decided what the contract meant without consideration of anything other than what it said. While there are no doubt certain instances where a breach of contract suit can be decided based on the contract and the complaint, this is not one of them. We do not agree with the trial court that the language of the agreement is unequivocal and lacks any ambiguity. The court incorrectly determined that as a matter of law the agreement was completely unambiguous, and that defendant had fully performed under the agreement. It could not properly make that determination as a matter of law at the pleadings stage.

We agree with plaintiff, that the agreement itself could be read as he contends, i.e., that defendants could only collect the buyers' premiums as part of the purchase price, against which defendants could collect a 10% commission.

To conclude that was unreasonable, on a motion to dismiss, drew the inferences in the wrong direction against plaintiff. More is needed before the court is positioned to address a dispositive motion on that or other grounds. Extrinsic evidence should be considered to determine what the parties intended. This is especially true where there are conflicting interpretations. Conway, 187 N.J. at 268-69. "Extrinsic evidence may include the structure of the contract, the bargaining history, and the conduct of the parties that reflects their understanding of the contract's meaning." In re Teamsters Indus. Emps. Welfare Fund, 989 F.2d at 135. No such evidence is yet available in the record.

V.

Having found that the trial court's interpretation of paragraph 3 must be reversed, we need not further pore over its determinations regarding paragraphs 2 and 9 in great detail. The court's decisions regarding these sections are of no continuing moment.

Paragraph 9, entitled "SETTLEMENT OF ACCOUNT WITH SELLER," sets forth the process and timing by which defendant was obliged to make payment to plaintiff of the net proceeds of the sale. The trial court concluded that the payment made by defendant to plaintiff was as per the settlement scheme set forth in this section given its findings as to how the commissions were to be

earned by defendant and net proceeds paid to plaintiff. Having determined that the court's reading of paragraph 3 was erroneous it thus follows that its interpretation of paragraph 9 cannot be sustained. Until a finding is made as to what paragraph 3 required as payment to defendants there can be no finding as to the accuracy of the settlement.

The trial court's interpretation of paragraph 2 of the agreement is similarly mooted. This paragraph, entitled "TITLE TO GOODS" provides that "proceeds of the sales" of the auction item "shall vest in and belong to Bertoia until accounted for and remitted to the Seller in accordance with the provisions of this [a]greement." That accounting is the process set forth in paragraph 9. Whether or not a breach occurred here requires findings as to paragraphs 3 and 9.

VI.

Every cause of action set forth in plaintiff's complaint has at its core the same factual basis: defendants retained a buyer's premium that they were not entitled to and failed to properly account for it when settling with the plaintiff. The trial court, finding as it did that there was no breach, concluded, with only limited discussion, that none of the other causes could survive if count one failed. We offer no opinion as to whether that is so. Having explained why it is that the court should not have concluded there was no breach, we need not

reach the effect of that breach on all other counts other than to reverse the order dismissing those counts as well. Whether or not the other causes are all so inextricably connected to the breach of contract claim so as to be incapable of surviving if that claim is dismissed is a question for another day.

In light of our decision, we need not address the other arguments raised by plaintiff on appeal. Reversed.