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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3020-20

ESTATE OF DONALD J.
CARROLL,

Plaintiff-Appellant,

v.

PRISM GREEN ASSOCIATES
IV, LLC and WEST ORANGE
TOWNSHIP,

Defendants-Respondents.

Submitted May 3, 2022 – Decided May 20, 2022

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey,
Chancery Division, Essex County, Docket No. C-
000036-20.

Nagel Rice, LLP, attorneys for appellant (S.M. Chris
Franzblau and Bradley L. Rice, of counsel and on the
briefs).

DeCotiis, Fitzpatrick, Cole & Giblin, LLP, attorneys
for respondent Prism Green Associates IV, LLC (Jason

M. Hyndman, of counsel and on the brief; Christian J. DiIenno, on the brief).

Trenk Isabel, attorneys for respondent Township of West Orange, join in the brief of respondent Prism Green Associates IV, LLC.

PER CURIAM

Plaintiff Estate of Donald J. Carroll (Estate) appeals from Chancery Division orders that granted summary judgment to defendants Prism Green Associates IV, LLC (PRISM) and Township of West Orange (Township), and denied plaintiff's cross-motion for summary judgment. We affirm.

We take the following facts from the record. In March 2000, the Township authorized the Township of West Orange Planning Board (Planning Board) to conduct a preliminary investigation to determine whether an area that encompassed plaintiff's properties (the Downtown Redevelopment Area) met the criteria for designation as "an area in a need of redevelopment" as defined in the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 to -49. The Planning Board investigated the Downtown Redevelopment Area and presented its determination to the Township's governing body. In 2000, the Township's governing body passed a resolution designating the Downtown Redevelopment Area as "an area in need of redevelopment" and directed the Planning Board to prepare a Redevelopment Plan for the Downtown

Redevelopment Area. The Planning Board held public hearings on the plan on February 7, September 25, and December 11, 2002.

On February 9, 2003, the Township's governing body considered the record compiled by the Planning Board and adopted an ordinance approving the 2003 Downtown Redevelopment Plan (Redevelopment Plan) for the Downtown Redevelopment Area. The property that is the subject of this action (the Property) lies within the Downtown Redevelopment Area and is authorized for acquisition by PRISM or the Township under the Redevelopment Plan.

In April 2006, the Township began the process of designating a developer for the Downtown Redevelopment Area that included the preparation and issuance of a Request for Qualifications and Concept Plans, the receipt of proposals submitted in response, and consideration of changes set forth in the proposal submitted by PRISM. The Township referred the proposed changes to the Redevelopment Plan to the Planning Board.

On August 15, 2006, the Township's governing body adopted an Ordinance approving the Amended Redevelopment Plan, which included the Property as potential properties for acquisition. The Amended Redevelopment Plan includes a section titled Acquisition Plan, which provides:

The Downtown Redevelopment Area is comprised of a mix of uses including residential and

commercial uses as well as vacant land, underutilized properties and incompatible industrial land uses. It is important that the Redevelopment Area be redeveloped in a comprehensive manner that accommodates and preserve the conforming and desirable land uses.

At the same time it is important that incompatible land uses, vacant land, property, dilapidated buildings, unsafe conditions and other impediments to proper development be removed in an orderly, planned and phased manner. At this time, it is anticipated that any property to be acquired within the Redevelopment Area will be purchased and assembled by private development interests. However, if acquisition in this manner proves to be unsuccessful, municipal acquisition by eminent domain will be pursued in order to create properly planned and developable parcels of land.

The Amended Redevelopment Plan further states:

This Redevelopment Plan authorizes the Township to exercise its power of eminent domain on all properties located within the Downtown Redevelopment Area to acquire property or to eliminate any restrictive covenants, easements, or similar property interests which may undermine the implementation of a redevelopment project. The Township, however, plans to continue working with affected property owners and businesses to promote private redevelopment of the parcels within the Downtown Redevelopment Area.

....

Prior to the commencement of any new construction, reconstruction, or rehabilitation of any existing structure; a site plan for such shall be

submitted by the developer or property owner to the Planning Board for review, so that compliance of such plans with the Plan and Plan amendments can be determined. No Building Permit shall be issued for any work requiring site plan review within the Area, without prior site plan review and approval of such work by the Planning Board. Regular maintenance and minor repair shall not require Planning Board review.

On December 20, 2006, the Township entered into an agreement (2006 Agreement) with PRISM for redevelopment of the Downtown Redevelopment Area, including the Property, in accordance with the Redevelopment Plan. PRISM's principal and Senior Vice President, Eugene Diaz, executed the 2006 Agreement on PRISM's behalf.

Section 3.3(a) of the 2006 Agreement governs acquisition of designated properties under the Redevelopment Plan. It provides: "Redeveloper agrees to use commercially reasonable efforts to acquire title to the Acquisition Parcels in an arm's length transaction between Redeveloper and the current owners of such properties." Under Section 3.3(b), upon written notice from the Redeveloper, "and at the sole cost and expense of Redeveloper, the Township agrees to diligently pursue acquisition of the designated parcels" identified in the notice. Section 4.1 provides that while the Agreement remains in effect, "[PRISM] shall have the exclusive right to redevelop Township-Owned Property and the Acquisition Parcels, once acquired."

The Township adopted additional amendments to the Redevelopment Plan in February 2007 and December 2010, which affirmed the Township's commitment to allowing property owners to redevelop their own properties in accordance with the Redevelopment Plan. Neither amendment changed Section 3.3 of the 2006 Agreement. On June 1, 2018, the Township and PRISM entered into the 2018 Agreement, amending and addressing the second phase of development contemplated in the 2006 Agreement. Diaz executed the 2018 Agreement on PRISM's behalf.

Section 3.3 of the 2018 Agreement similarly provides that PRISM would utilize commercially reasonable efforts to acquire the Acquisition Parcels from the current owners and upon written notice from PRISM, "the Township agree[d] to diligently pursue acquisition of the designated parcels" The 2018 Agreement established a four-phase construction schedule (Phases 2A through 2D). Implementation of the project was addressed in Section 4.1 of the Agreement. Subsection 4.1(a) sets forth the schedule for each phase of the project. Redevelopment of the Property is part of Phase 2C. PRISM is required to apply to the Planning Board for preliminary and final site plan approval within 120 days of the commencement of construction of Phase 2B. PRISM is also required to commence construction of Phase 2C within thirty days of receipt of

final building permits. PRISM estimated that construction of Phase 2C would be completed within twelve months of commencement of construction.

Diaz was the only person deposed by the Estate. Diaz testified that when the 2006 and 2018 Agreements were negotiated between PRISM and the Township, there was no mention of current property owners as beneficiaries of the Redevelopment Agreement. He also testified that construction of Phase 2B had not yet commenced. He explained that although uncompleted contingencies had delayed the commencement of construction of Phase 2B, PRISM had not been declared in default of the Agreement.

Donald J. Carroll owned the Property, designated as Block 64, Lots 3 and 25 on the Township Tax Map, that became part of the Estate when he died in July 2018. Lot 25 contained a commercial building and Lot 3 contained a junkyard. In May 2016, Carroll entered a one-year triple net lease with Hudson Invalid Coach LLC that included a portion of the property. The lease provided for renewals. The initial rent under the lease was for \$66,000 per year (\$5,500 per month) with an annual five percent increase per year. In August 2017, Carroll agreed to let the tenant sublease a portion of the property, increasing the base monthly rent by an additional \$36,000 per year (\$3,000 per month) with a yearly five percent cost of living increase. For reasons not included in the

record, the Estate declined to further renew the lease, but allowed the tenant rent on a month-to-month basis until December 31, 2020. The property has remained vacant since then.

Between January 15, 2021, and February 28, 2021, two interested parties inquired whether the Property could be purchased for \$650,000. Those parties declined to purchase the property after learning about the Agreement between PRISM and the Township because of PRISM's right to acquire the Property and, if unsuccessful, have the Township acquire the Property through a negotiated sale or eminent domain. Although the Estate was willing to sell the Property to PRISM or the Township, it did not subsequently market the Property for sale. PRISM claims that at no point prior to Carroll's death did anyone contact it to express an interest in selling the Property. PRISM has not made an offer to purchase the Property and has not been compelled to do so by the Township.

The Estate listed the following annual expenses for the Property: real estate taxes \$18,000, property management fees \$7,200, insurance \$10,000, utilities \$6,000. It also claimed it suffered lost rental income due to the Agreement.

On February 28, 2020, the Estate filed a complaint and order to show cause initiating this action against PRISM and the Township. The Estate

asserted a third-party beneficiary claim, and alleged defendants breached the Redevelopment Plan and the Agreement (count one); and inverse condemnation by the Township (count two). The Estate's complaint alleged that selling the Property is necessary for the Executor to finish carrying out his duties and close out the Estate. The Estate sought damages and reimbursement for upkeep expenses and claimed the Estate cannot be properly probated until the property is sold. The Estate alleged it is a third-party beneficiary of the Agreement and that PRISM's failure to purchase the Property and the Township's refusal to compel Prism to do so constituted a breach of contract and the implied covenant of good faith and fair dealing.

Count one demanded the following relief: (1) compelling PRISM to specifically perform and acquire the Property within sixty days; (2) damages and costs caused by defendants' delays in acquiring the property; (3) compelling PRISM to immediately plan and develop the Property in accordance with the Redevelopment Plan and the Agreement; (4) compelling PRISM to immediately assume control and possession of the Property and to secure the Property to prevent further environmental damage; (5) compelling defendant to reimburse the Estate for taxes paid during the delay in acquisition; (6) payment of the

purchase for the Property within sixty days with interest thereon from January 1, 2007; and (7) an award of counsel fees and costs.

In April 2020, defendants filed motions to dismiss the complaint under Rule 4:6-2(e) for failure to state a claim upon which relief may be granted. On June 9, 2020, the court denied the motions. The order noted that the Estate had withdrawn the inverse condemnation claim pleaded in count two and accordingly, count two was dismissed.

During a management conference in February 2021, the court limited discovery to the threshold issues of standing and liability, with the understanding that further discovery would be permitted if the Estate could establish standing and liability. A briefing schedule for summary judgment motion practice was also set.

In April 2021, following completion of discovery on the threshold issues, defendants moved for summary judgment. Following oral argument, which focused on whether the Estate was a third-party beneficiary of the Agreement, the trial court granted summary judgment to defendants and denied summary judgment to the Estate.

In its comprehensive written opinion, the trial court recounted the procedural history and set forth its findings of fact. We need not repeat those

findings here. The court found that there was no genuine issue of material fact. It found there was no dispute that plaintiff was not expressly named as a beneficiary in the Redevelopment Agreement. In terms of an implied beneficiary status, the court found that "there is nothing from the agreement(s) that leads this court to conclude that PRISM and the Township intended for Carroll to receive a benefit enforceable in the courts." The surrounding circumstances likewise did not indicate that the Estate was an intended beneficiary having the right to enforce the Agreement. Because the court did not find plaintiff to be a third-party beneficiary, the court dismissed plaintiff's breach of contract claims as moot and granted defendants summary judgment, dismissing the Estate's remaining claims with prejudice. This appeal followed.

On appeal, the Estate argues:

I. STANDARD OF REVIEW.

II. THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF IS NOT A THIRD-PARTY BENEFICIARY OF THE REDEVELOPMENT AGREEMENT BETWEEN PRISM AND WEST ORANGE.

A. New Jersey Law On Third-Party Beneficiaries.

B. The Redevelopment Agreement And Redevelopment Plan Expressly Designate Plaintiff's Property For Development And Thus

Embodies Sufficient Intent To Confer Third-Party Beneficiary Status On Plaintiff.

III. THIS MATTER SHOULD BE REMANDED TO THE TRIAL COURT TO RULE ON PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT.

IV. THE TRIAL COURT IMPROPERLY DISREGARDED PLAINTIFF'S EQUITABLE REQUEST FOR ALTERNATIVE RELIEF CONCERNING THE PROPERTY'S CARRYING COSTS.

We review a grant of summary judgment using the same standard that governs the trial court's decision. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018) (citing Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). Under that standard, summary judgment will be granted when "the competent evidential materials submitted by the parties[,] viewed in the light most favorable to the non-moving party, show that there are no "genuine issues of material fact" and that "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat, 217 N.J. at 38); accord R. 4:46-2(c). "An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Ibid. (quoting Bhagat, 217 N.J. at 38).

We owe no special deference to the trial court's legal analysis. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016). "The interpretation and construction of a contract is a matter of law for the trial court, subject to de novo review on appeal." Cumberland Farms, Inc. v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 438 (App. Div. 2016) (citing Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998)).

We first address whether plaintiff has standing to claim breach of contract and violation of the implied covenant of good faith and fair dealing as an intended beneficiary of the Agreement. Because the decedent and the Estate were not parties to the Agreement, the Estate's claims require a threshold finding that it is a third-party beneficiary of the Agreement. We are convinced the trial court correctly ruled that the Estate did not have standing to pursue breach of contract and breach of implied covenant claims against the Township and PRISM because the Estate was not an intended third-party beneficiary of the Agreement.

N.J.S.A. 2A:15-2 provides: "A person for whose benefit a contract is made, either simple or sealed, may sue thereon in any court . . . although the consideration of the contract did not move from him."

A third-party may only enforce a contract if they are an intended beneficiary, rather than an incidental beneficiary, of the agreement. Broadway Maint. Corp. v. Rutgers, State Univ., 90 N.J. 253, 259 (1982) (citing Standard Gas Power Corp. v. New England Cas. Co., 90 N.J.L. 570, 573-74 (E. & A. 1917)). "The determining factor as to the rights of a third[-]party beneficiary is the intention of the parties who actually made the contract." Ibid. (quoting Brooklawn v. Brooklawn Hous. Corp., 124 N.J.L. 73, 76-77 (E. & A. 1940)). "If that intent does not exist, then the third person is only an incidental beneficiary, having no contractual standing." Ibid. (citing Standard Gas Power, 90 N.J.L. at 573-74); accord Rieder Cmtys. v. N. Brunswick, 227 N.J. Super. 214, 221-22 (App. Div. 1988); Restatement (Second) of Contracts § 302 (Am. Law Inst. 1979); 9 John E. Murray, Jr., Corbin on Contracts § 44.1 (rev. ed. 2007).

"Thus, the real test is whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts; and the fact that such a benefit exists, or that the third party is named, is merely evidence of this intention." Broadway, 90 N.J. at 259 (quoting Brooklawn, 124 N.J.L. at 76-77). The contracting parties "may expressly negate any legally enforceable right in a third party. Likewise they may expressly provide for that right." Id. at 260. If the contract is silent on the issue, the court must "examine the

pertinent provisions in the agreement and the surrounding circumstances to ascertain that intent." Ibid. (citing Talcott v. H. Corenzwit & Co., 76 N.J. 305, 312 (1978)).

The implied covenant of good faith and fair dealing requires that parties to a contract "refrain from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive' the benefits of the contract." Pollack v. Quick Quality Rests., Inc., 452 N.J. Super. 174, 191 (App. Div. 2017) (quoting Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224-25 (2005)). To prove a breach of the implied covenant, a plaintiff must show that a contract exists between the parties and the defendant acted with bad faith and deprived plaintiff of rights or benefits under the contract. See Wade v. Kessler Inst., 343 N.J. Super. 338, 346-52 (App. Div. 2001) (explaining the different ways our courts have defined the covenant, and the importance of proving bad faith to show breach). A defendant may breach the implied covenant without violating any express terms in a contract. Brunswick Hills, 182 N.J. at 226. However, in the absence of a contract, there can be no breach of the implied covenant. Wade, 343 N.J. Super. at 345 (citing Noye v. Hoffmann-La Roche Inc., 238 N.J. Super. 430, 434 (App. Div. 1990)).

Here, the Agreement between the Township and PRISM is silent as to third-party beneficiaries. Similarly, the trial court found that there was no express provision in the Redevelopment Plan identifying plaintiff as a third-party beneficiary. In the absence of express language either providing the right or negating it, the court must ascertain the parties' intent based on the contract's provisions and the surrounding circumstances.

The only evidence proffered by the Estate to satisfy its burden of proof was that the plaintiff was named in the Agreement and the Property was identified for acquisition in the Agreement. Naming of a third party in the contract can be evidence of intent but is not dispositive. Brooklawn, 124 N.J.L. at 77. Indeed, the plaintiff in Brooklawn was not found to be a third-party beneficiary despite being named in the contract. Ibid.

The trial court rejected the Estate's claim that the mere mention of Carroll's name or the Property as a Designated Acquisition Parcel "establish[ed] an intent between PRISM and the Township to contract for the benefit of Carroll." The trial court noted that the only direct evidence on the issue of intent was the testimony of PRISM's principal, Eugene Diaz, who testified that "there was absolutely no mention of the current property owners as beneficiaries of the

Redevelopment Agreement." The Estate did not present any evidence to the contrary, and Diaz was the only person that the Estate deposed.

The trial court further concluded that the provision permitting the Township to invoke eminent domain powers, "and the statutory rights conferred upon [the Estate] thereunder, did not imbue [the Estate] with the contract[ual] right to compel PRISM to acquire [the Property] or provide for any of the other remedies [the Estate] seeks."

The record supports the trial court's findings and legal conclusions. The Agreement's primary goal is to redevelop the Township's downtown area, which includes the Property. Notably absent from the Agreement is any language evidencing an intention that the owners of the properties to be redeveloped were intended beneficiaries. The Estate has not established that the Township and PRISM intended to confer a right to enforce the Agreement upon the decedent or the Estate as intended beneficiaries. The trial court correctly dismissed the Estate's breach of contract, violation of the implied covenant of good faith and fair dealing, and specific performance claims.

In Point III of its brief, the Estate argues that this matter should be remanded to the trial court to rule on the Estate's cross-motion for summary

judgment. For the reasons we have already stated, this argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In Point IV of its brief, the Estate argues that the trial court improperly disregarded the Estate's request for alternative relief concerning the Property's carrying costs. The Estate contends it was harmed in a manner that offends principles of equity. It claims that PRISM's unwillingness to purchase the Property and the Township's refusal to compel PRISM to act or otherwise acquire the Property is causing the Estate "ongoing harm in rendering the [s]ubject Property unusable and unmarketable." The Estate asserts that it "cannot sell or lease the Property because it can be acquired or subject to eminent domain at the [d]efendants' whim, nor can [the Estate] sue the [d]efendants to force any action."

Notably, the Estate voluntarily withdrew its claim of inverse condemnation against the Township, which was dismissed by the trial court, and did not attempt to reinstate that claim. Although the Estate asserts that upkeep of the Property is too expensive, the Property was leased to a tenant who was paying rent until January 2021. Absent the right to enforce the Agreement as an intended third-party beneficiary, granting the equitable relief sought by the Estate would violate the well-established principle that "it is not the function of

the court to make a better contract for the parties, or to supply terms that have not been agreed upon." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999). The court cannot add new terms to a contract. Accordingly, the Estate's claim for alternative equitable relief was correctly dismissed.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION