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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3777-10T4

JAMES L. BONGIOVANNI, JR.,

Plaintiff-Respondent,

v.

ROBERT PETERSON,

Defendant-Appellant,

and

CAROL ANNE GRONCZEWSKI,

Defendant.

Submitted February 7, 2012 – Decided March 7, 2012

Before Judges Reisner and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-4206-07.

Emery Z. Toth, attorney for appellant (Mr. Toth and Chad Weiss, on the brief).

Archer & Greiner, attorneys for respondent (Jerrold S. Kulback and Benjamin D. Morgan, on the brief).

PER CURIAM

Defendant Robert Peterson appeals from an April 1, 2011 order denying his motion for reconsideration of a February 4, 2011 order granting summary judgment in favor of plaintiff James L. Bongiovanni. We affirm in part and remand in part.

I

This appeal arises from a dispute between business partners, as a result of which Bongiovanni filed a complaint against Peterson in 2007, and Peterson filed a counterclaim.[1] As we outlined in our opinion on a prior appeal, Peterson v. Archer & Greiner, supra, Bongiovanni and Peterson incorporated Sansom Street Associates, L.L.C. (SSA), a Delaware corporation. As his capital contribution, Bongiovanni transferred to SSA a piece of commercial property on Jeweler's Row in Philadelphia. The two men also incorporated Edwin Freed, L.L.C., which was to take over a portion of Bongiovanni's existing jewelry business, known as Ed-Mar Crystal. Bongiovanni alleged that Peterson, as the 75% shareholder and managing member of SSA, sold the SSA property to a buyer on commercially unreasonable terms. He also

[1] As the Bongiovanni v. Peterson lawsuit approached its first scheduled trial date, Peterson filed a separate complaint against Bongiovanni and others. On May 14, 2010, the trial court dismissed Peterson's complaint, without prejudice to his right to move to amend his counterclaim in the first-filed case. We dismissed Peterson's appeal from that order as interlocutory. Peterson v. Archer & Greiner, No. A-5020-09 (App. Div. Jan. 18, 2011).

alleged that Peterson misappropriated some of the sale proceeds. As a result, he contended, SSA was unable to reimburse Bongiovanni for his capital share.

In his counterclaim, Peterson asserted that Bongiovanni induced him to personally guarantee a $1.65 million bank loan to SSA, with the promise that the Edwin Freed jewelry business, which was to be one of SSA's tenants, would generate sufficient rent revenue to repay the loan. However, Peterson alleged, Bongiovanni misrepresented the financial condition of the jewelry business, which was unable to make rent payments, and as a result, Peterson faced personally liability for a large unpaid debt. He also alleged that Bongiovanni and his wife misappropriated corporate property of the Edwin Freed jewelry business, particularly jewelry and gold.

Discovery closed in April 2009. Bongiovanni filed a motion for summary judgment on November 19, 2010, about two months prior to a scheduled trial date of January 10, 2011. The motion was adjourned the first time in response to a letter from Peterson's counsel advising the court that his client had a stroke. On January 6, 2011, the judge reluctantly adjourned the motion again and adjourned the trial, based on defense counsel's representation that Peterson still had not recovered sufficiently to assist counsel in preparing opposition to the

motion. The judge indicated he was highly unlikely to grant any further adjournment even if Peterson was hospitalized.

Thereafter, Peterson's counsel filed a brief in opposition to the motion, and a cross-motion to dismiss the complaint for lack of jurisdiction. The brief, however, did not set forth any factual rebuttal to Bongiovanni's claims that Peterson agreed to a sale on commercially unreasonable terms and pocketed some of the sale proceeds. Peterson also provided no evidence that Bongiovanni misappropriated inventory from the jewelry business, or what any allegedly misappropriated goods were worth.

At the oral argument on February 3, 2011, Peterson's attorney conceded that he could not prove the counterclaim, noting that his client had "essentially disavowed much of what was in the counterclaim." Therefore, the attorney did not "have an objection" to dismissal of the counterclaim. In granting summary judgment dismissing the counterclaim, the judge noted that Peterson's counsel "essentially concedes that the plaintiff is entitled to summary judgment in regards to the counterclaim due to the . . . lack of specificity in terms of claims that the defendant believes the plaintiff had taken property."

Addressing Bongiovanni's affirmative claims, Peterson's counsel argued that there were material facts in dispute. However, the judge noted that Bongiovanni's summary judgment

motion was meticulously documented with citations to the record, while Peterson's opposition was minimal and had almost no citations to the record. In addition, Peterson's brief did not specify what material facts were in dispute. Therefore, the judge concluded that Peterson had not established that there were material disputes of fact.

The judge also rejected Peterson's contention that the court lacked jurisdiction over the case:

> This is not a case where the court lacks subject matter jurisdiction. It may be that the law of Delaware has to apply but it's not uncommon particularly in business disputes that the parties have agreed that no matter where the lawsuit occurs a different state's substantive law will apply. That doesn't divest New Jersey of subject matter jurisdiction.

Finally, addressing Peterson's illness, the judge noted for the record that the motion had been adjourned several times:

> Now there's one other point that ought to be spread on the record. The moving party was very, very upset the last time the court postponed the summary judgment motions. They've been pending for some time. Unfortunately Dr. Peterson has been quite ill. The court does not doubt that at all. But as I indicated the last time there was a telephonic conference call, I can't keep delaying dispositive motions due to a party's illness. That party could die and either the death will result in an inability to defend the matter or the matter will have to be defended with just the estate being substituted in. But this matter was postponed on several occasions in order to

> accommodate Dr. Peterson's illness. And . . . I'm sympathetic to [defense counsel] who may have to defend this in essence with one hand tied behind his back due to Dr. Peterson' illness. But the rules are there for a particular reason and in this particular case the opposition and [its] failure to present anything contained in the record that would defeat summary judgment other than some allegations that are contained in paragraph 4 that don't conform to [R.] 4:46-2 are insufficient.

The judge therefore granted Bongiovanni summary judgment, which included an award of close to $430,000 against Peterson. However, in granting summary judgment, the judge did not issue findings of fact or conclusions of law to explain his decision.

Peterson then filed a motion dated March 2, 2011, for reconsideration of the summary judgment motion. He also moved to reinstate and amend the counterclaim. The motion was supported by certifications from Peterson and two other witnesses.

In his certification, Peterson attested that he had a stroke and "was still not physically or mentally able to assist [his] attorney in any meaningful way" at the time the motion opposition papers were due in February 2011. In support of that assertion, he presented a medical record showing that he had a stroke in October 2010. He also submitted a December 14, 2010 letter from his treating neurologist stating that he was "being treated for a stroke condition" which might require surgical

treatment and that he was not "fit to participate in a trial for at least the next 6 months."

Peterson attested that Bongiovanni was aware of the proposed sale of the SAS property and the "structure of the sale." He further contended that Bongiovanni "made a gift of his equity to [SSA]" and "this equity was now a corporate asset." He thus attempted to deny that Bongiovanni was entitled to any credit in his capital account for contributing the Jeweler's Row property to SSA. This assertion was contrary to the signed SAS operating agreement, which acknowledged Bongiovanni's capital account of $550,000, corresponding to his contribution of real estate to SSA.

Peterson also asserted that when the jewelry business stopped making lease payments to SAS, shortly after the parties signed the operating agreement, he was forced to make loan payments from his personal funds to avoid default. He claimed that the judgment should have reflected a credit for those payments. Peterson further asserted, in general terms, that Bongivanni "took possession" of the jewelry business inventory and sold it. However, Peterson's certification still did not quantify the value of the goods allegedly taken.

Peterson also submitted a certification from Frank DeLuca, of Cambridge Financial Services, L.L.C. DeLuca introduced

Peterson to Bongiovanni, who was looking for someone to invest in his jewelry business. According to DeLuca, although the SSA operating agreement credited Bongiovanni with a $550,000 capital contribution, in fact Bongiovanni "gifted" his equity in the property to SSA. He also confirmed that both parties agreed to the $1.65 million loan. Peterson also submitted a certification of Carol Gronczewski, who had helped put together the deal to create SSA. She asserted, among other things, that Bongiovanni caused the tenant, Edwin Freed, to default on the lease with SSA and, as a result, Peterson paid "thousands of dollars" of his "personal funds" to keep the $1.65 million loan current. She further asserted that Bongiovanni stripped the jewelry business of its inventory. However, she did not state whether or how she had personal knowledge of any of that information.

In a brief in opposition to the reconsideration motion, Bongiovanni argued that Peterson's certification contained the same information as his deposition, which could have been offered in opposition to the original motion. Bongiovanni also contended that Peterson's certification did not deny the specific allegations of mismanagement and self-dealing in connection with the sale of the property, on which Bongiovanni's claim was based. However, Bongiovanni did not submit a

certification denying Peterson's statement that Bongiovanni was aware of the terms of the sale agreement.

Bongiovanni argued that DeLuca and Gronczewski were available at the time of the original motion and their certifications could have been submitted earlier. He also contended that Gronczewski's certification was inadmissible hearsay. He argued that because Peterson's capital account had not "increased," he was "not entitled to any part of the distribution when the property was sold, until . . . Mr. Bongiovanni received his $550,000." Bongiovanni also argued that Peterson produced no documentary proof to support his counterclaim.

In a reply certification, Peterson continued to assert that his doctors had advised against participating in any litigation; he attached a March 21, 2011 letter from his doctor stating that defendant was under his care "after a stroke", that surgery was planned "within the next month" and that Peterson "should be excused from participating in any legal matters for the next 6 months which may adversely impact his medical condition."

Peterson attested that Bongiovanni caused the loan default by failing to have the two jewelry companies pay the agreed-on rent, which in turn was to be used to repay the $1.65 million loan. He also attached documentation purporting to show that he

made "$1,081,839.83" in payments toward the loan from his own funds. However, no legally competent evidence was attached showing the source of the payments.[2] He also contended that, under the Operating Agreement, Bongiovanni was only entitled to 25% of the net proceeds of the sale, and thus the damages awarded to him were inconsistent with the terms of the agreement.

The motion was denied. In a very brief oral opinion, the trial judge stated that the motion did not proffer anything new and did not demonstrate that the court's original decision was "palpably incorrect." The judge also noted that Peterson's illness was "unfortunate" but that "we were already overindulgent in postponing the summary judgment motion due to his medical condition and the plaintiff has rights also."

II

We review a trial judge's grant of summary judgment de novo, using the Brill standard. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The abuse of discretion standard applies to a judge's denial of a reconsideration motion and

[2] It appears, however, that legally competent documents exist, in the form of checks, because they were reviewed at length and in detail in Peterson's deposition, the transcript of which was submitted as part of Bongiovanni's original summary judgment motion.

denial of an adjournment request. See Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996); Kosmowski v. Atl. City Med. Ctr., 175 N.J. 568, 574 (2003). It is fundamental that in granting summary judgment, a trial court must make findings of fact and conclusions of law, so that we can engage in meaningful appellate review. See R. 1:7-4(a); Curtis v. Finneran, 83 N.J. 563, 569-70 (1980); Shulas v. Estabrook, 385 N.J. Super. 91, 96 (App. Div. 2006).

In this case, we are constrained to remand for further proceedings for two reasons. First, it was a mistaken exercise of the trial court's discretion to force Peterson's attorney to file a response to the summary judgment motion, when Peterson was suffering the effects of a stroke and was unable to assist his counsel in preparing the necessary response papers. If either the judge or Bongiovanni's counsel doubted the representations being made about Peterson's medical condition, the court could have required Peterson to submit to an independent medical examination. Or, if it appeared that Peterson would be unable to proceed indefinitely, the court could have appointed a guardian ad litem. See Chambon v. Chambon, 238 N.J. Super. 225, 231 (App. Div. 1990). While Peterson's counsel certainly could have done a better job of preparing the motion response, even without his client's

assistance, it was fundamentally unfair to force counsel to proceed at a time when his client was unavailable to assist him.

Second, in deciding the summary judgment motion, the trial judge made no findings of fact or conclusions of law. While the judge indicated that the court would apply Delaware law in deciding the motion, as required by the terms of the operating agreement, the court provided no such analysis. See, e.g., Scheidt v. DRS Tech., Inc., ___ N.J. Super. ___ (App. Div. 2012) (reviewing Delaware law on fiduciary duty and related topics); In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 748 (Del. Ch. 2005), aff'd, 906 A.2d 27 (Del. 2006). Therefore, we have no legal or factual analysis as to the basis for Peterson's liability, as to the proper quantum of damages, or as to any credits or offsets to which Peterson might be entitled.

For example, the Operating Agreement provides that the members of the L.L.C. are not entitled to repayment of their capital contributions until the company's debts are paid. If Peterson used his own funds to make some of the loan payments, treating those outlays as a loan to SSA, he might be entitled to repayment of those sums before either he or Bongiovanni were entitled to repayment of their capital contributions. Based on our reading of Peterson's deposition, which was part of Bongiovanni's summary judgment motion, there are canceled checks

and other documents to support his claim that he made such payments. The Operating Agreement also provides that when SSA's assets are sold, the members are to be repaid from net proceeds in proportion to the amounts in their respective capital accounts. It is not clear whether the award to Bongiovanni is consistent with that formula.

Because the judge made no findings of fact or conclusions of law, Peterson was at a disadvantage in moving for reconsideration. Further, the trial court did not reconsider the matter ab initio, as if the summary judgment motion were newly filed, but rather applied the more rigorous standard applicable to a motion for reconsideration. See Cummings, supra, 295 N.J. Super. at 389. This put Peterson at a further disadvantage. Again, the motion papers could have been better prepared. Yet, after canvassing the entire record, we are left with unanswered questions concerning the fairness of the judgment on Bongiovanni's claims. To summarize, the motion for reconsideration should have been granted and the original order granting summary judgment should have been vacated.

On the other hand, after making a de novo review of the record, we are persuaded that no amount of reconsideration or review could salvage Peterson's counterclaim. Even at his deposition, taken long before he suffered the stroke, Peterson

was completely unable to quantify what he contended was misappropriated or its value. We also find no legally competent evidence to support the claim that Bongiovanni misrepresented the financial condition of his jewelry business or that he was responsible for the tenants' inability to pay the rent. Peterson's counsel candidly conceded that the counterclaim was not viable, during the argument of the summary judgment motion. See First Am. Title Ins. Co. v. Vision Mortg. Corp. Inc., 298 N.J. Super. 138, 143 (App. Div. 1997). Therefore, we are constrained to affirm the dismissal of the counterclaim.

We also agree with the motion judge that the court had subject matter jurisdiction.[3] Peterson's arguments on that point are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

For the reasons set forth herein, with respect only to Bongiovanni's complaint and not Peterson's counterclaim, we reverse the April 1, 2011 order denying reconsideration, vacate the February 3, 2011 order granting summary judgment, and remand this matter to the trial court. To be clear, we are ordering a "do over" of the summary judgment motion on Bongiovanni's

[3] While asserting that the court lacked jurisdiction over the case, Peterson admitted that Bongiovanni owned a house in New Jersey which might be his residence. Bongiovanni's opposition papers confirmed that he resided in Cherry Hill.

complaint. Bongiovanni should re-file his motion; Peterson should file opposition; and Bongiovanni should file his reply. All submissions should conform to Rule 4:46. While we are certain that the original motion judge would fairly consider the newly filed motion, it may be difficult to put aside the impressions made by the prior filings. Therefore, out of an abundance of caution, we direct that the motion be heard by a judge who has not previously been involved in this case.

Affirmed in part, reversed in part, and remanded.