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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1107-10T4

ZVI MARKOWITZ,

Plaintiff-Appellant,

v.

MAGIC TOUCH, INC.,

Defendant-Respondent.

Submitted February 1, 2012 - Decided February 15, 2012

Before Judges Fuentes, Harris, and Koblitz.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-5423-07.

Spector & Dimin, P.A., attorneys for appellant (William N. Dimin and Michelle Joy Munsat, on the brief).

Mark S. Carter, attorney for respondent.

PER CURIAM

Plaintiff Zvi Markowitz appeals from a final judgment of the Law Division dismissing his specific performance complaint following a bench trial. We affirm.

I.

We derive the following facts from the trial record. On June 10, 2006, Markowitz entered into an Agreement of Sale (the

agreement) to purchase defendant Magic Touch Inc.'s car wash located on Route 70 in Cherry Hill. Magic Touch operated the business at that location pursuant to an assignment of lease first executed in January 2001.

The agreement provided that Markowitz would acquire most, but not all, of Magic Touch's assets. It further contemplated that the lease would be assigned to Markowitz for the remainder of its term. The agreed purchase price was initially set at $1,625,000. The parties agreed to a closing date of August 9, 2006, memorializing the following to govern their time of performance:

> The Closing Date and all other dates and times referred to for the performance of any of the obligations of either party under this Agreement are understood to be of the essence of this Agreement and are binding. The Closing Date is not extended by any other provision of this Agreement and may only be extended by the mutual written agreement of the parties.

The agreement also stated that if Markowitz performed all of his "covenants and conditions" prior to closing, he could "pursue any action at law or in equity, including, but not limited to, an action for specific performance." Reciprocally, in the event that Markowitz breached the agreement and Magic Touch performed all of its contractual obligations, Magic Touch would keep the $50,000 escrow deposit as liquidated damages.

Following the expiration of the agreement's twenty-one day due diligence period, the parties proceeded to amend the agreement on August 2, 2006, which made a $25,000 reduction to the purchase price and rescheduled the closing date —— still subject to time of the essence performance —— to September 15, 2006.

Shortly thereafter, Markowitz learned that Magic Touch had commenced litigation in the Chancery Division, Camden Vicinage, against its landlord to ensure that the lease would not be terminated, and remain assignable. The landlord filed a counterclaim seeking remedies for alleged environmental contamination on the subject property. Markowitz testified that he and a representative of Magic Touch agreed that the closing would be delayed until the litigation was resolved, but nothing was ever memorialized in a written instrument.

On September 22, 2006, the Chancery Division determined that the subject lease could be assigned, ruling further that the obligation to remediate any environmental contamination on the property would lie with "either the buyer or seller or both" because the obligation "[ran] with the land." Following this decision, Markowitz became concerned that he would be obliged to remediate the property, stating, "and then, if I close[d] with

[Magic Touch], I'd be stuck with God knows what kind of expenses to clean that property."

On November 13, 2006, Markowitz's counsel received a letter from Magic Touch's attorney asking that Markowitz make a decision whether he would proceed to closing or execute a written termination of the agreement. The letter required Markowitz to render his decision by November 20, 2006, and proceed to closing "on or before . . . November 22, 2006."

Markowitz's counsel replied that his client would not release Magic Touch from the agreement and that he was prepared to close if "[Magic Touch] is willing to provide a discount on the purchase price." Alternatively, Markowitz was "willing to await the outcome of the litigation before closing."

No one appeared for a closing on November 22, and instead, in the months that followed, the parties continued with unstructured discussions and negotiations. On May 23, 2007, Markowitz's counsel received a letter from a different attorney for Magic Touch, this time indicating that discovery in the litigation, now lodged in the Law Division, would not be completed until November 20, 2007, at the earliest, and opining that "trial would likely be some months thereafter." The letter advanced a "non-negotiable offer" to Markowitz requiring that he choose either to (1) proceed to a closing on June 4, 2007, and

"take[] on the pending lawsuit" or (2) execute "a mutual release whereby the agreement to purchase would be cancelled and neither party would have any liability to the other after execution of mutual releases. [Markowitz] would receive his $50,000.00 deposit back." However, if Markowitz failed to choose one of these options, Magic Touch would retain the $50,000 and "consider [Markowitz] in breach of the original agreement." On May 30, 2007, Markowitz rejected Magic Touch's non-negotiable offer.

On October 25, 2007, Markowitz filed a one-count declaratory judgment action against Magic Touch in the Law Division, Camden Vicinage. The only remedy sought in the complaint was a declaration that the agreement between Markowitz and Magic Touch was valid and enforceable. Magic Touch answered, and filed a counterclaim seeking declaratory relief in the nature of a declaration that the agreement was terminated based upon Markowitz's putative breach of contract.

The case went to trial on September 1, 2010. By that time the car wash business had been sold to a third party: Dong Soo Pyo.[1] Initially, in September 2007, Pyo contracted with Magic

[1] The trial transcript refers to the purchaser as Pongsoo Pyo. However, the written instruments conveying the business are in the name of Dong Soo Pyo.

Touch to acquire its assets, including a lease assignment, for the price of $1,900,000. Later, for reasons that are not explained in the record, the asset acquisition agreement was jettisoned in favor of a "Subscription Agreement for Sale of Corporate Stocks of Magic Touch, Inc.," and Pyo bought 100% of the shares of stock in Magic Touch for $2,200,000 in December 2007.[2]

The trial court found that "from the time the lawsuits were filed[,]" Magic Touch was unable to "convey clear title" and thus "was not able to perform under the agreement." The court further found that the parties continued negotiations as to how to resolve the issues posed by the landlord's litigation, which resulted in Markowitz being unwilling to close because he did not want to be "stuck with a lawsuit[,]" unless the price was reduced again.

The court further found that the parties had, in so many words, abandoned their agreement:

> So, there are two parallel streams of information going. We have the written contracts and the written agreement with which neither party complies, and we have a series of conversations and business

[2] The stock transfer was between Yacov Wathstein and Pyo. Wathstein was the representative of Magic Touch who negotiated with Markowitz. The subscription agreement disclosed the existence of the two separate lawsuits —— the landlord's and Markowitz's —— that were then pending against Magic Touch.

> negotiations between two individuals; one trying to buy a car wash, the other trying to sell a car wash.

The court concluded that "[Markowitz] chose not to close. The seller couldn't produce, the buyer chose not to close and changed the price." It determined that there was no basis upon which to order specific performance because there was no "meeting of the minds" as to the ultimate purchase price or when the closing would occur. The court reasoned:

> Accordingly, the [c]ourt finds that [Magic Touch] . . . is obligated to return to [Markowitz] his full deposit, plus interest at the court —— a calculated rate. The [c]ourt finds that there is no basis to order . . . specific performance of the contract because the [c]ourt finds that, as it matured and as it materialized, the contract was breached by each party. One couldn't produce, the other didn't step up.

On September 20, 2010, a judgment consistent with the trial court's oral decision was entered. This appeal ensued.

II.

Our scope of review of a judgment in a non-jury case is extremely limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). The general rule is that "'we do not disturb the factual findings and legal conclusions 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[.]'" In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008) (quoting Rova Farms Resort, Inc. v. Invest. Ins. Co., 65 N.J. 474, 484 (1974)). "While we will defer to the trial court's factual findings so long as they are supported by sufficient, credible evidence in the record, our review of the trial court's legal conclusions is de novo." 30 River Court E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 476 (App. Div. 2006) (citing Rova Farms, supra, 65 N.J. at 483-84; Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

When evaluating whether the trial court's findings are supportable, this court must not make that determination based upon whether it would have reached a different result. State v. Elders, 192 N.J. 224, 244 (2007). A close reading of the record supports the conclusion that there was adequate, substantial, and credible evidence to deduce that the terms of the agreement had been abandoned by the mutual conduct of the parties following the Chancery Division's declaration that the lease could be assigned, but the environmental responsibility remained unsettled.

The trial court's use of the phrase, "there was not a meeting of the minds, an agreement on price, or a closing date," can only be understood in context. It was uttered immediately

after the court had analyzed the parties' conflicting positions and had concluded, "each side in the formal correspondence and offers and counteroffers took strident positions that lead the [c]ourt to believe in the end there was no agreement at the end." This conclusion is supported by logic, reason, and a full understanding of the transaction as it was revealed by the testimony and documents at trial.

It is well-settled that the conduct of parties "after execution of the contract is entitled to great weight in determining its [effect]." Joseph Hilton & Assoc., Inc. v. Evans, 201 N.J. Super. 156, 171 (App. Div.), certif. denied, 101 N.J. 326 (1985). The trial court's finding that the agreement was breached by each party because "one couldn't produce [and] the other didn't step up" was sufficient to mutually invoke the principle "that a material breach by either party to a bilateral contract excuses the other party from rendering any further contractual performance." Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 285 (App. Div. 1998)(citing Nolan v. Lee Ho, 120 N.J. 465, 472 (1990)). It would also logically follow, as the trial court appears to have concluded, that when both parties materially breached the agreement their actions in this case constituted repudiation of the agreement.

Once the Chancery Division litigation ensued, the parties embarked upon a plain course of action to restructure their relationship by changing —— or attempting to change —— material aspects of the agreement. The trial court found their efforts not sufficiently crystallized ("there was not a meeting of the minds") to warrant the equitable exercise of specific performance. We conclude that the trial court acted well within the mainstream of its discretionary authority.

Specific performance is an equitable remedy that courts do not grant lightly. Because the remedy operates to compel one party to unwillingly transact with another, it should be granted in only exceptional circumstances. See Centex Homes Corp. v. Boag, 128 N.J. Super. 385, 392-93 (Ch. Div. 1974) (noting that "considerable caution should be used in decreeing the specific performance of agreements, and the court is bound to see that it really does the complete justice which it aims at, and which is the grounds of its jurisdiction") (quoting King v. Morford, 1 N.J. Eq. 274, 281-82 (Ch. 1831)); see also Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 113 (App. Div. 1990)(specific performance is a "discretionary remedy resting on equitable principles"), certif. denied, 126 N.J. 321 (1991).

We are persuaded that Markowitz was neither entitled to a declaratory judgment in his favor, which he initially pleaded,

nor to the remedy of specific performance. The trial court's thoughtful analysis of the facts and his adherence to appropriate legal principles convinces us that it was not so wide of the mark to call forth our intervention.

Affirmed.[3]

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

CLERK OF THE APPELLATE DIVISION

[3] We have considered Markowitz's argument that Magic Touch breached the implied covenant of good faith and fair dealing, and conclude that it is without merit. R. 2:11-3(e)(1)(A), (E).