NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4583-09T3

NORTHGATE CONDOMINIUM
ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

CALIBER BUILDERS, INC., GOLDEN
ORCHARDS ASSOCIATES, L.P. and
GOLDEN OAKS HOMEOWNERS
ASSOCIATION, INC.,

Defendants-Respondents.

Argued March 1, 2011 - Decided March 30, 2011

Before Judges Carchman and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-9182-07.

Ira Weiner argued the cause for appellant (Beattie Padovano, L.L.C., attorneys; John J. Lamb, of counsel and on the brief; George G. Campion and Daniel L. Steinhagen, on the brief).

Russell R. Huntington argued the cause for respondents (Huntington Bailey, L.L.P., attorneys; Mr. Huntington, of counsel and on the brief; Siobhan Spillane Bailey, on the brief).

PER CURIAM

In this contract dispute, plaintiff Northgate Condominium Association, Inc. appeals from an order of the Law Division granting defendants Caliber Builders, Inc. (Caliber), Golden Orchards Associates, LP (Golden Orchards), and Golden Oaks Homeowners Association (Golden Oaks) (collectively, defendants) partial summary judgment on seven of the eight counts of the complaint. The complaint sought, among other things, specific performance of a settlement agreement entered into by the parties.[1] The motion judge determined that the agreement applied to a project that was never built and found that there was no breach of the agreement. He granted summary judgment and dismissed the complaint. We affirm.

The dispute between the parties transcends the issues raised here. In fact, plaintiff filed an action in lieu of prerogative writs challenging the approval of the subsequent application filed by Caliber. After an adverse decision in the Law Division, plaintiff appealed, and we affirmed. Northgate Condo. Ass'n v. Hillsdale Planning Bd., No. A-1042-09 (App. Div. Jan. 24, 2011).

[1] The remaining count, which is not a subject of this appeal, was subsequently dismissed by stipulation, Rule 4:37-1(a).

These are the facts relevant to this appeal.[2] Golden Orchards owns approximately 12.5 acres of land partially located in the Borough of Hillsdale and partially in the Township of Washington (the property). Caliber, Golden Orchards's developer, sought to develop single-family houses on the property and filed applications with both the Hillsdale and Washington Planning Boards for subdivision approval. Northgate, a community of town homes, objected to Caliber's plans due to water drainage concerns.

More specifically, the property owned by Golden Orchards is located on the tax map of Hillsdale as Block 506, Lot 1, and the tax map of Washington, Block 2101, Lots 3 and 7. The bulk of the property, 9.79 acres, is located in Hillsdale, and the remaining 2.69 acres is located in Washington. The property is "unimproved and mostly wooded area," and commonly referred to as "Golden Orchards."

In 2001, Caliber was interested in building age-restricted homes on the property. However, the Hillsdale Borough Council did not enact the necessary zoning ordinances, and Caliber abandoned the project. The next year, 2002, Caliber developed plans for a use permitted under the existing zoning ordinances –

[2] While the facts related in the earlier opinion are not directly related to the issues raised on this appeal, they provide a context for the present appeal.

a nineteen lot subdivision, in which each lot was to contain one single-family dwelling (the 2002 project).[3] Caliber submitted applications to both the Hillsdale and Washington Planning Boards because the project encompassed "both jurisdictions and . . . some individual lots [lay] within both Hillsdale and . . . Washington." Moreover, because portions of the property border "environmentally restricted areas," Caliber also requested permits from the New Jersey Department of Environmental Protection (NJDEP).

In December 2003, Caliber received preliminary subdivision approval from the Hillsdale Planning Board. However, during public hearings before the Washington Planning Board, the application was unwaveringly opposed by Northgate, an association of seventy-one townhouses, located "on the [Washington] municipal boundary line with Hillsdale to the north." Critically, Northgate, 200 feet immediately south, is at a lower elevation than the property.

According to Northgate's president, Robert Malone, "[d]rainage and storm water is a serious problem at Northgate"

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[3] The record is inconsistent as to the proposed number of homes. In some instances, there are references to a nineteen lot subdivision while in other instances reference is made to twenty or twenty-one lots. The approvals were granted for sixteen lots.

because "[w]henever the complex experiences heavy rains, the storm water detention basins quickly fill up, and on occasion, overflow." Malone expressed concern "that development on [Northgate's] northern border . . . could exacerbate the problematic drainage conditions that already existed." In addition to drainage, Northgate expressed concern about "reasonable landscaped buffers, a fence on the common border, and suitable building setbacks"; however, the drainage issue dominated the concern. As a result, Northgate retained John Thonet, a professional engineer and expert in storm water management, who summarized Northgate's concerns:

> Northgate sits at an elevation lower than properties to the north, so during periods of rainfall, water naturally drains . . . onto Northgate over the entire border of the properties. Some storm water falling on Northgate is accumulated in detention basins which were designed over 20 years ago to manage only the storm water that fell from the Northgate townhouse project. It was not designed to handle a discharge of water from a new project to its north.

Thonet determined that Caliber's application "would result in excess storm water runoff being directed onto Northgate's property with flooding of the existing detention basins." In response, he met with engineers from Caliber, the Hillsdale Planning Board, and the Washington Planning Board "to discuss storm water management and drainage issues." Caliber

subsequently "agreed to redesign its plans" to satisfy some, but not all, of Northgate's drainage objections.

As a result of ongoing discussions and modifications, attorneys representing Caliber and Northgate "proposed [an] agreement which regulated what could be built and the site improvements that would be constructed." A finalized settlement agreement (the agreement) was reached on April 29, 2005. The agreement provided, in part:

> In consideration of this agreement, [Northgate] withdraws any objections to the proposed amended subdivision plan before the [Washington Planning] Board, providing a satisfactory agreement as to the details is reached (and subject to the right to review, comment and/or object to any future modifications, revisions, amendments and/or variances before the [Washington Planning] Board, the NJDEP, or any other governmental agency.)
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> . . . .
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> 16. Withdrawal of Objection: In consideration of this Agreement, Northgate shall withdraw their objection to this project before the Washington Township Planning Board and Hillsdale Planning Board . . . . In addition, (subject to the specifically reserved right to intervene, make comments, or object, in the event of breach or noncompliance by [Caliber] with any NJDEP requirement or any condition of any approvals of any governmental agency or any change or revision to the Plans, or pursuant to the enforcement of this Agreement, or breach thereof), the above parties shall inform the NJDEP of their lack of objection to the plans as presented and

> shall cease all opposition to the project with any agency. However, the Applicant agrees that it shall discharge the water from Detention Basin B to be released at the top of the wetlands (and buffer) by Ell Road, as shown on the latest revised Plans (and as described to the Planning Board on December 9, 2004 meeting), which Plans have been submitted to the NJDEP. The Applicant has agreed to apply for a stream encroachment permit in connection with said discharge (and shall send a copy to the Association at the time of filing).
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> . . . .
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> 18. Successors: This Agreement shall apply to the successors and assigns of the respective parties.

Northgate ceased objecting to the revised plans. As a result, resolutions granting Caliber approval for the project were adopted by the Washington Planning Board on July 6, 2005,[4] the Hillsdale Planning Board on December 19, 2006, and the NJDEP. However, based on "environmental constraints," the approved applications reduced the requested subdivision from nineteen lots to sixteen.

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[4] The Washington Planning Board resolution included reference to the agreement: "WHEREAS, during the public hearing on June 29, 2005, [Caliber] and [Northgate] submitted to the Planning Board a Settlement Agreement . . . attached hereto as Exhibit A, and which the Board finds to be comprehensive in the manner in which it provides for the resolution of the various issues which were presented and litigated during the course of the public hearings . . . ."

Caliber targeted commencement of construction to the Spring 2007. However, prior to that time, a Caliber officer "was contacted by Hillsdale Officials who inquired if Caliber would build the senior [age-restricted] project if the zoning was enacted . . . ." Hillsdale enacted the zoning ordinance in February 2007, and Caliber filed an application with Hillsdale in April 2007 for "[c]onstruction of 39 single family age-restricted houses[,] most of which are entirely or partially located in the Borough of Hillsdale and a minor subdivision for one single family house that is not age restricted and located in the Township of Washington" (the 2007 project). During the hearings on this application, Northgate lodged its objections but to no avail as the Hillsdale Planning Board adopted a resolution granting Caliber approval on January 29, 2008. As a result of these approvals, the 2002 project was abandoned. In response to the approvals of the 2007 project, Northgate filed the action in lieu of prerogative writs, which was rejected by the Law Division and affirmed by our opinion of January 24, 2011. Northgate, supra. In response to Caliber's abandoning the 2002 project and proceeding with the 2007 project, Northgate filed an eight count complaint on December 14, 2007, seeking, among other things, specific performance of the agreement and "that [Caliber] be permanently and perpetually enjoined from

undertaking any development that does not meet the specific requirements set forth in [the] Settlement Agreement."[5]

Defendants successfully moved for summary judgment. This appeal followed.

Although plaintiff raises a number of issues on appeal, the critical finding, which is dispositive, was that plaintiff was not entitled to specific performance as a matter of law.

Our review of an order granting summary judgment requires that we "'employ the same standard [of review] that governs the trial court.'" Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (alteration in original) (quoting Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004)). Moreover, because defendants moved for summary judgment, the facts are considered in the light most favorable to Northgate. R. 4:46-2(c).

Additional considerations apply when reviewing a settlement agreement. "[A] settlement agreement is governed by principles of contract law." Thompson v. City of Atlantic City, 190 N.J. 359, 379 (2007). Therefore, "in ruling on a summary judgment motion that involves the interpretation of a contract, a court

[5] The additional counts included causes of action sounding among other things, in breach of agreement; misrepresentation, fraud and fraudulent concealment; and equitable estoppel.

must necessarily determine whether there is any genuine issue of material fact regarding the parties' intention." Celanese Ltd. v. Essex County Imprv. Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (emphasis added). However, when there is no genuine issue of material fact regarding the parties' intention, the "standard is de novo, and the trial court rulings 'are not entitled to any special deference.'" Henry, supra, 204 N.J. at 330 (quoting Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995)).

"The touchstone in construing a contract is to ascertain the intention of the parties and 'if the four corners of the . . . contract provide a coherent expression of the parties intent, [the court] need search no further.'" Farrell v. Janik, 225 N.J. Super. 282, 287 (Law Div. 1988) (quoting Oldfield v. Stoece Homes, Inc., 26 N.J. 246, 257 (1958)); see also Watson v. City of E. Orange, 175 N.J. 442, 447 (2003) (Long J., dissenting) ("Under our law, when the terms of a contract are clear and unambiguous, there is no room for construction and the court must enforce those terms as written").

The agreement, itself, defines its scope: "In consideration of this agreement, [Northgate] withdraws any objections to the proposed amended subdivision plan before the [Washington Planning] Board . . . ." (Emphasis added). At the

time of the agreement, April 29, 2005, Caliber had only filed one application with the Washington Planning Board for subdivision approval——an application for the 2002 project. Furthermore, Paragraph One, "Construction of Improvements," states that the property shall be developed in accordance with the engineering plans developed between 2003 and 2004.

Narrow language is also found in Paragraph 16, "Withdrawal of Objection" (Paragraph 16):

> 16. Withdrawal of Objection: In consideration of this Agreement, Northgate shall withdraw their objection to this project before the Washington Township Planning Board and Hillsdale Planning Board . . . . In addition, (subject to the specifically reserved right to intervene, make comments, or object, in the event of breach or noncompliance by [Caliber] with any NJDEP requirement or any condition of any approvals of any governmental agency or any change or revision to the Plans, or pursuant to the enforcement of this Agreement, or breach thereof), the above parties shall inform the NJDEP of their lack of objection to the plans as presented and shall cease all opposition to the project with any agency.

The parallel references to "plan[s] before the Board," "to this project," and "to the plans as presented," demonstrate that the agreement strictly applied to 2002 project. See E. Brunswick Sewage Auth. v. E. Mill Assocs. Inc., 365 N.J. Super. 120, 125 (App. Div. 2004) ("When the terms of a contract are clear, the court must enforce them as written"). Judge Powers concluded:

> Here, the agreement is clear and unambiguous, both for what is provided and what is not provided. The agreement states that it applies "to the proposed amended subdivision plan before the Board[,]" "to this project before the Washington Township Planning Board and the Hillsdale Planning Board[,]" and concerns a forbearance of objections "to this project" in exchange for the developer's agreement to provide certain drainage, land improvements and other conditions.[] There can be no dispute that the project then under consideration was . . . a 16-lot project about which plaintiff agreed to inform the NJDEP of its lack of objection "to the plans as presented."
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> [(Internal citations omitted).]

The judge correctly concluded that the scope of this agreement was limited to the 2002 project.

The judge also determined that: "Absent from the agreement is any language, term, definition, clause or phrase which explicitly requires [Caliber] to proceed with the development described in 'the plans as presented,' or to refrain from pursuing any other development plan for this land." Plaintiff argues that absent such language, the four corners of the agreement do not satisfactorily resolve the parties' intent. Farrell, supra, 225 N.J. Super. at 287.

In fact, Paragraph 16 speaks to Caliber's change of plans as Northgate "specifically reserved [the] right to intervene, make comments, or object . . . [to] any change or revision to the Plans." (Emphasis added). While plaintiff claims that such

language does not permit abandonment, we disagree. As Judge Powers noted, to adopt plaintiff's position that Caliber's option was to proceed with the 2002 plan or nothing "would require the land to lay forever fallow, if for instance, financing fell through or all approvals could not be obtained." Such a result borders on the absurd. We must read agreements as they were intended and with a modicum of common sense. See Krosnowski v. Krosnowski, 22 N.J. 376, 387 (1956) ("The construction of a written instrument to be adopted is the one which appears to be in accord with justice and common sense and the probable intention of the parties") (internal quotation marks omitted). Plaintiff's antipathy towards development of this property cannot be the basis for interpreting a contract beyond its plain meaning and intent. See Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953) ("The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in 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").

Finally, we question whether there was any breach of the agreement. Plaintiff obligated itself to withdraw its objections to the 2002 project, and Caliber obligated itself to

provide certain drainage, setback and other improvements consistent with the project. The project was never constructed and by its terms, this agreement applied to the 2002 project and no other. We agree with the trial judge that there was no breach.

As to the other issues raised by plaintiff on this appeal, we have carefully considered the record. We conclude that plaintiff's additional arguments are without merit and do not require further discussion. R. 2:11-3(e)(l)(E).

We affirm substantially for the reasons set forth in Judge Powers' thoughtful and thorough written opinion attached to the order of August 20, 2009.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION