NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5345-10T3

THOMAS COMPANY, INC.,

Plaintiff,

vs.

TAMBURRO BROTHERS CONSTRUCTION
CO., INC.,

Defendant/Third-Party
Plaintiff-Respondent,

vs.

HAMILTON TOWNSHIP BOARD OF
EDUCATION,

Third-Party Defendant-
Appellant.

Submitted: March 14, 2012 - Decided: July 27, 2012

Before Judges Cuff and Waugh.

On appeal from the Superior Court of New Jersey, Chancery Division, Atlantic County, Docket No. C-50-09.

Davis, Bucco & Ardizzi, attorneys for appellant (Paul A. Bucco and Robert D. Ardizzi, on the brief).

Gruccio, Pepper, De Santo & Ruth, P.A., attorneys for respondent (Robert A. De Santo, on the brief).

PER CURIAM

Defendant Hamilton Township Board of Education (Board) and Tamburro Brothers Construction Co., Inc. (Tamburro) entered an agreement to renovate one of the Board's schools. Tamburro filed suit to obtain money owed to it by the Board. Eventually, the parties executed a settlement agreement. The Board appeals from an order finding Tamburro did not materially breach the settlement agreement, finding the settlement agreement binding, and compelling the parties to participate in a non-judicial arbitration proceeding. We affirm in part, reverse in part, and remand for further proceedings.

The settlement agreement at issue provided that the Board would pay $345,000 of approximately $365,000 sought by Tamburro of which $295,000 would be paid by December 28, 2007, and Tamburro committed to perform the following work by January 15, 2008: removal and replacement of broken terrazzo tiles located in the hallway of the school, scarification of the perimeter of the drainage basin in the areas excavated by Tamburro during the project, and removal and replacement of two sets of door panic bars. The settlement agreement acknowledged on-going litigation involving the gymnasium floor, and that those claims were not included in the settlement between the Board and Tamburro. In fact, each party reserved the right to assert appropriate claims and defenses in that litigation. The Board also "agree[d] to

participate in binding arbitration among and between Thomas [Company, Inc., the plaintiff in the gymnasium flooring litigation,] Tamburro and the Board and agree[d] to be bound by the decision of the arbitrator." Finally, $50,000 of the settlement fund would be paid to Tamburro at the conclusion of the gymnasium floor litigation.

This is not the first time the dispute regarding the settlement agreement has been before this court. In Thomas Company, Inc. v. Tamburro Brothers Construction Co. and Hamilton Township Board of Education, Docket No. A-1490-09 (App. Div. September 14, 2010), we held that a plenary hearing was required to determine whether Tamburro breached the terms of the settlement agreement and whether any breach was sufficiently material to excuse further performance by the Board of its obligations, including participation in the arbitration proceeding to resolve the Thomas Company claims. Following a three-day evidentiary hearing, the trial judge found that neither the tile work nor the work on the drainage basin were completed in the time contemplated by the settlement agreement, that Tamburro did not establish the Board waived or modified the time requirement by its conduct, but the breach by Tamburro was not material.

On appeal, the Board argues that the trial judge improperly barred evidence regarding the circumstances surrounding the settlement agreement and the intentions of the parties to that agreement. It also contends that the holding that the breach by Tamburro was not a material breach is erroneous.

An appellate tribunal does not conduct a de novo review of the trial record of a case tried by a judge sitting without a jury. Rather, we review the record to determine whether the findings of fact are supported by adequate, substantial and credible evidence in the trial record, and then whether the trial judge identified and applied the relevant legal principles to the facts as found. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974); Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 180 (App. Div.), certif. denied, 196 N.J. 85 (2008). This court will not disturb findings of fact based on sufficient credible evidence in the record. Rova Farms, supra, 65 N.J. at 484; Spring Creek, supra, 399 N.J. Super. at 180. On the other hand, we owe no deference to the legal conclusions of the trial judge and review questions of law de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Here, Tamburro filed an action to enforce the settlement agreement between it and the Board, particularly the provision

requiring the Board to participate in the arbitration proceeding between Tamburro and Thomas Company, Inc., the sub-contractor retained by it to perform work on the gymnasium floor. The Board contended Tamburro breached the settlement agreement and its breach excused its participation in the arbitration proceeding. The trial judge, therefore, had to determine whether a breach occurred and, if so, whether any breach was a material breach that excused further performance by the Board of its undertakings in the settlement agreement.

A settlement agreement is a contract. Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div.), certif. denied, 94 N.J. 600 (1983). "Interpretation and construction of a contract is a matter of law . . . ." Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). Interpretation of a contract involves a determination of the meaning of the language used by the parties. 5 Corbin on Contracts § 24.3 (Perillo ed. 1998). It is a basic rule of contract interpretation that a court must discern and implement the common intention of the parties and enforce the contract as written. Pacifico v. Pacifico, 190 N.J. 258, 266 (2007). Construction involves a determination of the legal operation of the contract. 5 Corbin on Contracts, supra.

Here, the Board attempted to introduce evidence at trial regarding the use of the word "scarify" as it was used in the settlement agreement in the sense that the evidence would "show the condition of the basin at the time [of the Settlement Agreement], the understanding of the parties at the time, and what was the end result from the Settlement Agreement." Relying on the parol evidence rule, the trial judge barred this evidence.

Generally, the parol evidence rule bars "introduction of evidence that tends to alter an integrated written document." Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 268 (2006); Restatement (Second) of Contracts § 213 (1981). The restrictive view of the parol evidence rule permits introduction of parol evidence only when the language of the agreement is unclear. Conway, supra, 187 N.J. at 268. A more expansive view of the rule permits introduction of evidence to shed light on the "'[a]ntecedent and surrounding factors that throw light upon [the meaning of the contract] . . . .'" Id. at 268-69 (quoting 3 Corbin on Contracts § 579 (West ed. 1960)).

Whether a breach occurred requires an understanding of the common intention of the parties. The judge must initially identify the mutual obligations undertaken by the parties to the agreement. Only then can the judge determine whether any breach

is material or an essential element of the agreement to excuse further performance by the other party to the agreement. Chance v. McCann, 405 N.J. Super. 547, 565-66 (App. Div. 2009).

Here, to the extent the trial judge barred the introduction of evidence to define the meaning of "scarify," we agree. We, as the trial judge, find the word is not ambiguous. In fact, the trial record amply demonstrates the parties to the settlement agreement knew the meaning of scarify and the manner in which someone performs that operation.

On the other hand, the trial judge ignored the more expansive view of the rule that permits introduction of evidence to identify the factors informing the agreement between the parties. Here, the language of the settlement agreement, particularly paragraph 3, suggests that the purpose of the three tasks to be undertaken by Tamburro was to give the Board the benefit of its bargain. That is, the Board would receive a floor that did not contain missing or cracked tiles, two doors with panic bars, and an expanded drainage basin that performed its intended function. As interpreted by the trial judge, without the benefit of any extrinsic evidence of the antecedent and surrounding factors, the simple function of a tractor entering the drainage basin and scratching the surface of the basin satisfied the terms of the agreement. Such an

interpretation seems on its face too limited. Furthermore, the failure to admit evidence of the antecedent and surrounding factors to the settlement agreement severely limits any determination of the materiality of any breach. If the parties contemplated no more than entry of a tractor into the drainage basin to scratch the surface of the basin, a finding that the delay in performance of this task is not a material breach is unassailable on this record. If, however, the purpose of the scarification task was to enhance or improve the performance of the basin, we question how the trial judge could determine materiality without the extrinsic evidence proffered by the Board.

Accordingly, we reverse and remand for a new trial to permit introduction of extrinsic evidence of the circumstances surrounding the formation of the settlement agreement as it pertains to scarification of the drainage basin.[1] We are satisfied from our review of the record that the findings of fact regarding the materiality of the breach of the settlement

[1] Notably, in his initial decision dated June 8, 2011, the judge acknowledged that he "would perhaps have a different view with respect to the materiality issue because of the element . . . recognized in the cases requiring that in assessing materiality one engages in this quantitative analysis. I might have reached a different result."

agreement concerning removal and replacement of floor tiles is supported by substantial credible evidence in the record.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

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

CLERK OF THE APPELLATE DIVISION