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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

US ESTATES, INC., US ESTATES,

LLC, KEARSLEY 2, LLC, RAY

DARAKHSHAN, and JOE DARAKHSHAN,[1]

Plaintiffs-Appellants,

v.

THE BANCORP BANK,

Defendant-Respondent.

September 2, 2014

Argued March 19, 2014 - Decided

« Citation Data

Before Judges Sapp-Peterson, Lihotz and Maven.

On appeal from the Superior Court of New Jersey,
Law Division, Camden County, Docket No. L-2122-11.

Guido Babore argued the cause for appellants.

Brett A. Datto argued the cause for respondent (Weir & Partners LLP, attorneys; Mr. Datto and Jennifer Hiller Nimeroff, on the brief).

PER CURIAM

Plaintiffs, US Estates, Inc., US Estates, LLC, Kearsley 2, LLC, Ray Darakhshan and Joe Darakhshan (collectively US Estates), appeal from the trial court order granting defendant, The Bancorp Bank (Bancorp), summary judgment and declaring that US Estates breached the parties' settlement agreement and were jointly and severally liable to Bancorp in the amount of $743,897.12. The court found the terms of the settlement agreement were clear and unambiguous, and it was undisputed US Estates breached those terms, entitling defendant to judgment.

On appeal, US Estates contends the court erred in finding it breached the agreement because subsequent events modified the agreement, or, alternatively, it complied with the agreement as written. Additionally, it argues summary judgment was improperly granted because Bancorp was equitably estopped from claiming US Estates breached the agreement, and the doctrine of promissory estoppel applies. We agree summary judgment was improvidently granted because there are genuinely disputed issues of fact as to whether US Estates breached the terms of the settlement agreement. We therefore reverse.

In the fall of 2005, Bancorp made two loans to US Estates. The first loan was a $1,755,000 construction loan, which was evidenced by two debt instruments in favor of defendant. The second loan was a $2,213,750 business loan, evidenced by a promissory note in favor of defendant. The Darakhshans each executed and delivered to defendant a surety agreement for each loan, unconditionally guaranteeing payment and performance of all obligations incurred by US Estates as a result of the loans. The loans were obtained to build single-family homes on Kearsley Road in Gloucester Township (the Township), property US Estates owns and intended to subdivide (the property). The Darakhshans were the only members of US Estates.

US Estates defaulted on the loans. On April 30, 2008, the parties subsequently

entered into an Extension and Forbearance Agreement (EFA), which extended the date on which the loans matured to February 1, 2009. On that date, however, US Estates defaulted on its obligations under the EFA. Thereafter, the parties, along with other financial institutions, became embroiled in litigation. That litigation was resolved through the agreement the parties reached on June 16, 2010. The agreement resolved US Estates' obligations to Bancorp and numerous other lenders and lending institutions. Only Sections 2 and 21, as well as Sections 3, 5, and 7 and subsections contained therein, are pertinent to this appeal.

Under Section 2.2, US Estates acknowledged and confirmed it was in default under the September 16 and November 30, 2005 loans and indebted to Bancorp in the amount of $1,272,883.06, including interest and late fees (plus daily per diem interest in the amount of $131.78). Pursuant to Section 3.2, Bancorp agreed to reduce the amount owed to $1,000,000, in accordance with the schedule set forth in the agreement. At the time of execution, Bancorp was owed an amount equal to or no less than $281,131.37. Thereafter, US Estates agreed to make three specific takedowns[2] of the property as follows:

> [T]he sale of the first set of seven (7) lots from the . . . [p]roperty (the "First Takedown") shall occur no later than sixty (60) days from the date of this [a]greement. . . . [T]he sale of the second set of seven (7) lots from the . . . [p]roperty (the "Second Takedown") shall occur no later than ninety (90) days after the date of the First Takedown. . . . [T]he sale of the third set of seven (7) lots from the . . . [p]roperty (the "Third Takedown") shall occur no later than ninety (90) days after the date of the Second Takedown. Each of these dates is subject to the forty-five (45) day cure period set forth in Section 7.2.

In Sections 5.3 to 5.5, US Estates agreed to pay Bancorp $150,000 from the monies received from the first takedown; $350,000 from the second takedown; and $220,000 from the third takedown.

Section 7 governed default and provided remedies upon default. Section 7.1 provided that if US Estates:

> (a) fail[s] to comply timely with any of their obligations as set forth in this [a]greement (including, but not limited to, the [plaintiffs'] full compliance with

> their obligations set forth in Sections 5.3, 5.4, and 5.5 with respect to payment to . . . Bancorp from the [f]irst, [s]econd, and [t]hird [t]akedowns); . . . (c) commit[s] an event of default under the Bancorp [l]oan [d]ocuments, except for the [e]xisting Bancorp [d]efaults, then this [a]greement shall be in default (each, an "[e]vent of [d]efault"). It shall further be considered an [e]vent of [d]efault as to Bancorp only if any portion of the net proceeds of the [f]irst [t]akedown, [s]econd [t]akedown, and/or [t]hird [t]akedown is used to collateralize the [l]etter of [c]redit [o]bligation.

Notwithstanding the provisions of Section 7.1, Section 7.2 stated:

> [W]here the [e]vent of [d]efault occurs through actions or events beyond the control of [US Estates], . . . [US Estates] shall have a period of forty-five (45) days within which to cure any [e]vent of [d]efault as set forth in Section 7.1. If, upon the [e]vent of [d]efault, [US Estates is] able to fulfill the outstanding obligation causing the [e]vent of [d]efault within forty-five (45) days, the [p]arties agree that Bancorp . . . shall forebear enforcement of any of the rights and remedies set forth in this [a]greement[.]"

Further, Section 7.4 required US Estates to notify Bancorp, in writing, of "the occurrence of any event" that "will cause, may cause, or is likely to cause" an event of default. The agreement listed a non-exhaustive list of circumstances that could cause default, including delays in one or all of the takedowns specified in Section 5.2.

Sections 23 and 21 of the settlement agreement governed integration and modification, respectively. Section 23 states the agreement "is the complete, full and exclusive agreement among and between the [p]arties with respect to the subject matter. It supersedes any prior agreements, understands and discussions." Further, Section 21 provides that the agreement "may be changed, modified or amended only by a written instrument executed by all [p]arties hereto."

Upon execution of the agreement, US Estates made the first required payment of $282,650.11. By e-mail dated July 13, 2010, US Estates informed Bancorp that it "may be in a position to make a lump sum payment . . . to cover the entire settlement amount at the time of the [f]irst [t]akedown because Richmond [America] ha[d] offered to purchase additional lots at the time of the [f]irst [t]akedown, albeit at a

lower purchase price than originally contemplated and which was the basis for [their] settlement agreement." The email stated further that in order "to determine whether they can accept Richmond [America's] offer and expedite payment to Bancorp[,]" plaintiffs proposed the following:

> Instead of paying $1,000,000 to Bancorp in three payments over time, as permitted under the settlement agreement, [US Estates] will make a one[-]time payment to Bancorp of $920,000 upon the [f]irst [t]akedown -- which represents an 8% discount from the settlement amount -- as full and final settlement of all of [US Estates'] obligations to Bancorp under the [s]ettlement [a]greement and the Bancorp [l]oan [d]ocuments.

Defendants did not respond to this proposal.

On August 6, 2010, ten days before the sale of the first seven lots was scheduled to take place under the agreement, US Estates attempted to exercise its right, pursuant to Section 7.2, to a 45-day extension to make payment from the first takedown. However, Bancorp responded on August 16, 2010, that the forty-five-day cure period was not automatic, and sought to clarify that the agreement "clearly states" US Estates is "only entitled to such 45-day cure period 'where the [e]vent of [d]efault occurs through actions or events beyond the control of'" US Estates. Bancorp responded that it "may be willing to indulge [US Estates'] request for a 45-day extension, but requires further clarification" regarding the circumstances which led to the restructure of the contract with Richmond [America]. US Estates provided an explanation for the delay in compliance with the takedown dates but not until two months later. In the interim, Bancorp notified US Estates that as of August 15, 2010, it was in default under the agreement pursuant to Section 7.1.

US Estates did not make the next payment, totaling $370,000, until December 17, 2010. Although clearly beyond the due date, defendant accepted the payment. US Estates made no other payments thereafter. Instead, in April 2011, US Estates requested a payoff letter from Bancorp because it "had to borrow money from a certain investor and wanted to see what the payoff amount was . . . ." The first payoff letter reflected that US Estates owed Bancorp $226,202.59 through April 15, 2011. While, "[t]he payment was prepared . . . [the parties] disagreed about the amount of the two

payoff letters." Additionally, Bancorp required that $299,000 be paid together with the $226,202.59 in a lump sum payment. Because US Estates believed Bancorp was "about [$]200,000 over what the agreement as per the settlement agreement" required, it did not pay that amount.

On April 27, 2011, US Estates filed a complaint in lieu of prerogative writs against defendant seeking to enforce the parties' settlement agreement. Bancorp answered, asserting nine separate defenses, and counterclaimed for a declaratory judgment that US Estates breached the settlement agreement and owed Bancorp $1,272,883.06.

On August 19, 2011, the trial court granted US Estates' motion for emergent relief to enforce the settlement agreement. On November 11, 2011, the trial court dismissed US Estates' complaint, but it was reinstated on January 20, 2012.[3]

Thereafter, on April 18, 2012, Bancorp filed a third-party complaint against the Darakhshans seeking a declaratory judgment that they violated the terms of the settlement agreement and, as a result, were liable for $1,272,883.06, the claimed total amount of their indebtedness. After the Darakhshans failed to respond, Bancorp sought a default judgment against them.

Following a July 9, 2012 case management conference, the trial court entered a consent order vacating the August 19, 2011 order and granting US Estates leave to file an amended complaint. US Estates amended its complaint, alleging Bancorp breached the settlement agreement by failing to accept payment of the outstanding balance owed by US Estates and seeking damages.

Bancorp moved for summary judgment, and on January 11, 2013, after conducting oral argument, the court granted Bancorp's summary judgment motion, declaring that US Estates breached the settlement agreement by failing to make full and timely payment to Bancorp, and as a result of the breach, the Darakhshans were jointly and severally liable to Bancorp in the amount of $743,897.12. The present appeal followed.

Summary judgment is appropriate where no genuine issue of material fact exists and "the moving party is entitled to judgment as a matter of law." Manahawkin Convalescent v. O'Neil, 426 N.J. Super. 143, 150 (App. Div.) (citing R. 4:46-2(c)), aff'd,

217 N.J. 99 (2014). We "review the grant of summary judgment using the same standards as the motion judge." Id. at 150-51 (citing Lee v. First Union Nat'l Bank, 199 N.J. 251, 254 (2009)). Thus, we must determine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The issues raised in this appeal surround the interpretation of provisions of a contract. Ordinarily, such issues implicate "legal question[s] for the court and may be decided on summary judgment unless there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation . . . ." Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (citations and internal quotation marks omitted). Thus, we will interpret the terms of a contract, as a matter of law, "unless the meaning is both unclear and dependent on conflicting testimony." Ibid. (citations and internal quotation marks omitted).

US Estates argues that while the settlement agreement was clear at the time it was executed, it was subsequently modified when Richmond America "decided to switch the purchase" of the properties. Specifically, US Estates claims Richmond America's decision to purchase all twenty lots at once, rather than in accordance with the schedule in the settlement agreement, "materially changed" the agreement's terms. As a result, US Estates urges this court to examine both the settlement agreement and the parties' actions to "determine how US Estates should repay the loan to Bancorp." In doing so, it relies on Section 3.2 of the agreement as well as pre-agreement assurances from Bancorp's Executive Vice President Chief Lending Officer, Scott R. Megargee, who the Darakhshans contend assured them that as long as $1,000,000 was paid by May 12, 2011, Bancorp would be satisfied.

"An agreement to settle a lawsuit is a contract, which like all contracts, may be freely entered into and which a court, absent a demonstration of fraud or other compelling circumstances, should honor and enforce as it does other contracts." Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008) (citations and internal quotation marks omitted). If, however, "a settlement agreement is achieved through

coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent thereto, the settlement agreement must be set aside." Ibid. (citations and internal quotation marks omitted).

Here, Section 21 clearly required a signed writing to modify the settlement agreement, and the record is devoid of any such writing. While US Estates proposed, in writing, to modify the repayment terms, there is no evidence to suggest Bancorp agreed to its proposal. Section 21 aside, parties to an existing contract may, by mutual agreement, modify it. Cnty. of Morris v. Fauver, 153 N.J. 80, 99 (1998). Contractual modification may be proven by explicit agreement to modify or by the conduct of the parties, so long as the intention to modify is mutual and clear. Ibid. A proposed modification by one party to a contract must be accepted by the other to constitute mutual assent to modify as knowledge and assent to the changes are essential to an effective modification. Ibid. Moreover, an agreement to modify must be based on new or additional consideration. Ibid.

US Estates' argument that the settlement agreement was modified is unpersuasive. It relies on Richmond America's conduct, a non-party to the settlement agreement, as evidence of a modification. However, it offers no evidence that Bancorp clearly expressed its mutual intention to modify the agreement. Further, the July 13, 2010 email sent to Bancorp informing it of Richmond America's offer to purchase the properties at a single closing, was, at best, a proposed modification. The record fails to support any assertion that Bancorp accepted US Estates' proposal. Therefore, the settlement agreement was never modified.

US Estates argues the established record demonstrates it adhered to the terms of the agreement because Section 3.2 allowed final payment to Bancorp to be made within one year and its payment of $370,000 in December 2010, satisfied this requirement. In support of this interpretation of the agreement, US Estates relies on a pre-settlement agreement assurance by Bancorp that plaintiffs would have satisfied its obligation so long as it paid Bancorp $1,000,000 by May 1, 2012.

Contracts are read as a whole "'in a fair and common sense manner.'" Porreca v. City of Millville, 419 N.J. Super. 212, 233 (App. Div. 2011) (quoting Hardy ex. rel.

Dowdell v. Abul-Matin, 198 N.J. 95, 103 (2009)). As such, "[a] contract should not be interpreted to render one of its terms meaningless." Ibid. (citations and internal quotation marks omitted). Generally, the interpretation of contract terms "are decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony." Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001). In other words, a court must first decide if an ambiguity exists.

"An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations. . . ." Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (quoting Kaufman v. Provident Life and Cas. Ins. Co., 828 F. Supp. 275, 282 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993)). Therefore, in "interpreting a contract, a court must try to ascertain the intention of the parties as revealed by the language used, the situation of the parties, the attendant circumstances, and the objects the parties were striving to attain." Celanese, supra, 404 N.J. Super. at 528.

Where there is ambiguity as to the meaning of a contractual term, however, the Supreme Court has stated that

> we allow a thorough examination of extrinsic evidence in the interpretation of contracts. Such evidence may include consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct. Kearny PBA Local # 21 v. Town of Kearny, 81 N.J. 208, 221 [] (1979). Semantics cannot be allowed to twist and distort the words' obvious meaning in the minds of the parties. Consequently, the words of the contract alone will not always control.
>
> [Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 269 (2006) (citations and internal quotation marks omitted).]

Given those principles, the trial judge erroneously determined the settlement agreement was unambiguous. The agreement contains provisions supporting a conclusion that US Estates was required to pay Bancorp as scheduled under Section 5,

while other provisions suggest that the time table for payment of the debt under the agreement may have been May 1, 2011.

Under Section 5.2, US Estates agreed the first takedown shall occur no later than sixty days from the date of this agreement; the second takedown shall occur no later than ninety days after the first takedown; and the third takedown shall occur no later than ninety days after the second takedown. Further, Sections 5.3 to 5.5 state "Bancorp shall receive the remaining amount of net proceeds" of the first takedown after numerous other parties are paid "which amount is estimated to be $150,000.00"; after the second takedown, Bancorp shall receive an "estimated" $350,000; and after the third takedown, Bancorp shall receive an "estimated" $220,000. These sections evidence an intent that US Estates was required to pay Bancorp as scheduled.

Section 3.2, however, states:

> Bancorp agrees that it will reduce [the amount owed by US Estates] to [o]ne [m]illion [d]ollars ($1,000,000.00) . . . in consideration of [US Estates'] compliance with the terms herein (including, but not limited to, [US Estates'] full compliance with their obligations set forth in Sections 5.3, 5.4, and 5.5 with respect to payment to Bancorp from the [f]irst, [s]econd, and [t]hird [t]akedowns . . . and the express agreement of [US Estates] . . . that any remaining portion of the [the amount owed by US Estates] which was not available for distribution to Bancorp from the Westrum [e]scow, the [f]irst [t]akedown, [s]econd [t]akedown, and [t]hird [t]akedown despite [US Estates'] compliance with their warranties, representations, and objections set forth in Section 5 herein, shall be paid no later than May 1, 2011.

This section may reasonably be interpreted as defendant's intent to afford US Estates until May 1, 2011 to make the payment of the $1,000,000 owed. In our analysis, we attempt to afford meaning to all contractual terms. See Porreca, supra, 419 N.J. Super. at 103. As such, had the parties intended US Estates to strictly comply with the schedule in Section 5, there would have been no need to include the May 1, 2011 deadline provision in the agreement.

Moreover, US Estates alleged assurances from defendant prior to execution of the agreement, although disputed, strengthen its claim the agreement is ambiguous, and,

at the very least, raise a factual dispute regarding a material issue sufficient to defeat summary judgment. The motion judge failed to recognize these conflicting provisions rendered the agreement susceptible of two interpretations. In light of the frequent warning that intent is not usually appropriately decided on a motion for summary judgment, the question of whether the parties intended for US Estates' payment deadline to be May 1, 2011 or pursuant to the provisions in Section 5 was not ripe for resolution at the summary judgment stage. See Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 181 N.J. 245, 271 (2004).

Both parties submitted certifications in support of and in opposition to Bancorp's motion for summary judgment. US Estates submitted certifications of Rodney Green, a "developer/lender" who worked with both parties in this matter, and Ray Darakhshan. Green certified he "specifically remember[ed] that McGargee [sic] stated that as long as US Estates paid Bancorp $1,000,000 within one year, Bancorp would be satisfied." Further, he understood "that as a result of the meeting and negotiations a [s]ettlement [a]greement was memorialized which included [Section] 3.2 allowing US Estates to pay any deficiencies by May 1, 2011." Similarly, Ray Darakhshan certified "McGargee [sic] stated in the meeting that as long as US Estates paid Bancorp $1,000,000 within one year, Bancorp would be satisfied, which prompted paragraph 3.2 in the [a]greement." Moreover, he stated that

> [a]t that meeting all parties agreed to settlement of $1,000,000.00 as full and final payment to Bancorp; [i]n turn, Bancorp would release all liens on the US Estate [p]roperties, and that US Estates must make final payment by May 1, 2011, a date agreed upon by all parties and memorialized in the settlement agreement.

Megargee, in his certification, took "issue with the repeated assertions that claim [he] told Ray Darakhshan and Rodney Green '[w]hen entering into the contract . . . that as long as the $1,000,000 was repaid within the year, Bancorp would be satisfied.'" As a result, he swore to the following, which US Estates challenges as false and misleading:

> In our meeting, Bancorp agreed to reduce the total indebtedness owed by US Estates and the Darakhshans in consideration of their "full compliance" with their obligation to pay Bancorp as set forth in [Sections] 5.3-

> 5.5 of the [s]ettlement [a]greement. "Full compliance" required US Estates and the Darakhshans, along with others, to pay Bancorp, on or by August 15, 2010, November 13, 2010 and February 11, 2011, the proceeds from the sale of certain real estate units, after satisfaction of certain other indebtedness.

Rather than recognizing these conflicting certifications were sufficient to defeat summary judgment, the motion judge discounted them. Brill, supra, 142 N.J. at 540.

In light of our determination the motion judge erred in granting summary judgment to defendant, we need not address US Estates' alternative arguments that equitable and promissory estoppel apply to preclude Bancorp from prevailing on its claim that it breached the agreement.

Reversed.

certify

1 Ray and Joe Darakhshan were referred to as Hossein and G. Reza Darakhshan in a third-party complaint which preceded the filing of the amended complaint. These parties are also referred to as Hossein and G. Reza Darakhshan throughout the appellate record.

2 Takedown - (1) a draw or demand against a pre-approved limit in a construction loan for a progress payment to contractors. See also progress payments. (2) a draw or demand to acquire one or more parcels of land in an assemblage program where the lender has committed funds for that purpose. Homesurfer.com, http://www.homesurfer.com/real-estate-definitions/t/take-down.html (last visited August 13, 2014).

3 While the parties both agree that the complaint was dismissed and reinstated on these dates, the record does not contain either order.
