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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2266-13T1

TRICO DEVELOPMENT ASSOCIATES
LIMITED PARTNERSHIP, a New
Jersey Limited Partnership,

Plaintiff-Appellant,

v.

O.C.E.A.N., INC., a New
Jersey Corporation,

Defendant-Respondent.

Argued November 13, 2014 – Decided July 30, 2015

Before Judges Fuentes, Kennedy and O'Connor.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0152-10.

Harmon H. Lookhoff argued the cause for appellant.

Keith D. McDonald argued the cause for respondent (Norris McLaughlin & Marcus, attorneys; Mr. McDonald, of counsel and on the brief; Danielle M. DeFilippis, on the brief).

PER CURIAM

Plaintiff appeals the Law Division's order dismissing its complaint and entering judgment in favor of defendant. Defendant had moved for dismissal and for judgment pursuant to

R. 4:37-2(b) and R. 4:40-1, following the presentation of plaintiff's proofs at trial. On appeal, plaintiff contends the trial court erred in determining that plaintiff had failed to adduce sufficient evidence to support its cause of action and, further, in denying a motion for a mistrial. We have considered these arguments in light of the record and the law, and we affirm essentially for the reasons expressed by Judge Fred H. Kumpf in his lengthy and learned opinion from the bench. We add only the following.

On December 4, 2009, plaintiff transferred title of a federally-subsidized housing development in Barnegat to defendant, a New Jersey non-profit corporation, pursuant to a contract the parties had entered in August of that year. Plaintiff argues that at closing, $115,843 was wrongfully deducted from the equity due to it because defendant in Section 5.2(r) of the contract had agreed to "assume responsibility" for paying that sum to correct building deficiencies identified in a July 2008 Capital Needs Assessment. Defendant argues that the clause in question referred only to responsibility for undertaking the repairs — and that plaintiff was still obligated to pay the cost of the repairs; that the clause itself, even if it were read as plaintiff argues, was superseded by controlling federal regulations; and that plaintiff knowingly

closed title, and signed several documents acknowledging its responsibility to pay the disputed sum, and thus is not entitled to relief.

Very briefly, in the l980s, plaintiff built a senior citizen apartment complex in Barnegat, having secured financing for the project from the United States Department of Agriculture, Rural Development (USDA/RD), through its "Rural Rental Housing Loan Program." By 2002, plaintiff had defaulted on USDA/RD loans on six properties — including the Barnegat property — and, presumably as a defensive measure, it filed a complaint against the federal agency in the United States District Court alleging various causes of action. In 2007, plaintiff and the USDA/RD entered into a settlement agreement (Settlement Agreement) which required plaintiff to pay all the loans within seven months on the properties other than Barnegat, failing which the agency could proceed with uncontested foreclosure.

The Settlement Agreement also obligated plaintiff to sell Barnegat to a qualified, non-profit or public body within one year or the agency would accelerate the loan and start foreclosure proceedings against the property. USDA/RD agreed to provide financing to facilitate plaintiff's sale of the property to a qualified buyer, and such sale was explicitly subject to

the approval of USDA/RD and federal regulations governing the transfers of agency-funded properties. The Settlement Agreement further provided that the regulations were to be commonly interpreted by USDA/RD.

Plaintiff obtained a Capital Needs Assessment (CNA) for the Barnegat property in 2008, which identified necessary capital repairs for 2008 and 2009. The CNA, which was required by federal regulation, 7 C.F.R. 3560.406(d), estimated the cost of the repairs at $115,843. At this time, the reserve account maintained by plaintiff for repairs and general maintenance — also required by federal regulation — was grossly underfunded, despite plaintiff's failure to make any capital repairs to the property for several years. Apparently, plaintiff had improperly utilized funds from the reserve account to pay property taxes for several years, as well.

The USDA/RD identified defendant in 2008 as a potential purchaser of the Barnegat property. Because defendant's purchase of the property was to be completely financed by the USDA/RD, the purchase price was negotiated between plaintiff and the federal agency through an appraisal process. The agreed-upon price was $2,275,000.

Over the course of the next few months, the USDA/RD repeatedly denied plaintiff's requests for permission to invade

the reserve fund to pay overdue real estate taxes on the property, and advised plaintiff it had an obligation to make capital repairs.

Negotiations over the terms of the contract of sale took place during the Spring and Summer of 2009. Plaintiff sought the approval of USDA/RD to revisions in the proposed contract terms with respect to the reserve account and the capital repairs. The federal agency made it clear to plaintiff that it had a responsibility to fund the repairs identified in the CNA, and to transfer at closing a fully funded reserve account. The agency also clarified that the contract would be subject to applicable federal regulations and that in the event of a conflict between the contract terms and federal regulations, the requirements of the regulations would govern.

The contract was signed by plaintiff and defendant on August 20, 2009, and required plaintiff to deliver at closing a comprehensive CNA and a reserve account totaling $127,135, subject to adjustments. With respect to the CNA, the contract at Section 5.2(r) required plaintiff to provide:

> a housing assessment report revealing that the buildings are all in suitable condition as defined by the USDA or revealing any defects and unacceptable condition and setting forth the Seller's remediation plan. A [CNA] dated July 22, 2009 estimates cost to correct deficiencies at $115,843.00 for

> which Purchaser shall assume responsibility[.]

The contract also stated the parties were "bound by the provisions of 7 C.F.R. 3560.406, 7 C.F.R. 3560.753(g), and 7 C.F.R. 3560.659, the Regulations. In the event of any conflict between the terms of this contract and the requirements set forth in said Regulations, the requirements set forth in the regulations shall govern."

Prior to closing, the USDA/RD circulated to the parties a "Transfer Agreement" which both parties had to sign at closing. That document provided in part that:

> [plaintiff] will pay [defendant] $115,843 to cover the 2008 and 2009 rehabilitation costs per the CNA. [Plaintiff] will also fund the reserve account to its required level of $133,384.70 as of December 1, 2009.

When plaintiff's counsel objected to the terms of the Transfer Agreement, the agency advised that under applicable federal regulations, the cost of repairs identified in the CNA was the responsibility of the seller; that the contract only required defendant to arrange for the repairs to be completed, but did not require defendant to pay for the repairs; and that if plaintiff did not sign the Transfer Agreement, there would be no sale because the USDA/RD would not release its mortgage on the property. Plaintiff then signed the agreement.

At the closing of title three days later, plaintiff sought to close subject to a "reservation of rights." Defendant refused to proceed on that basis, and the closing thereafter was completed. Plaintiff also executed the HUD-1, which clearly identified both the reserve amount and the $115,843 cost of the CNA repairs as obligations of plaintiff. Within a month, plaintiff filed this action.

After five days of trial, plaintiff rested its case, and defendant moved for a directed verdict. Plaintiff then moved for a mistrial, and argued that defendant's representative testified differently at trial than he had at a deposition.

In granting defendant's motion, Judge Kumpf emphasized that while the contract provision appears ambiguous, that ambiguity is largely irrelevant, given that it conflicts with a controlling federal regulation and, further, by signing the Transfer Agreement and the HUD-1, plaintiff is now bound by those documents. 7 C.F.R. 3560.406(d)(5) states:

> All immediate and long-term repair and rehabilitation needs must be identified by a capital needs assessment. The reserve requirements for the housing project will be reviewed by the Agency and adjusted, if necessary, to adequately cover the cost of addressing the property's capital needs. The Agency may approve the release of the current reserve amount to the transferor provided the transferee agrees to deposit the amount to cover the project's immediate needs into the reserve account at closing.

This regulation, according to the USDA/RD, clearly justified its insistence that the seller remain responsible to provide the funds necessary to undertake the capital repairs identified in the CNA. Moreover, plaintiff signed the Transfer Agreement which clearly obligated it to fund the reserve account and to pay the costs for the capital repairs, and that document governed the obligations of the parties, making irrelevant any interpretation of the pertinent clause in the original contract.

We discern no error in Judge Kumpf's analysis. A motion for involuntary dismissal is premised "on the ground that upon the facts and upon the law the plaintiff has shown no right to relief." R. 4:37-2. The motion shall be denied "if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." Ibid. If the court, "accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom," finds that reasonable minds could differ, the motion must be denied. Dolson v. Anastasia, 55 N.J. 2, 5 (1969). We employ the same standard when we review a trial court's grant or denial of a motion for involuntary dismissal. Fox v. Millman, 210 N.J. 401, 428 (2012).

Addressing briefly plaintiff's claims of economic duress against defendant, an otherwise enforceable contract may be invalidated on the ground that it was entered into under "economic duress." Continental Bank of Pa. v. Barclay Riding Academy, Inc., 93 N.J. 153, 175, cert. denied, 464 U.S. 994, 104 S. Ct. 488, 78 L. Ed. 2d 684 (1983). "Economic duress" occurs when the party alleging it is the victim of a wrongful or unlawful act or threat which deprives the victim of his unfettered will. Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 263 (App. Div. 2000) (citing 13 Williston on Contracts § 1617), certif. denied, 165 N.J. 527 (2000). The decisive factor is the wrongfulness of the pressure exerted. Continental Bank, supra, 93 N.J. at 177. "Merely taking advantage of another's financial difficulty is not duress. Rather, the person alleging financial difficulty must allege that it was contributed to or caused by the one accused of coercion." Ibid.

Plaintiff alleges it granted defendant an adjustment of $115,843 at closing because of economic duress and coercion. Although recognizing that it made a business decision to close title, plaintiff contends that it only did so because of the threat of foreclosure. Plaintiff concedes that it was not compelled to execute the original contract as a result of

economic duress, and admits that it engaged in arm's length negotiations while represented by an attorney.

Plaintiff's precarious finances and USDA/RD's option to foreclose under the Settlement Agreement had nothing to do with defendant. Under the circumstances of this case, it is utterly specious to suggest that plaintiff was wrongfully coerced into executing the Transfer Agreement under the threat of foreclosure when it agreed that foreclosure would be USDA/RD's remedy if plaintiff failed to meet its settlement obligations. It is equally specious to suggest that defendant in any way created plaintiff's economic stress.

Although it did not name the USDA/RD as a party in this action, plaintiff argues that the federal agency exerted wrongful pressure on it and that in doing so, it acted as an "agent" of defendant. This argument is without merit, largely because there is nothing in the record to suggest that the federal agency's conduct was 'wrongful' in any way. Beyond this, however, nothing in the record supports the claim that the USDA/RD was acting as an "agent" for defendant.

An agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent. Sears Mortgage Corp. v. Rose, 134 N.J. 326, 337 (1993). In the absence of an

explicit agreement creating an agency relationship, agency may nonetheless arise based on "the nature or extent of the function to be performed, the general course of conducting the business, or from particular circumstances of the case." Id. at 337-38. A court must examine the totality of the circumstances to determine whether an agency relationship existed. Sears, supra, 134 N.J. at 338.

As Judge Kumpf explained, the USDA/RD was involved in the transaction to protect and promote its own interests, having financed plaintiff's original investment in the project, and defendant's subsequent acquisition of it:

> As the bank for the transaction, USDA/RD was providing to [plaintiff] its own requirements for the transaction under the Code of Federal Regulations . . . the Contract was subject to meeting the regulations in the Code of Federal Regulations . . . pursuant to the settlement agreement between [plaintiff] and [USDA/RD] . . . . . While there were times that [defendant's] attorney, Smith, told [plaintiff's] attorney to contact USDA/RD about specific requests concerning the contract language, this did not give USDA/RD apparent authority to act on behalf of [defendant] as an agent . . . .

Our own review of the record leads us to the same conclusion. We find the remainder of plaintiff's arguments on appeal to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION