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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4629-13T1

THE STRAND CORPORATION,

Plaintiff-Respondent/
Cross-Appellant,

v.

KENNEDY FUNDING, INC.,

Defendant/Third Party
Plaintiff-Appellant/
Cross-Respondent,

and

BENJAMIN KAMINECKI,

Third Party Defendant.

Submitted: May 27, 2015 – Decided: June 3, 2015

Before Judges Reisner and Haas.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, L-0089-12.

Jordan B. DeFlora, attorney for appellant/cross-respondent.

Scott E. Becker, attorney for respondent/cross-appellant.

PER CURIAM

In this commercial loan case, defendant Kennedy Funding, Inc. appeals from the May 1, 2014 Law Division judgment

requiring it to pay plaintiff, The Strand Corporation, $45,000. Plaintiff has filed a cross-appeal, challenging the court's May 9, 2013 order dismissing its claim for additional damages under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. We affirm both of the court's orders.

We summarize the facts from the record. Plaintiff is a corporation that owned property on the boardwalk in Wildwood. Benjamin Kaminecki is "a principal of [the] corporation[.]" Plaintiff's property contained approximately twelve retail units that were rented by businesses during the summer season.

In 1998, plaintiff had obtained a loan from defendant to enable it to purchase the property. Plaintiff repaid the loan eighteen months later.

In 2007, plaintiff borrowed approximately $4.7 million from another lender, which then held a mortgage on the property. Kaminecki agreed to personally guarantee this loan. Plaintiff fell behind in its loan payments and the lender initiated a foreclosure action. The court appointed a receiver to "control the property, the rentals, the whole property" and the rents received from plaintiff's tenants were paid directly to the receiver.

In November 2010, Kaminecki approached defendant to inquire about obtaining a loan to pay off the mortgage held by the other

lender. As those negotiations were drawing to a close, plaintiff, Kaminecki, and the mortgage lender entered into a forbearance agreement on March 24, 2011. Under the terms of this agreement, the lender agreed to accept $3 million in full satisfaction of the approximately $4.58 million remaining due on the loan. The agreement required plaintiff to pay the $3 million to the lender by July 1, 2011. As part of the agreement, plaintiff made a $100,000 down payment to the lender and agreed to make repairs to the property so that a certificate of occupancy could be issued in time for the summer season. Plaintiff also agreed to pay the property taxes due on the property.

On March 28, 2011, plaintiff and defendant entered into a loan commitment under which defendant agreed to loan plaintiff a maximum of $3 million. The loan had to be repaid within three years, with the interest varying each year.

As a condition for receiving the loan, plaintiff was required to pay defendant a "commitment fee in the amount of . . . $80,000 . . . which is non-refundable and earned for, among other things, the commitment to provide funds." Pursuant to the parties' agreement, plaintiff paid $45,000 of the commitment fee at the time the agreement was signed, and agreed to pay the remaining $35,000 when the loan closed. Closing was

to occur by May 11, 2011, but the parties subsequently entered into written agreements extending the closing date to July 1, 2011.

The loan commitment also contained a provision limiting defendant's liability to plaintiff in the event the loan did not close. This provision stated:

> If [defendant] is unable to perform its obligations under the terms of this commitment for whatever reason, [defendant] shall only be obligated to refund the paid portion of the commitment fee. SAID REFUND SHALL BE THE TOTAL EXTENT OF ANY LIABILITY OR OBLIGATION ON THE PART OF [DEFENDANT] UNDER ANY CIRCUMSTANCE. There will be no refund if [plaintiff] does not accept the loan offer(s) made by [defendant] pursuant to this commitment or [plaintiff] has not complied with all the conditions of this commitment.

Kaminecki testified that, after the loan commitment was signed, defendant sent plaintiff a checklist of seventy-eight items that plaintiff had to complete in order to receive the loan. These specific conditions had not been included in the loan commitment. Many of the items were routinely required in financial transactions of this nature. Thus, for example, the checklist required plaintiff to perform title searches and obtain title insurance, and provide copies of the tenants' leases for defendant's review.

However, defendant also asked plaintiff for things that were not usually requested as part of a loan closing. For example, defendant directed plaintiff to establish a lock box to collect the rents paid by its tenants. Because a receiver had been appointed to receive the rents, however, plaintiff could not comply with this requirement.

Defendant also required plaintiff to obtain engineering reports and set up a new corporation to receive the loan in order to protect defendant in the event plaintiff went into bankruptcy. When plaintiff complained about these two conditions, defendant agreed to forego them. Defendant also asked for specific information explaining why a new tenant was paying $15,000 less in rent than a prior tenant, and it sought estoppel certificates from all of the tenants.

Kaminecki testified that he tried to provide the items requested in the checklist, and was ready to close, but it seemed that, every time he did so, defendant "would always come up with a new list. It seemed like the list never ended. It seemed like . . . they didn't have money, but they were playing games with me and they would always give me lists and lists and lists."

Kaminecki retained a title insurance company to assist him during the process. The company's manager testified that she

was unfamiliar with many of defendant's loan requirements. When asked whether defendant's requirements were "normal type of requests[,]" the manager stated, "[s]ome of the endorsements, a lot of the endorsements I have never heard of and I needed the direction of our underwriter" to interpret them.

Defendant's loan attorney testified that defendant's requests were appropriate. He acknowledged that defendant asked for different things as plaintiff began to provide responses to the original checklist. However, the attorney explained,

> In any loan, the checklist changes as more information becomes available to us. So, for example, as items -- we start off with an initial checklist, you know, somewhat tailored to the loan. And then as diligence -- closing deliverables come into our office, we review them and have questions and comments and sometimes based on those comments, we require additional documents.

The attorney testified that plaintiff was unable to supply all of the documents and information defendant requested by the July 1, 2011 closing date. As a result, defendant never issued the loan to plaintiff. Plaintiff attempted to secure a loan from another lender, but was unable to do so in time to prevent the mortgage holder from withdrawing its offer to accept less than the full amount due on the mortgage.

On September 14, 2011, plaintiff filed its complaint, alleging that defendant breached its agreement to provide

plaintiff with the $3 million loan. In count four of the complaint, plaintiff claimed that defendant's actions violated the CFA. Defendant filed an answer, a counterclaim, and a third-party complaint, seeking to require plaintiff and Kaminecki to pay the remaining $35,000 due on the commitment fee. In response, Kaminecki filed a third-party complaint seeking to hold defendant financially responsible for the judgment entered against Kaminecki by the mortgage lender in the foreclosure action.

Following the completion of discovery, defendant filed a motion for summary judgment, which plaintiff opposed. On May 9, 2013, Judge J. Christopher Gibson issued a comprehensive twenty-page opinion dismissing plaintiff's claims under the CFA and Kaminecki's third-party complaint, and limiting the amount of damages plaintiff could recover for breach of contract to the $45,000 commitment fee it had previously paid to defendant.

With regard to plaintiff's CFA claim, Judge Gibson found:

> Here, [p]laintiff has pointed to no evidence of record to substantiate its claims but merely notes in opposition [to defendant's motion] that there are "ample facts from which one could conclude that the material elements of consumer fraud occurred." The [c]ourt disagrees. Based on the deposition testimony of Kaminecki, the alleged misrepresentation did not occur until June 2011, at least two (2) months after the Loan Commitment was executed and involved [d]efendant's promise to close.

> Even if [d]efendant breached the contract, said breach, alone, is insufficient to establish a cause of action under the CFA. Plaintiff has offered no evidence to suggest that [d]efendant deceived [p]laintiff into entering the Loan Commitment . . . without intent to perform. In fact, the parties' prior successful transaction speaks to the contrary. As such, the [c]ourt finds that no reasonable finder of fact could find that [d]efendant violated the CFA.

The judge also rejected plaintiff's argument that, if there was a breach of contract, plaintiff's recovery should not be limited to the $45,000 loan commitment fee it paid to defendant. The judge found this was an "arm's length" transaction and that the "limitation of damages clause in the contract [was] reasonable as a matter of law and therefore, enforceable."

The judge explained:

> Here, the parties are both commercial entities who have a prior business relationship and who entered into the limitation freely. Defendant advises that after four (4) months of negotiating the terms of the Loan Commitment, the parties agreed to limit the damages which could be assessed against [d]efendant to a return of the commitment fee. The [c]ourt finds this reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of additional loss.

Therefore, the judge limited any possible recovery by plaintiff to the $45,000 specified in the parties' agreement and he

dismissed Kaminecki's third-party complaint seeking to recover additional damages.[1]

Judge Gibson concluded there were material disputes of fact as to whether either party had breached the contract. Therefore, he conducted a two-day bench trial at which Kaminecki, the title insurance company manager, and defendant's loan attorney testified. On May 1, 2014, Judge Gibson rendered a thorough twenty-two-page oral decision, finding that defendant breached the loan agreement and ordering it to return the $45,000 commitment fee to plaintiff.

The judge found that some of the conditions defendant placed on closing the loan were not reasonable because they were beyond plaintiff's control. For example, defendant directed plaintiff to set up a lock box for the rents plaintiff collected from its tenants. However, plaintiff could not comply with this requirement as a condition of closing because all of the rents were being paid to the receiver in the foreclosure action. Plaintiff did not provide all of the lease information for its tenants that defendant demanded. However, the judge found that the leases were "not mentioned in the loan commitment" and

[1] Kaminecki has not filed a notice of appeal from the dismissal of his third-party complaint against defendant.

"there was nothing in the loan commitment that gave [defendant] the right to deny the loan due to this rental issue."

The judge found that Kaminecki's and the title insurance company manager's testimony that plaintiff was prepared to close on the loan prior to July 1, 2011 was "credible." The judge therefore found that defendant breached the loan agreement and ordered it to return the $45,000 commitment fee plaintiff had previously paid. This appeal and cross-appeal followed.

In its appeal, defendant argues that the judge's finding that it breached the loan commitment was not supported by the evidence presented at trial and "should be overturned as a matter of law." In its cross-appeal, plaintiff argues the judge erred in dismissing its CFA claim and limiting its damages to the recovery of the $45,000 commitment fee.

We have considered the parties' contentions in light of the record and applicable legal principles. We affirm substantially for the reasons expressed in Judge Gibson's May 9, 2013 written opinion and in his May 1, 2014 oral opinion. However, we make the following brief comments.

Our review of a trial court's fact-finding in a non-jury case is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). "'The general rule is that findings by the trial court are binding on appeal when supported by adequate,

substantial, credible evidence. Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility.'" Ibid. (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). We "should 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." Ibid. (internal quotation marks omitted). However, we owe no deference to a trial court's interpretation of the law, and review issues of law de novo. State v. Parker, 212 N.J. 269, 278 (2012); Mountain Hill, L.L.C. v. Twp. Comm. of Middletown, 403 N.J. Super. 146, 193 (App. Div. 2008), certif. denied, 199 N.J. 129 (2009). We also review mixed questions of law and fact de novo. In re Malone, 381 N.J. Super. 344, 349 (App. Div. 2005).

Applying these standards, we conclude there was ample credible evidence in the record to support the judge's determination that defendant breached the loan agreement. While some of defendant's requests for information in its post-commitment checklist were routine, others were not. Relying upon the title company manager's testimony, the judge found that several items, including defendant's demand that plaintiff

establish a lock box to collect the rents from its tenants, were unusual and beyond plaintiff's ability to fulfill. The judge also found that Kaminecki and the manager's testimony that plaintiff was ready to close on the loan was credible, and we defer to that credibility determination. Thus, we affirm Judge Gibson's May 1, 2014 order.

Turning to plaintiff's cross-appeal from the May 9, 2013 order, we agree with Judge Gibson's decision to grant defendant's motion for summary judgment,[2] dismiss plaintiff's CFA claim, and limit plaintiff's damages to the $45,000 provided for in the loan commitment. While the judge found that defendant breached its contract with plaintiff, there was no basis in the record for concluding defendant violated the CFA.

A breach of contract is not per se unconscionable and does not alone violate the CFA. See Cox v. Sears Roebuck & Co, 138 N.J. 2, 18 (1994) (reiterating that "'a breach of warranty, or any breach of contract, is not per se unfair or unconscionable . . . and a breach of warranty alone does not violate a consumer

[2] Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Nicholas v. Mynster, 213 N.J. 463, 477-78 (2013). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

protection statute[]'") (quoting D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 25 (App. Div. 1985)). Our Supreme Court has therefore consistently held that any breach of contract is unfair to a non-breaching party, but contract law already provides remedial damages in those circumstances. Cox, supra, 138 N.J. at 18; see also D'Ercole Sales, Inc., supra, 206 N.J. Super. at 31. Thus, in order to recover on a CFA claim, a plaintiff must establish "substantial aggravating circumstances . . . in addition to the breach." Cox, supra, 138 N.J. at 18 (citing DiNicola v. Watchung Furniture's Country Manor, 232 N.J. Super. 69, 72 (App. Div.), certif. denied, 117 N.J. 126 (1989)).

As Judge Gibson found, plaintiff failed to demonstrate any "substantial aggravating circumstances" in this case. The parties simply disagreed on the reasonableness of defendant's requests for information relating to the loan closing. Although the judge correctly found, under the circumstances of this case, that defendant breached the loan commitment, plaintiff failed to establish fraud within the intendment of the CFA.

Finally, we discern no basis for disturbing the judge's determination that plaintiff was limited to recovering the $45,000 loan commitment fee. The record fully supports the judge's finding that this was an arms-length negotiation between "two commercial entities who ha[d] a prior business relationship

and who entered into the limitation freely." See MetLife v. Washington Ave. Assoc., 159 N.J. 484, 496 (1999) (noting "that liquidated damages provisions in a commercial contract between sophisticated parties are presumptively reasonable . . . .").

Affirmed.