(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

ZVI ROSENTHAL,

Plaintiff-Appellant/

Cross-Respondent,

v.

HDOX BIOINFORMATICS, INC.,

Defendant-Respondent/

Cross-Appellant.

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February 3, 2015

Before Judges Yannotti, Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-0532-12.

Mark F. Heinze argued the cause for appellants (Ofeck & Heinze, L.L.P., attorneys; Mr. Heinze, of counsel and on the brief; Patrick J. Jordan, on the brief).

James A. Moss (Balber Pickard Maldonado & Van Der Tuin, PC) argued the cause for respondent.

PER CURIAM

In this dispute over a promissory note, plaintiff Zvi Rosenthal appeals from a judgment of no cause of action entered after a jury trial, as well as orders denying pretrial and post-trial motions. Defendant HDOX Bioinformatics, Inc. ("HDOX"), cross-appeals, challenging a pretrial order denying its motion to dismiss. We affirm on the appeal, and as a result, dismiss the cross-appeal as moot.

I.

We discern the following facts from the record. Plaintiff has three sons, Amir Rosenthal, Ayal Rosenthal, and Oren Rosenthal.[1] The Rosenthal sons operated Aragon Partners, L.P., ("Aragon"), which pooled and invested the family's money. Amir became personally acquainted with Meenashki Degala, the founder and C.E.O. of HDOX, and Pejman Delshad, technical director and part-owner of HDOX. In 2005, Amir, through Aragon, invested $180,000 in a 6% equity interest in HDOX.

In January 2006, Amir became aware that the Securities and Exchange Commission ("SEC") had launched an investigation into the Rosenthal family for insider trading regarding an unrelated investment.[2] Soon thereafter, Amir began distributing funds from Aragon to individual members of the Rosenthal family, the partnership was voided as a business entity in its home jurisdiction of Delaware on June 1, 2006.[3]

In August 2006, the parties began discussing a loan to HDOX. On August 29, 2006, Amir provided HDOX with a check from Aragon for $120,000. While the money came from an Aragon checking account, plaintiff was listed as the payee in the Note. Amir told Degala that "all of Aragon is

Zvi's money[,]" and that after Amir drafted a written contract they would exchange "original signed copies with . . . signatures of [both Degala] and Zvi.

Then, on August 31, 2006, Amir prepared and sent HDOX a "Promissory Note" ("Note"), which Degala signed, scanned, and emailed back to Amir. The signature page mistakenly identified plaintiff as the "maker" of the Note and HDOX as the "payee." The last paragraph of the Note required that the parties must cause the Note to be signed and delivered by their respective authorized officers. The parties never exchanged original signatures, and there is no evidence that plaintiff ever signed the Note.

Shortly after receiving the scanned copy of the Note bearing Degala's signature, Amir advised by email that the first draft had to be changed, because the signatures of both parties had to appear on the same page. Amir then sent a revised draft of the Note, which was identical to the first version except that the signature lines of both parties were on the same page.

The Note required HDOX to pay interest monthly, at an annual rate of eighteen percent, on the first business day of every month, with the principal due as a lump sum on August 31, 2008. The Note further stated, "At the occurrence and during the continuation of an Event of Default . . . the Interest Rate [was to] be increased . . . to [twenty-four percent.]" In pertinent part, an "event of default" included:

> The failure by [HDOX] to pay . . . any installment of interest hereon within five business days of the date when due shall, at the option of the Payee, entitle Payee to declare all sums of principal and interest then remaining unpaid, due and payable, all without demand, presentment, notice or protest, all of which hereby are expressly waived[.]

According to HDOX, in addition to the mistaken identifications on the signature page, the Note materially altered the terms of the agreement between the parties by including a provision that impermissibly linked HDOX's monthly repayments to funds it would receive from a contract with the

Center for Disease Control ("CDC"). The Note also failed to include a conversion provision, a critical term of the agreement from HDOX's point of view.

The conversion provision would have allowed HDOX, at the end of the loan period, to satisfy any outstanding principal with an equity interest in HDOX. According to HDOX, neither Delshad nor Degala read the Note carefully, and both had wrongly assumed that the conversion provision was included in the document. Only after Degala signed and emailed the scanned Note did they realize that it did not contain the conversion provision. Delshad and Degala testified that HDOX asked Amir to draft an amended Note, omitting the CDC provision and including the conversion provision, but this was never done. As to this point, Amir testified that he never agreed to a conversion provision.

HDOX made no payments in September 2006, but began payment of interest on October 23, 2006, and continued making regular payments of approximately $1860 a month through February 2007, for a total of five payments. No payments were made for seven months, until September 10, 2007, when HDOX began making larger payments of approximately $2690 per month, reflecting the higher default interest rate. The payments dropped to approximately $2000 per month in January 2008, and with the exception of a few scattered months of missed payments, HDOX consistently paid $2000 per month every month from January 2008 through January 2010. In total, HDOX paid plaintiff $61,136.72.[4]

Throughout the payments the parties discussed modifications to the loan agreement, and Amir orally agreed not to accelerate the loan so long as HDOX made monthly interest payments at the higher default rate. Based on Amir's oral instructions, some of HDOX's interest payments were made to Ayal as compensation for consulting work, and some were made to plaintiff's wife. No modifications were ever formalized in a written and executed document.

Although plaintiff's complaint alleged the default rate should be applied retroactively back to September 6, 2006, at trial Amir admitted that they "did not count [the lack of September payment] as a default[,]" and did not start the default rate until "March 1, 2007, [when] HDOX stopped making

payments altogether." The record contains no evidence of HDOX ever receiving a written notice of default.

Plaintiff filed suit on January 12, 2012, alleging breach of contract on the Note. HDOX counterclaimed for fraudulent inducement, economic duress, and breach of the implied covenant of good faith and fair dealing. HDOX argued that it had agreed to the loan on the basis of the conversion provision, only to have that provision omitted from the written contract after it had accepted the money. Prior to completing discovery, plaintiff moved for summary judgment. The court denied plaintiff's motion, noting outstanding issues of material fact.

HDOX then moved to dismiss for lack of standing. The court denied the motion, noting that plaintiff was the named payee on the Note and that HDOX failed to raise standing as an issue in its answer or counterclaim.

The case proceeded to trial before a jury on March 13, 2014. At trial, both Delshad and Degala admitted to the existence of the loan, including the obligation to pay twenty-four percent interest so long as the loan was in default. Amir was extensively cross-examined regarding the SEC investigation, suggesting that he had invested the money in HDOX in order to shelter it from possible disgorgement by the government.

During deliberations, the jury sent a note to the court asking, "If we find that the written [promissory] note is not a binding agreement, does that mean that we cannot find that there was a binding agreement in another form that was [breached?]" Before responding, the court discussed the question with counsel. Plaintiff's attorney acknowledged that the jury appeared to be asking if plaintiff was "making a claim on a separate oral agreement[,]" and admitted "the answer is we [are] not. [T]he cause of action is on the [N]ote." The judge then instructed the jurors that if they find that the written Note is not a binding agreement, then they "cannot find that there [was] a binding agreement in another form that was breached."

The jury returned a verdict finding that the Note was not a binding agreement between the parties, that Amir had not fraudulently induced HDOX to accept the loan, and that plaintiff had not violated the implied covenant of good faith and fair dealing. The jury having rejected all claims advanced by both parties, the court entered an order dismissing the complaint with prejudice on May 30, 2013.

On the same day, plaintiff moved in the alternative for a new trial or a judgment notwithstanding the verdict. On June 24, 2013, the court denied plaintiff's motion.

This appeal followed. On appeal, plaintiff argues that the trial court erred in denying his motion for summary judgment because he conclusively proved a written contract, binding upon HDOX, and that oral agreements predating the written contract are barred by the parole evidence rule. Plaintiff further argues that the jury instructions were incorrect, and that the judge erred in denying his post-trial motions. HDOX cross-appealed, arguing that the court should have granted its motion to dismiss, asserting that plaintiff lacked standing to pursue the claim.

II.

Summary judgment is appropriate "if 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). The court views the evidence "in the light most favorable to the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). If "the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant

summary judgment." Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed.2d 202, 214 (1986)).

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)). However, we review the trial court's legal conclusions de novo. Ibid.

Generally, "the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document." Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 268 (2006). However, that general rule no longer applies where the agreement itself is ambiguous. Id. at 268-69. Then, parol evidence is admissible to determine the intent of the parties. Ibid. "[A] writing which in view of its completeness and specificity reasonably appears to be a complete agreement, . . . is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final [27] expression." Chance v. McCann, 405 N.J. Super. 547, 564 n.6 (App. Div. 2009) (citation and internal quotation marks omitted). Here, the Note lacks any merger or integration clause explicitly stating that it is a final or integrated document.

Viewing the evidence in the light most favorable to HDOX, the non-moving party, the trial court concluded that an issue of material fact existed. We agree.

Though the parties agree that the sum of $120,000 was loaned to HDOX, they do not agree how the loan was to be ultimately satisfied. Specifically, the parties disagree whether the equity conversion option was to be included in the loan agreement. On the one hand, plaintiff contends that the loan was to be serviced by interest payments for two years and then repaid in cash. On the other hand, HDOX provided a certification from Degala, which claimed that the unpaid principal was to be "converted to equity" at the end of the two-year interest period. Based on conflicting certifications and the fact that the Note was not an integrated writing, an issue of material fact remained relating to the equity conversion option, precluding summary judgment. See Great Atl. & Pac. Tea Co., Inc. v. Checchio, 335 N.J. Super.

495, 502 (App. Div. 2000) (noting that where there is uncertainty or ambiguity regarding agreement between the parties, doubt should be resolved by the jury).

Additionally, HDOX raised the affirmative contract defense of fraud in the inducement, arguing that Amir had induced HDOX into accepting the loan with false promises that HDOX could satisfy the loan through equity conversion. Moreover, the irregularities in the Note cast doubt on the parties' intent to be bound by the Note as a final written document. There is evidence that the transaction was rushed due to Amir's desire to distribute the funds from Aragon in light of a looming SEC investigation. This argument finds support in the errors Amir made on the signature page of the Note where he misidentified plaintiff as the "maker" and HDOX as the "payee." While plaintiff need not have signed the document to enforce it against HDOX, the circumstances here are sufficient to present a genuine issue of fact as to HDOX's intent to be bound by the Note. Therefore, the trial court did not err in denying plaintiff's motion for summary judgment.

We also address the denial of plaintiff's post-trial motions. In reviewing a motion for judgment notwithstanding the verdict, R. 4:40-2, we "'accept as true all evidence supporting the position of the party defending against the motion and must accord that party the benefit of all legitimate inferences which can be deduced [from the evidence]." Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 572 (2010) (alteration in original) (quoting Lewis v. Am. Cyanamid Co., 155 N.J. 544, 567 (1998)). If reasonable minds could reach different conclusions, the motion must be denied. Rena, Inc. v. Brien, 310 N.J. Super. 304, 311 (App. Div. 1998). If the evidence is so one-sided, however, that one party must prevail as a matter of law, then a directed verdict is appropriate. Frugis v. Bracigliano, 177 N.J. 250, 269-70 (2003). The trial judge may not consider issues of witness credibility in making the determination. Rena, supra, 310 N.J. Super. at 311.

Here, Degala and Delshad both testified that they did not intend to be bound by the Note until they exchanged original copies signed by both parties to the contract. Based upon this testimony, and the

circumstances surrounding the execution of the Note, there is room here for reasonable minds to differ as to the enforceability of the Note. Accordingly, the trial court properly denied plaintiff's motion for judgment notwithstanding the verdict.

Rule 4:49-1(a) provides that a trial court may only grant a motion for a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." "A jury verdict is entitled to considerable deference[,]" and the motion "'should be granted only where to do otherwise would result in a miscarriage of justice shocking to the conscience of the court.'" Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011) (quoting Kulbacki v. Sobchinsky, 38 N.J. 435, 456 (1962)). Such an injustice "can arise . . . from manifest lack of inherently credible evidence to support the finding, obvious overlooking or under-valuation of crucial evidence, [or] a clearly unjust result." Ibid. (alteration in original) (quoting Lindenmuth v. Holden, 296 N.J. Super. 42, 48 (App. Div. 1996), certif. denied, 149 N.J. 34 (1997)). The standard of review is the same on appeal, although we must give "'due deference to the trial court's feel of the [1134] case[.]'" Id. at 522 (quoting Jastram v. Kruse, 197 N.J. 216, 220 (2008)).

Plaintiff argues that the jury charges misled the jury to believe that the Note was unenforceable without plaintiff's signature. The jury charges were based upon the model charge for contract claims, and the judge properly tailored the instructions to the claims presented. While plaintiff need not have signed the Note, an enforceable contract requires agreement as to essential terms and the manifestation of an intent to be bound. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). Here, as previously discussed, the evidence adequately supports the jury's conclusion that HDOX did not intend to be bound by the Note.

We are convinced that the trial judge correctly determined that, based on the evidence adduced at trial, the jury could reasonably have determined that the Note was not a binding agreement between the

parties. Considering the circumstances surrounding the loan, the irregularities in the Note, and the fact that the Note provided for the signature of both parties, yet plaintiff never signed the Note, we conclude the trial court properly determined that the outcome did not shock the conscience and the verdict was not a miscarriage of justice.

Accordingly, we reject plaintiff's challenges to the verdict and affirm. In light of our disposition of plaintiff's appeal, we dismiss HDOX's cross-appeal as moot.

Affirmed.

1 For ease of reference, we refer to plaintiff's sons by their first names.

2 Amir, Ayal, and plaintiff ultimately pled guilty to securities fraud, and served varying prison sentences.

3 The record indicates that Aragon was formed on July 7, 2003. No annual reports were ever filed and the limited partnership owed $2715.50 in taxes when it was "cancelled-voided" by the State of Delaware on June 1, 2006.

4 Plaintiff's complaint mistakenly acknowledged receipt of two refunded payments, and therefore incorrectly stated, to HDOX's advantage, that HDOX had paid him $65,154.42.
