SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-0698-14T3
A-0858-14T3

SHEILA MARTELLO,

Plaintiff-Respondent,

v.

ROBERT A. FRANCO, ESQ. and
RANDI K. FRANCO, ESQ.,

Defendants-Appellants,

and

FRANCO & FRANCO, ATTORNEYS AT LAW,
ELLIOT H. VERNON, ESQ.,
MICHAEL KIRKOVICH, ESQ.,
TODD SIEGMEISTER, ESQ.,
CROWN FINANCIAL SOLUTIONS, LLC,
CROWN PRECIOUS METALS GROUP, LLC, and
VERDE TROPICAL DEVELOPMENT GROUP, LLC,

Defendants.

SHEILA MARTELLO,

Plaintiff-Respondent,

v.

ROBERT A. FRANCO, ESQ.;
RANDI K. FRANCO, ESQ.;
FRANCO & FRANCO, ATTORNEYS AT LAW,

ELLIOT H. VERNON, ESQ.,
MICHAEL KIRKOVICH, ESQ.,
CROWN FINANCIAL SOLUTIONS, LLC,
CROWN PRECIOUS METALS GROUP, LLC, and
VERDE TROPICAL DEVELOPMENT GROUP, LLC,

Defendants,

and

TODD SIEGMEISTER,

Defendant-Appellant.

Argued October 24, 2017 – Decided November 14, 2017

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2704-11.

Robert A. Franco and Randi K. Franco, appellants in A-0698-14, argued the cause pro se.

Todd Siegmeister, appellant in A-0858-14, argued the cause pro se.

Geoffrey T. Bray argued the cause for respondent (Bray & Bray, LLC, attorneys; Geoffrey T. Bray, on the briefs).

PER CURIAM

Defendants Robert A. Franco, Randi K. Franco, and Todd Siegmeister appeal from a September 19, 2014 order enforcing two stipulations of settlement reached with plaintiff Sheila Martello, requiring defendants to re-pay plaintiff funds she advanced relating to a gold venture in Africa.[1] They also appeal from an order entered the same date denying their cross-motion to vacate the settlement agreements. These are back-to-back appeals consolidated for the purpose of this opinion. We affirm.

This matter commenced when plaintiff filed a Law Division complaint asserting Robert A. Franco and Randi K. Franco committed fraud, negligence, misappropriation, civil conspiracy to commit fraud, and conversion. The complaint sought veil piercing remedies against the Francos' law firm. Plaintiff also asserted: fraud, misappropriation, civil conspiracy to commit fraud, conversion, and piercing the corporate veil against Todd Siegmeister.

Plaintiff claimed defendants fraudulently induced her to loan them $785,000 for a fictitious venture. Specifically, Robert allegedly informed plaintiff's brother, Paul Martello, "he could make money quickly if he could find people to make a [thirty] day loan of $200,000 to Crown Financial who would re-pay the loan plus [twelve percent] interest and $100,000 within [thirty] days." Robert allegedly assured Paul Martello he was part owner of Crown Financial and that the company needed the money to finance the shipment of gold from Africa.

[1] We will refer to Robert A. Franco and Randi K. Franco collectively as "the Francos." As defendants share a common last name, we will refer to them individually by their first names; no disrespect is intended.

Paul Martello informed Robert he thought his sister could make the loan. Robert and Siegmeister contacted plaintiff. Robert allegedly represented he was Crown Financial's international general counsel, and Siegmeister its President. Robert allegedly informed plaintiff her monetary contribution would be used to pay the taxes, insurance, and freight for the gold transaction, and that he would personally "ensure the payment of those expenses out of his Law Firm's Trust Account." Plaintiff also alleges defendants stated her investment would be insured and guaranteed by an all-risk policy issued by Lloyd's of London.

Plaintiff loaned defendants $200,000 on December 23, 2010, $150,000 on January 13, 2011, $60,000 on March 7, 2011, $175,000 on April 11, 2011, $56,000 on June 3, 2011, and $144,000 on June 9, 2011. Defendants executed loan agreements and promissory notes for the funds plaintiff provided. Plaintiff alleged these funds were never used to pay taxes, insurance, or freight, but were distributed from the Francos' Law Firm Trust Account to defendants. Plaintiff also alleged her loans were not insured by Lloyd's of London. Plaintiff was never repaid.

On January 6, 2014, the matter was scheduled in the Law Division for a default proof hearing. Defendants' pleadings had previously been stricken for failing to comply with a court order to pay an award of counsel fees and accounting fees to plaintiff.

The parties engaged in settlement discussions and plaintiff reached two settlement agreements with defendants.

The settlement agreement between plaintiff and Siegmeister also resolved all claims against Michael Kirkovich, Elliot Vernon, Crown Financial Solutions, LLC, Crown Precious Metals Group, LLC, and Verde Tropical Development, Group LLC. The agreement with Siegmeister required plaintiff be re-paid a total of $550,000 in three equal installments of $183,333.33, payable on June 30, September 30, and December 30, 2014. In exchange, plaintiff agreed to dismiss her complaint. In the event of a default, the settlement agreement provided plaintiff could file a motion to seek entry of a judgment against Siegmeister, Michael Kirkovich, Elliot Vernon, Crown Financial Solutions, LLC, Crown Precious Metals Group, LLC, and Verde Tropical Development Group, LLC in the amount of $900,000, less any sums paid by these defendants.

The settlement agreement between plaintiff and the Franco defendants provided for a payment obligation totaling $350,000, payable in three installments of $116,670.00, due on June 30, September 30, and December 30, 2014. The Franco settlement agreement contained the same default provisions as the agreement with Siegmeister, and stipulated plaintiff would be able to seek entry of judgment in the amount of $800,000, less any payments made by the Franco defendants.

Neither the Francos nor Siegmeister made the June 30, 2014 payment. Consequently, plaintiff filed a motion to enter judgment in accordance with the settlement agreements. Both Siegmeister and the Francos opposed the motion and filed cross-motions to invalidate the settlement agreements, claiming they were usurious, fraudulent, and unconscionable. After oral argument, the motion judge entered an order denying both cross-motions, and entered judgment for plaintiff, in accordance with the settlement agreements, for $800,000 against the Francos and $900,000 against Siegmeister.

On appeal, the Francos and Siegmeister argue the September 19, 2014 order entering judgment should be vacated as a matter of law because both settlement agreements are illegal. Specifically, defendants allege the settlement agreements are usurious and violate <u>N.J.S.A.</u> 31:1-1, since the combined amount they are obligated to pay is more than two-hundred percent of the original loan amount. Defendants also argue the motion court should not have enforced an illegal agreement, which contained a punitive amount of interest. Defendants claim they are entitled to relief by framing these arguments within <u>Rule</u> 4:50-1(a), (b), (c), (d) and (f).

I.

We begin by reciting our standard of review. We review a trial judge's entry of judgment pursuant to Rule 1:10-3, under an abuse of discretion standard. Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011). Generally, Rule 1:10-3 is "a civil proceeding to coerce the defendant into compliance with the court's order." Pasqua v. Council, 186 N.J. 127, 140 (2006) (citing Essex Cty. Welfare Bd. v. Perkins, 135 N.J. Super. 189, 195 (App. Div.), cert. denied, 68 N.J. 161 (1975)). In fact, a proceeding under Rule 1:10-3 "is [the] proper tool to compel compliance with a court order." Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997). As such, a trial judge's exercise of discretion will not be disturbed absent a demonstration of an abuse of discretion resulting in injustice. Cunningham v. Rummel, 223 N.J. Super. 15, 19 (App. Div. 1988). "An abuse of discretion 'arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Barr, supra, 58 N.J. Super. at 46 (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561 (2002)).

II.

Defendants argue the judgments are unenforceable because both settlement agreements are illegal and represent a "mistake of the exploitive amount calculated in the settlement agreement and applied in the judgment; plaintiff and plaintiff's attorney's fraudulent acts of fashioning a judgment which is tantamount to criminal and civil usury; and the judgment's void nature since it is illegal." Specifically, defendants allege the agreements are unenforceable since they penalize defendants in the event of a default.

We have stated that:

> 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. Indeed, "settlement of litigation ranks high in our public policy." Moreover, courts will not ordinarily inquire into the adequacy or inadequacy of the consideration underlying a compromise settlement fairly and deliberately made. . . . [W]here there is no showing of "artifice or deception, lack of independent advice, abuse of confidential relation, or similar indicia generally found in the reported instances where equity has declined to enforce, as unfair or unconscionable, an agreement voluntarily executed by the parties," the agreement should be enforced. It is only where the inadequacy of consideration is grossly shocking to the conscience of the court that it will interfere.
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> [Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div.) (citations omitted), cert. denied, 94 N.J. 600 (1983).]

Rule 4:50-1 states:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or

> the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud[,] . . . misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; . . . (f) any other reason justifying relief from the operation of the judgment or order.

Generally, "[c]ourts should use Rule 4:50-1 sparingly, [and] in exceptional situations[.]" Hous. Auth. of Morristown v. Little, 135 N.J. 274, 289 (1994). Relief under Rule 4:50-1 "is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." Manning Eng'g, Inc. v. Hudson Cty. Park Comm'n, 74 N.J. 113, 120 (1977) (citing Hodgson v. Applegate, 31 N.J. 29, 43 (1959)).

"The kind of mistake contemplated by [Rule 4:50-1(a)] has been described as one in which the parties could not have protected themselves from during the litigation." Pressler & Verniero, Current N.J. Court Rules, cmt. 5.1.1 on R. 4:50-1 (2018); See DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 263 (2009). Therefore, "neither the court's nor an attorney's error as to the law or the remedy constitutes mistake under this section." Pressler & Verniero, supra, cmt. 5.1.1 on R. 4:50-1.

To establish relief from a judgment based on newly discovered evidence under Rule 4:50-1(b) the evidence must be:

> (1) [] material to the issue and not merely cumulative or impeaching, (2) have been discovered since the trial and must be such as by the exercise of due diligence could not have been discoverable prior to the expiration of the time for moving for a new trial; and (3) be of such a nature as to have been likely to have changed the result if a new trial had been granted.
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> [Pressler & Verniero, Current N.J. Court Rules, cmt. 5.2 on R. 4:50-1 (2018).]

Fraud, under Rule 4:50-1(c) requires proof of: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172-73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). Fraudulent misrepresentation occurs when an individual purports to represent a fact when it is in fact false. Jewish Ctr. of Sussex Cty. v. Whale, 86 N.J. 619, 624 (1981). Legal fraud or fraudulent misrepresentation must be established by clear and convincing evidence. See Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395-96 (App. Div. 1989), certif. denied, 121 N.J. 607 (1990).

Under Rule 4:50-1: "No categorization can be made of the situations which warrant redress under subsection (f). . . . [T]he very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." DEG, supra, 198 N.J. at 269-71 (quoting Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)).

Here, the record demonstrates the parties voluntarily entered into two settlement agreements, whose terms were unambiguous, including the provisions pertaining to enforcement of the agreements in the event of a default. The agreements were reached at arms-length, and with each party having provided consideration. There is no evidence in the record to the contrary.

We do not view the motion judge's enforcement of the settlement agreements by entering judgment against defendants as an unconscionable penalty. A settlement agreement providing for enforcement is considered a penalty, and thus unenforceable when: a) the penalty is designed to be a punishment for a breach of the contract; and b) the penalty has no relation whatsoever to the amount of damages. See Westmount Country Club v. Kameny, 82 N.J. Super. 200, 206-07 (App. Div. 1964).

Here, plaintiff's claims against defendants exceeded $1.7 million. She agreed to compromise those claims for $900,000, in exchange for surety of payment under an agreed upon schedule, and the ability to seek a $1.7 million judgment in the event of default. Thus, the sums set forth in the settlement did not exceed the total amount claimed in plaintiff's complaint and had a relation to the damages plaintiff alleged.

We reject defendants' claims the settlement agreement and judgment enforcing them are usurious. Defendants misconstrue N.J.S.A. 31:1-1. This statute does not apply to the settlement agreements here because they were not loan instruments. See Loigman v. Keim, 250 N.J. Super. 434, 437 (Law Div. 1991) ("[T]he law of this State is consistent with the majority view that the usury statute N.J.S.A. 31:1-1, does not apply to interest on defaulted obligations.").

Also, the settlement agreements do not impose an interest rate. The motion judge explained the sums due in the event of default encompassed the damages sought by plaintiff in her complaint under the parties' contract, including plaintiff's claims against defendants for misappropriation, fraud, and legal fees. Therefore, the terms of the settlement agreements are fair and entitled to enforcement.

The record is devoid of a material misrepresentation by plaintiff that defendants relied upon resulting in damages. Indeed, defendants do not profess ignorance of the express terms of the settlement agreements. They negotiated the agreements for which there was a bargained for consideration. These facts do not support a finding of mistake, fraud, or misrepresentation.

The record lacks any evidence, other than defendants' claim the settlement agreement was usurious, which we have rejected, to support their arguments on the grounds of newly discovered evidence or exceptional circumstances. Defendants do not point out what new evidence came to light that they did not have when they entered into the agreements. Also, because the settlement agreements were not usurious and the order enforcing the settlement was not an abuse of discretion, there are no exceptional circumstances warranting relief under Rule 4:50-1(f).

III.

Defendants challenge the September 19, 2014 order and reassert their arguments that they have no personal or individual obligation to plaintiff because the loans she made were to the corporate defendants, not the Francos or Siegmeister individually. The record clearly demonstrates defendants acknowledged individual responsibility for the funds provided by plaintiff by personally obligating themselves to repay plaintiff, and in default thereof to accept the imposition of a judgment for the unpaid amounts. We deem this argument without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Lastly, Siegmeister argues the motion judge improperly denied his request for an adjournment of the motion, which Siegmeister made on the return date of the motion. We find no abuse of discretion in this regard, and this argument also lacks merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed.