SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1326-15T3

PHILIP BASS, EXECUTOR OF THE ESTATE OF CLARA PINKMAN,

Plaintiff-Appellant,

v.

SPARTAN OIL COMPANY,

Defendant-Respondent,

and

P&S FUEL, LLC,

Defendant/Intervenor.

Argued April 6, 2017 – Decided April 24, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1270-15.

Sean Monaghan argued the cause for appellant (Schenck, Price, Smith & King, LLP, attorneys; Mr. Monaghan, on the brief).

Kristin V. Hayes argued the cause for respondent (Wiley Malehorn Sirota & Raynes, attorneys; Ms. Hayes, of counsel and on the brief).

PER CURIAM

In this holdover action, plaintiff Philip Bass, the executor of the Estate of Clara Pinkman (estate), appeals from the August 20, 2015 Law Division order granting defendant Spartan Oil Company its motion for summary judgment dismissal of the third count of plaintiff's complaint.[1] Following our review of the record and applicable legal principles, we reverse and remand for further proceedings.

I

We derive from the summary judgment record the following salient facts. In 1998, the estate entered into a commercial lease with defendant, which permitted defendant to operate a gas station on the estate's property. The lease expired on November 30, 2013. The estate did not renew the lease with defendant, instead leasing the property to defendant intervenor P&S Fuel, L.L.C. (intervenor). Defendant did not surrender the premises until April 15, 2015.

Because defendant failed to vacate the premises, in March 2014, plaintiff filed a verified complaint seeking, among other things, a declaratory judgment defendant was liable to the estate for holding over. As the remedy for holding over,

[1] Although the estate is the real party in interest, as an executor, Bass is permitted to sue in his name on behalf of the estate. See R. 4:26-1.

plaintiff sought to enforce a provision in the lease that obligates defendant to pay double rent for each month it holds over. Specifically, the lease states:

> In the event that LESSEE shall continue in occupancy of the Demised Premises after the expiration or other termination of this Lease, such occupancy shall not be deemed to extend or renew the term of this Lease, but LESSEE, at the option of the LESSOR, shall be deemed to be occupying the Demised Premises as a tenant from month-to-month upon the covenants, provisions, and conditions contained in this Lease as the same are applicable to a month-to-month tenancy, at the rental rate and other required payments in effect during the last month of the original Lease term, or any extension thereof, as the case may be, prorated and payable for the period of such occupancy; provided, however, that the monthly Basic Rent shall be double.

At the time the lease expired, defendant was paying $4700 per month in rent.

Defendant maintained it was justified in remaining on the premises after the lease terminated because, at that time, the parties were embroiled in a dispute over whether defendant could retain and remove the "fuel delivery system" (system) on the property, which consisted of the underground storage tanks, the fuel lines, the gasoline pumps, and the gasoline dispensers. The lease states if plaintiff offers to purchase the system from defendant at a price satisfactory to it, defendant is obligated

to accept such offer and leave the system in place. The lease provides in pertinent part:

> [W]ith respect to the tanks and the fuel oil delivery systems[,] at the option of the Lessor, . . . Lessee shall (a) remove the [system] or (b) if Lessee is indemnified to its satisfaction by the Lessor or a third party agreeable to it, leave the [system], which . . . will become owned by and be the property of the Lessor.

When defendant refused to sell the system to the estate, plaintiff included a count in his complaint seeking a determination plaintiff made a satisfactory offer to defendant and, thus, defendant must accept the offer and leave the system in place. This issue was resolved when, on August 1, 2014, the court granted defendant's motion for partial summary judgment on this count, finding defendant had the right to retain and remove the system. Although the court's reasons were not provided, the record informs the trial court determined plaintiff failed to make a satisfactory offer to defendant.

Notwithstanding the court's ruling, defendant refused to surrender the premises. On October 10, 2014, plaintiff obtained an order compelling defendant to surrender the premises by December 30, 2014. In that same order, the court also denied plaintiff's motion to compel defendant to pay double rent for each month it holds over after October 30, 2014. The record

does not reveal why plaintiff chose October 30, 2014, as opposed to when the lease terminated on November 30, 2014, as the date the double rent was to commence; the parties did not provide the trial court's statement of reasons.

Despite the entry of an order giving it a deadline to vacate the premises, defendant took the position it could not move out because it was unable to secure a permit to remove the system. Defendant claimed plaintiff had advised the municipality defendant did not have the authority to remove the system and, thus, the municipality declined to issue a permit to defendant. Defendant was also reluctant to move out and leave the system behind, maintaining that unless it were on site, it could not protect the integrity of the system. We note on August 1, 2014, the court found defendant was entitled to remove the system, yet defendant did not seek to obtain a permit from the municipality until November 2014.

Defendant also claimed it was hesitant to leave the premises because there were ongoing discussions about the intervenor purchasing the system for its use at the property. Those discussions proved unsuccessful, but defendant reasoned it had to remain at the property pending these negotiations to protect the system. It is unclear from the record when these negotiations took place and when they ultimately failed.

On December 17, 2014, plaintiff, defendant, and the intervenor entered a consent order providing defendant had until February 15, 2015 to surrender the premises. The consent order also stated, "Effective January 1, 2015, defendant shall pay to the plaintiff the sum of $6,500.00 on or before the first day of each month that the defendant continues to occupy the premises."

A series of emails exchanged among the three parties while drafting the consent order suggests the monthly payment of $6500 was not to be considered rent but, rather, payment for defendant's use of the premises until it surrendered the property. Further, as defendant's counsel stated in one of the emails, "[t]he purpose of the consent order is not to prejudice any of the party[']s claims or positions, but merely to identify that Spartan Oil has until the end of February to surrender the premises."

Defendant finally moved out on April 15, 2015. Thereafter, defendant filed a motion for summary judgment dismissal of the third count in plaintiff's complaint, the count in which plaintiff sought a determination defendant must pay double rent from the time the lease terminated to the time it moved out. We are informed defendant argued the consent order was an agreement that replaced the holdover provision in the lease and, thus,

constituted a waiver of plaintiff's claim for holdover rent in the amount of $9400 per month.

The court granted defendant's motion and dismissed the third count with prejudice. The court merely stated:

> As far as the holdover rent, I do think that [the] consent order does, whether you call it holdover or not, establish[es] a rental amount which was agreed to by the parties. . . . I think [the consent order] does establish a rental amount of $6,500 a month which, I think, should be paid as long as defendant did occupy the premises [from January 1, 2015 to April 15, 2015].

The trial court did not rule on whether defendant held over from December 1, 2013 to January 1, 2015, as plaintiff alleged in its complaint.

This appeal ensued, which is limited to the court's dismissal of the third count of plaintiff's complaint.

II

On appeal, plaintiff contends the trial court erred when it found the consent order constituted an agreement setting defendant's obligation to pay holdover rent, from January 1, 2015 to April 15, 2015, at the rate of $6500 per month. Plaintiff notes there is no evidence it waived its right to receive holdover rent as provided in the lease, and the consent order merely represented what defendant was willing to pay

pending the removal of the system and its surrender of the premises.

Without providing any citation to the record, defendant asserts when the parties entered the consent order, they "extended the surrender date in exchange for an increased monthly rental payment," and plaintiff waived its claim for holdover rent. We find no evidence in the record to support this factual claim. Defendant also argues that, as a matter of law, plaintiff's acceptance of defendant's payments of $4700 per month, from the time the lease expired to January 1, 2015, constituted a waiver of plaintiff's claim for holdover rent and created a periodic tenancy.

Defendant further maintains when, on October 10, 2014, the court denied plaintiff's motion for summary judgment on the third count of his complaint, the court in effect found plaintiff was not entitled to holdover rent. However, defendant failed to provide a copy of the court's statement of reasons. We question whether the denial of plaintiff's summary judgment motion was in fact a ruling on the merits when, thereafter, defendant filed a motion for summary judgment seeking dismissal of the third count. Finally, defendant argues a tenant cannot be liable for holdover rent if it had a bona fide reason for holding over.

In considering plaintiff's appeal, we must adhere to well-settled principles applicable to summary judgment motions. The court must "consider 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); see also R. 4:46-2(c). The court itself cannot resolve contested factual issues but instead must determine whether there are any genuine factual disputes. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005). If there are materially disputed facts, the motion for summary judgment should be denied. Parks v. Rogers, 176 N.J. 491, 502 (2003); Brill, supra, 142 N.J. at 540.

Our review of an order granting summary judgment must observe the same standards, including our obligation to view the record in a light most favorable to the non-moving parties, here plaintiff. See W.J.A. v. D.A., 210 N.J. 229, 238 (2012). We give no special deference to a court's assessment of the documentary record, as the decision to grant or withhold summary judgment does not hinge upon a court's determinations of the credibility of testimony rendered in court, but instead amounts to a ruling on a question of law. See Manalapan Realty, L.P. v.

Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (noting that no "special deference" applies to a trial court's legal determinations).

Here, the trial court made a finding the consent order constituted an agreement by the parties that defendant could discharge its obligation under the lease by paying $6500 per month in rent from January 1, 2015 to the time defendant ceased to occupy the premises. We find no support for such finding in the record. That is not to say this was not the agreement. It may have been, but there is insufficient evidence for the court to have arrived at this conclusion. This is particularly so in light of the email exchanges, in which the parties affirmatively agreed to excise from the form of consent order the term "rent," and defendant itself acknowledged the consent order was not intended to prejudice a party's claims.

At best, there was a question of fact whether the consent order affected plaintiff's claim to the holdover rent as provided in the lease. In addition, the trial court did not rule upon the period from December 1, 2013 to January 1, 2015. Plaintiff was seeking holdover rent during this period as well, but the court dismissed the third count in its entirety.

Defendant attempts to salvage the trial court's ruling by arguing we can affirm the trial court because, as a matter of

law, plaintiff's acceptance of defendant's monthly payments of $4700 after the lease expired constituted a waiver of plaintiff's claim for holdover rent. We disagree.

First, defendant provides no authority -- and we were unable to find any authority -- to support this premise. Second, the lease provides defendant must pay double rent in the event it holds over. This provision gave plaintiff a specific legal right, which is authorized by N.J.S.A. 2A:42-6. This statute states in pertinent part:

> When a tenant for any term . . . willfully holds over . . . the person so holding over shall, for and during the time he so holds over or keeps the person entitled out of possession of such real estate pay to the person so kept out of possession, his executors, administrators or assigns, at the rate of double the yearly value of the real estate so detained, for so long a time as the same is detained.
>
> [N.J.S.A. 2A:42-6.]

Here, the remedy the parties included in the subject lease for holding over is different from what is provided in the statute, but parties are free to agree to a remedy other than compelling a tenant to pay "double the yearly value of the real estate."

Because the holdover provision in the parties' lease was a legal right, a waiver of such right can occur only if plaintiff intentionally and voluntarily relinquishes it. See Knorr v.

Smeal, 178 N.J. 169, 177 (2003). Evidence of a wavier must be clear and unequivocal. Scibek v. Longette, 339 N.J. Super. 72, 82 (App. Div. 2001) (citing Country Chevrolet v. N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983)). In addition, in order for a waiver "to be operative, [the waiver] must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition." W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152-53 (1958) (quoting Aron v. Rialto Realty Co., 100 N.J. Eq. 513 (Ch. 1927), aff'd 102 N.J. Eq. 331 (E. & A. 1928)).

Here, the trial court made no finding plaintiff waived its right to holdover rent. Because the trial court did not do so, we cannot decide this issue in the first instance. See Ins. Co. of N. Am. v. Gov't Emps. Ins. Co., 162 N.J. Super. 528, 537 (App. Div. 1978). Therefore, we cannot determine, as plaintiff urges, there was a waiver as a matter of law.

Finally, defendant argues it cannot be liable for holdover rent if it had a bona fide reason for holding over, citing Ancona Printing Co. v. Welsbach Co., 92 N.J.L. 204 (E. & A. 1918). In Ancona, the Court held a holdover tenant can avoid a double rent penalty, but only if his reasons for holding over

were "honest" and "bona-fide." Id. at 207. Here, whether or not defendant had sufficient reasons to avoid holding over rent must await a determination by the finder of fact.

In summary, we reverse the order granting summary judgment dismissal of the third count of plaintiff's complaint. The court's finding the consent order represents an agreement plaintiff would accept $6500 per month in rent, for the period January 1, 2015 to April 15, 2015, is not supported by the record. In addition, the trial court failed to make a determination about plaintiff's claim for holdover rent for the period December 1, 2013 to January 1, 2015. For the reasons previously outlined, we reject defendant's invitation to rule upon the merits of its defenses. To the extent we have not addressed any of defendant's remaining arguments, it is because they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.