SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1671-14T4

BMW FINANCIAL SERVICES NA, LLC,

Plaintiff-Respondent,

v.

DONALD PLOETNER and MADELINE PLOETNER,

Defendants-Appellants,

and

PEOPLE OF THE STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF TAXATION AND FINANCE,

Defendants,

and

DONALD PLOETNER and MADELINE PLOETNER,

Third-Party
Plaintiffs-Appellants,

v.

BMW OF NORTH AMERICA, LLC,

Third-Party
Defendant-Respondent.

Argued on September 20, 2016 – Decided July 25, 2017

Before Judges Fisher, Ostrer and Leone.

On appeal from the Superior Court of New Jersey, Chancery Division, Morris County, Docket No. F-32595-09.

Robyne D. LaGrotta argued the cause or appellants.

Joann Sternheimer argued the cause for respondent BMW Financial Services NA, LLC (Deily & Glastetter, LLP, attorneys; Ms. Sternheimer, on the brief).

John R. Skelton (Seyfarth Shaw LLP) of the Massachusetts bar, admitted pro hac vice, argued the cause for respondent BMW of North America, LLC (Seyfarth Shaw LLP, attorneys; Ardrelle Bahar and Mr. Skelton, on the brief).

PER CURIAM

Defendants Donald and Madeline Ploetner[1] appeal from a final judgment of foreclosure and interlocutory orders that: dismissed their counterclaim against their lender, plaintiff, BMW Financial Services NA, LLC (BMW Financial); dismissed their third-party complaint against BMW of North America, LLC (BMW NA), which franchised a BMW dealership to a corporation the Ploetners controlled; and granted summary judgment. The trial court held that the Ploetners' affirmative claims were derivative of claims that belonged to their two bankrupt business entities – Towne,

[1] We were informed at oral argument that Donald Ploetner is deceased.

Inc. (Towne), which operated a BMW automobile dealership in Oyster Bay, New York, and DMD Towne, LLC (DMD), which owned the dealership's realty. Towne and DMD released their claims against BMW Financial and BMW NA (the BMW entities) pursuant to a 2010 Bankruptcy Court order and release agreements between the bankruptcy trustee and the BMW entities (Trustee Releases). The Ploetners and their businesses also released claims against BMW Financial under an earlier Forbearance Agreement. Consequently, the court held that the Ploetners' affirmative claims were barred. As they raised no other personal defenses or claims in response to the foreclosure action, the court granted BMW Financial summary judgment and, ultimately, a final judgment of foreclosure.

On appeal, the Ploetners challenge the validity of the Forbearance Agreement and the Trustee Releases. They argue the former lacks consideration and is illusory and the latter violates federal bankruptcy law. We reject those arguments and affirm.

I.

The Ploetners purchased and operated a BMW dealership in Oyster Bay. In order to do so, the Ploetners and their businesses (the borrowers) entered into various credit and guarantee agreements with BMW Financial. Among the loans obtained, the Ploetners personally borrowed $848,000 and $948,000 from BMW

Financial. The loans were secured by mortgages on two reportedly undeveloped parcels in Harding Township (New Jersey Mortgages).

Less than three years after they acquired the dealership, the borrowers defaulted on the inventory finance agreement that enabled Towne to obtain vehicles on credit, but obliged it to repay BMW shortly after a vehicle's sale. Rather than resort to its post-default remedies, BMW Financial, pursuant to the Forbearance Agreement, offered to refrain from exercising its rights and remedies and to permit the borrowers to delay certain payments. At that time, the borrowers owed BMW Financial almost $10 million under the various loans. The Forbearance Agreement was "intended to provide Borrower a series of weekly periods to develop and execute a business turnaround plan designed to address capitalization and cash flow issues" and take other steps. The Forbearance Agreement terminated upon the earlier of: a default of the Forbearance Agreement; at the end of the forbearance period, November 3, 2008; or BMW Financial's "determin[ation] in its discretion that Borrower [was] not making sufficient progress to satisfactorily address the capitalization and cash flow issues." The Forbearance Agreement was to be construed according to Ohio law.

As consideration for BMW Financial's forbearance, the Ploetners and their business entities broadly released claims they had or might have against BMW Financial:

> Each Obligor acknowledges and agrees that: (a) such Obligor has no claim or cause of action against Lender (or any of Lender's directors, officers, employees, or agents); (b) such Obligor has no offset right, counterclaim, or defense of any kind against any of the Obligations; and (c) Lender has heretofore properly performed and satisfied in a timely manner all of Lender's obligations to each Obligor. Lender wishes, and each Obligor agrees, to eliminate any possibility that any past conditions, acts, omissions, events, circumstances, or matters would impair or otherwise adversely affect any of Lender's rights, interests, collateral security, or remedies. In consideration of, among other things, the forbearance provided for herein, and any other financial accommodations which Lender elects to extend to Obligors, each Obligor forever waives, releases and discharges any and all claims (including, without limitation, cross-claims, counterclaims, rights of setoff and recoupment), causes of action, demands, suits, costs, expenses and damages that it now has or hereafter may have, of whatsoever nature and kind, whether known or unknown, whether now existing or hereafter arising, whether arising at law or in equity that arise under or relate to any of the Loan Documents or this Agreement (collectively, "Claims"), against Lender, or any of its subsidiaries and affiliates, and its and their respective successors, assigns, officers, directors, employees, agents, attorneys and other representatives, based in whole or in part on facts, whether or not known, existing on or prior to the date of this Agreement. As further consideration for the above release, Borrowers hereby agree, represent, and warrant

> that the matters released herein are not limited to matters which are known or disclosed, and Borrowers hereby waive any and all rights and benefits which it now has, or in the future may have. The provisions of this section shall survive the termination of this Agreement, the Loan Documents and payment in full of the Obligations.

The Forbearance Agreement recited that it was "dated as of October ___, 2008[,]" but the precise date was left blank. The Ploetners admit they signed the agreement. There is no competent evidence that BMW Financial's representatives did so as well.[2] Yet, the Ploetners do not dispute there was a period of forbearance. It was short-lived, however. According to Ms. Ploetner, the forbearance expired after ten days. BMW Financial alleged it offered to extend the Forbearance Agreement for another forbearance period, but the Ploetners' refused.

In December 2008, BMW Financial sued Towne, DMD, and the Ploetners in New York state court to enforce its rights under loan agreements other than the New Jersey mortgage notes. Thereafter, Towne, with DMD following closely behind, sought protection under

[2] At a 2012 deposition, Ms. Ploetner acknowledged that she and her husband had signed the agreement, but her counsel noted that the copy with which she was confronted did not contain BMW Financial signatures. At oral argument before us, BMW Financial's counsel presented to the court a copy of a completely signed agreement, which counsel had provided to the Ploetners' counsel only the day before. The document was unaccompanied by a certification of a person with personal knowledge to authenticate it or to specify when the BMW Financial representatives actually signed it.

Chapter 11 of the Bankruptcy Code. Towne filed an adversary proceeding against the BMW entities, alleging various wrongs in connection with the purchase and operation of the dealership, but voluntarily dismissed it within a month.[3] The Bankruptcy Court vacated the automatic stay to permit BMW Financial to foreclose on the dealership and to replevy collateral. The Ploetners were unable to secure BMW Financial's consent to sell the dealership for an amount less than its outstanding debt.

The Bankruptcy Court eventually converted the Chapter 11 proceeding into a Chapter 7 proceeding, and a bankruptcy trustee assumed decision-making authority. In January 2010, the Bankruptcy Court authorized the trustee to sell the dealership's assets and to release BMW Financial and BMW NA of any claims Towne or DMD had against them. The trustee then executed the Trustee Releases, covering claims against the two BMW entities, "on behalf of Towne and DMD and their[] directors, officers, employees, managers, agents, attorneys, or other representatives, and to the extent their claims are derivative of the claims of Towne and/or DMD, Towne's and DMD's members, stockholders, or principals . . . ." The release of BMW NA covered all current and future claims, including those:

[3] Few of the Bankruptcy Court filings are included in the record before us. We rely on the parties' representations about the nature of the filings.

> arising out of or relating to (i) the Dealer Agreements or the operation of Towne as an authorized BMW NA dealership; (ii) any claims based on the factual allegations made by Towne in the Adversary Proceeding including, as alleged therein, any claims based on the acquisition of the Towne Dealership Assets or the Dealership Property; BMW NA's review and approval of the acquisition of the Town dealership; the allocation and sale of vehicle inventory by BMW NA to Towne; any effort by Towne to sell its dealership; or BMW NA's AVP or CPO programs; and (iii) any claims asserted or which could have been asserted in the State Court Action.

The release of BMW Financial covered all current and future claims, including those:

> arising out of or relating to (i) Loan Documents and any related documents; (ii) any claims based on the factual allegations made by Towne in the Adversary Proceeding including, as alleged therein, any claims based on the acquisition of the Towne Dealership Assets or the Dealership Property; any effort by Towne and/or DMD to sell their assets; BMW [Financial]'s consent to the sale; and (iii) any claims asserted or which could have been asserted in the Replevin Action and/or the Foreclosure Action.

Both agreements stated that the releases were "intended to be general and absolute and relieve the . . . releasees from any possible claim by or liability that might conceivably exist arising from or relating to matters prior to the date of this release." (All caps removed). The Ploetners did not challenge the Trustee Releases before the Bankruptcy Court.

While the bankruptcy case was proceeding, BMW Financial filed this action to foreclose on the New Jersey Mortgages. In an amended answer in March 2010, the Ploetners asserted a five-count counterclaim against BMW Financial and a third-party complaint against BMW NA. In the first two counts, the Ploetners alleged that the BMW entities, in violation of the New York Franchised Motor Vehicle Dealer Act, constructively terminated their franchise by suspending its agreement to purchase new motor vehicle inventory and imposing onerous requirements upon the dealership (count one), and interfered with their ability to sell the dealership upon favorable terms (count two). In the remaining counts, the Ploetners also alleged the BMW entities: violated the New Jersey Franchise Practices Act (count three); tortiously interfered with Towne's business relations and the Ploetners' reasonable economic expectations (count four); and breached the duty of good faith and fair dealing owed to Towne and the Ploetners (count five).

The case then took a detour to Bankruptcy Court when BMW NA removed the third-party complaint. But that court later remanded the case back. In support of remand, the Ploetners had argued they were asserting claims personal to them and independent of Towne. Their counsel wrote, "The Ploetners are not pursuing claims

which belonged to, were released by, or are derivative to Towne, Inc."

A year later, BMW Financial and BMW NA filed motions for "judgment on the pleadings" to dismiss the counterclaim and third-party complaint. BMW Financial expressly requested, in the alternative, entry of summary judgment. The BMW entities provided the court with the Forbearance Agreement and the Trustee Releases.

In opposition, the Ploetners contended they had not failed to state a claim under Rule 4:6-2; the motion to dismiss relied on extrinsic materials; and summary judgment was premature, as no discovery had occurred. With respect to the Trustee Releases, the Ploetners again argued they were seeking redress for harm done to them personally. Citing Strasenburgh v. Straubmuller, 146 N.J. 527, 550-51 (1996), they argued they suffered "special injury," not suffered by shareholders generally, which fell outside claims of the business entities the trustee released. At oral argument, counsel reiterated, "I wouldn't be here if I believed that we could pursue the claims of Town[e], Inc. We're not, [and] we don't intend to[.]" In reference to his prematurity argument, he argued, "[W]e should be able to examine the validity of the [Forbearance] [A]greement." However, counsel did not actually challenge the Agreement's validity.

The court granted "judgment on the pleadings" dismissing the counterclaims and third-party complaint. In an oral decision entered September 9, 2011, the judge stated the claims belonged to the Ploetners' business entities, which the trustee released. The court rejected the Ploetners' prematurity argument, concluding no discovery would affect the Trustee Releases' validity and their impact on the business entities' claims. The Ploetners' counsel asked for leave to amend — presumably to assert claims other than those found to be derivative of the businesses. The court allowed the Ploetners to move to amend, but they never did.

Over a year-and-a-half later, BMW Financial filed a motion for summary judgment entitling it to foreclose on the Harding Township properties. By then pro se, the Ploetners opposed the motion and filed a cross-motion seeking various forms of relief. Most pertinent to this appeal, they asked the court to vacate its previous order. They certified they were duped into signing the Forbearance Agreement by their attorney, and that they would never have knowingly exchanged the release in return "for being permitted to remain in business approximately an additional ten (10) days[.]" They contended the business entities' counsel disserved them, ultimately resulting in the loss of their dealership and investment.

On September 30, 2013, the court granted BMW Financial's motion. In a written statement of reasons, the court noted that the only defense to foreclosure consisted of the Ploetners' allegation that BMW NA had engaged in various wrongs that forced the dealership into bankruptcy. The court concluded that both the Forbearance Agreement and Trustee Releases barred those claims, and the foreclosure matter was therefore deemed uncontested.[4]

The Ploetners subsequently sought clarification of the court's order, as well as a stay, which the court denied. In the course of oral argument, Ms. Ploetner asserted for the first time that the Forbearance Agreement was invalid because BMW Financial did not sign it. The court rejected the argument on the grounds that BMW Financial had performed.

Thereafter, BMW Financial moved for final judgment of foreclosure, which the court granted on October 28, 2014. This appeal followed. The Ploetners, now represented by counsel, present the following points for our consideration:

POINT I

THE FINAL JUDGMENT FOR FORECLOSURE DATED OCTOBER 28, 2014 SHOULD BE VACATED AS IT WAS PREMISED ON AN ORDER GRANTING SUMMARY JUDGMENT ON SEPTEMBER 30, 2013.

[4] In another appearance, in which the Ploetners sought to hasten the filing of the foreclosure judgment to pave the way for an appeal, Ms. Ploetner contended orally for the first time that BMW Financial failed to perform as promised under the Forbearance Agreement. That argument has not been renewed on appeal.

A. THE ORDER FOR SUMMARY JUDGMENT DATED SEPTEMBER 30, 2013 SHOULD BE VACATED AS IT WAS PREMISED ON AN INVALID FORBEARANCE AGREEMENT.

B. THE ORDER FOR SUMMARY JUDGMENT DATED SEPTEMBER 30, 2013 SHOULD BE VACATED AS IT WAS PREMISED ON AN INVALID RELEASE SIGNED BY THE BANKRUPTCY TRUSTEE.

POINT II

THE ORDER DISMISSING THE COUNTERCLAIM AND THIRD PARTY COMPLAINT DATED SEPTEMBER 9, 2011 MUST BE VACATED.

II.

The Ploetners challenge the validity of the Forbearance Agreement and the Trustee Releases, contending they are the linchpins of the order granting summary judgment on September 30, 2013, which in turn cleared the way for entry of a final judgment of foreclosure. They also challenge the September 9, 2011 order dismissing their counterclaim and third-party complaint. Their arguments lack merit.

At the outset, we reject the BMW entities' argument that we should decline to even consider the Ploetners' challenge to the September 30, 2013 and September 9, 2011 orders because they did not identify them in their notice of appeal. The BMW entities do not contend they are prejudiced by the Ploetners' omission. We are mindful that the Ploetners' pro se notice of appeal and case information statement identified the October 28, 2014 judgment as the only judgment, decision or order being appealed. See Rule 2:5-1(f)(3)(A) (stating that a notice of appeal "shall designate

the judgment, decision, action or rule, or part thereof appealed from"); Fusco v. Bd. of Educ. of Newark, 349 N.J. Super. 455, 461-62 (App. Div.) (stating that appellate review pertains only to judgments or orders specified in the notice of appeal), certif. denied, 174 N.J. 544 (2002). But the case information statement included an extensive statement of facts and procedural history that identified the September 9, 2011 and September 30, 2013 orders. Moreover, in their description of proposed issues to be raised on appeal, the Ploetners challenged the validity of the Forbearance Agreement and contended the Trustee Releases were a product of improper actions. We therefore choose to address the merits of the appeal.[5]

We review the trial court's 2011 and 2013 orders de novo, applying the same standard as the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (summary judgment); Rezem Family Assocs. v. Borough of Millstone, 423 N.J. Super. 103, 113-14 (App. Div.) (motion to dismiss), certif. denied, 208 N.J. 366 (2011). With respect to a summary judgment motion, "the

[5] We also recognize that the Ploetners did not timely challenge the validity or enforceability of the Forbearance Agreement and Trustee Releases before the trial court. They opted instead to contend that the Trustee Releases did not bar claims of special damages or other claims personal to the Ploetners, as distinct from their entities. Although we are not required to consider the validity and enforceability arguments as they were not raised below, see Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973), we choose to do so.

appellate court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." Henry, supra, 204 N.J. at 330. Where a "complaint states no basis for relief and . . . discovery would not provide one, dismissal of the complaint [under Rule 4:6-2] is appropriate." Cnty. of Warren v. State, 409 N.J. Super. 495, 503 (App. Div. 2009), certif. denied, 201 N.J. 153, cert. denied, 561 U.S. 1026, 130 S. Ct. 3508, 177 L. Ed. 2d 1092 (2010).

The Ploetners argue the Forbearance Agreement is invalid because it lacked consideration. Ohio courts have adopted the principle that "[f]orbearance from exercising a right or doing an act which one has a right to do is legal consideration." HomEq Servicing Corp. v. Schwamberger, 4th Dist. Scioto No. 07CA3146, 2008-Ohio-2478, ¶ 19 (quoting 3 Williston on Contracts § 7:43, at 677 (Lord ed., 4th ed. 1992) in enforcing forbearance agreement between mortgagee and defaulting mortgagor), aff'd, 908 N.E.2d 423 (Ohio 2009). However, the Ploetners contend they were not bound because no one signed the agreement on behalf of BMW Financial. They further argue BMW Financial's promise to forbear was illusory because it retained the discretion to terminate the forbearance term.

Both arguments are unavailing. Unless parties have specified that an agreement must be signed, a signature of a contracting party is not essential to create an enforceable contract, provided assent is demonstrated through other means. See Richard A. Berjian, D.O. v. Ohio Bell Tel. Co., 375 N.E.2d 410, 413-14 (Ohio 1978) (enforcing a contract though one party did not sign it in the space provided, stating, "[s]ignature spaces in the form contract do not in and of themselves require that the signatures of the parties are a condition precedent to the agreement's enforceability"); see also Bruzzese v. Chesapeake Exploration, LLC, 998 F. Supp. 2d 663, 674-75 (S.D. Ohio 2014).

Assent can be demonstrated by performance. Hocking Valley Cmty. Hosp. v. Cmty. Health Plan of Ohio, 4th Dist. Hocking No. 02CA28, 2003-Ohio-4243, ¶ 16 ("Performance can substitute for execution of a written contract against the party who did not execute the contract . . . as well as against the party who executed the contract[.]"). In this case, there is no dispute that BMW Financial did perform, at least for ten days, forbearing from exercising the various remedies at its disposal based on the Ploetners' default.

Nor was BMW Financial's promise to forbear illusory because it retained the right to terminate the Forbearance Agreement if it "determine[d] in its discretion that Borrower [was] not making

sufficient progress to satisfactorily address the capitalization and cash flow issues." BMW Financial did not retain an "unlimited right to determine the nature or extent of [its] performance," which would "destroy[] [its] promise and thus make[] it merely illusory." Bruzzese, supra, 998 F. Supp. 2d at 672 (quoting Domestic Linen Supply & Laundry Co. v. Kenwood Dealer Grp., Inc., 672 N.E.2d 184, 186 (Ohio Ct. App.), cause dismissed, 663 N.E.2d 327 (Ohio 1996)); see also Atkinson v. Akron Bd. of Educ., 9th Dist. Summit No. 22805, 2006-Ohio-1032, ¶ 16. Although it retained discretion, BMW Financial's termination right was tied to the borrowers' progress, which was subject to detailed standards in the agreement. See Bruzzese, supra, 998 F. Supp. 2d at 672 (rejecting claim contract was illusory because it "provided standards by which Chesapeake was to determine whether land was acceptable for leasing"). Furthermore, BMW Financial was bound to exercise its termination authority in good faith. See ibid. (noting that Chesapeake could not utilize its discretionary determination whether title was marketable in bad faith).

The Ploetners' challenge to the Trustee Releases fares no better. The proper forum for the Ploetners' challenge was in the Bankruptcy Court, and if unsuccessful, the United States District Court and the United States Court of Appeals. "[T]he proper medium for a challenge to the original bankruptcy court's order is through

a direct challenge of that order. The collateral attacks brought later are barred by res judicata." Hendrick v. Avent, 891 F.2d 583, 587 (5th Cir.) (rejecting collateral attack of bankruptcy court order for the sale of debtor's stock), cert. denied, 498 U.S. 819, 111 S. Ct. 64, 112 L. Ed. 2d 39 (1990). The Bankruptcy Court order authorizing the sale of the dealership and the release of the BMW entities, is res judicata, as the Towne entities participated in the bankruptcy. See Regions Bank v. J.R. Oil Co., 387 F.3d 721, 731 (8th Cir. 2004).[6]

Furthermore, the legal basis for the Ploetners' contention that the trustee lacked the authority to enter the releases is unavailing. The trustee did not release claims of the Ploetners. Thus, their reliance on In re Central Ill. Energy, LLC, 406 B.R. 371 (Bankr. C.D. Ill. 2008) is misplaced. The Ploetners also can

[6] We note that the Ploetners have taken a position that they assiduously avoided before the Bankruptcy Court. After BMW NA removed the third-party complaint to Bankruptcy Court, the Ploetners sought a remand. Their attorney contended not that the Trustee Releases were invalid — an issue for the Bankruptcy Court — but that the Ploetners alleged personal claims outside the scope of the Trustee Releases — an issue for the state court. A remand followed. However, we decline to find they are judicially estopped from arguing the Trustee Releases were unenforceable. To apply the doctrine the proponent must establish that "a party . . . [has] advance[d] a position in earlier litigation that is accepted and permit[ted] the party to prevail in that litigation . . . ." Bhagat v. Bhagat, 217 N.J. 22, 36 (2014). Although the Ploetners prevailed in their effort to secure a remand, the record simply does not reflect whether the court accepted the Ploetners' argument, as opposed to some other grounds for remand.

find no support from In re Continental Airlines, 203 F.3d 203 (3d Cir. 2000), which they cite, as that case addresses the discharge of non-debtors, not a release of rights of the debtors.

In sum, the Forbearance Agreement and the Trustee Releases were valid and enforceable. The Ploetners' affirmative claims were repackaged claims of their business entities, which were released in the Trustee Releases (as pertained to both BMW entities) and in the Forbearance Agreement (as pertained to BMW Financial). Furthermore, the Ploetners released claims personal to them against BMW Financial in the Forbearance Agreement. As they raised no other genuine defenses to the foreclosure, the court correctly granted summary judgment and entered final judgment of foreclosure.

To the extent not addressed, the Ploetners' remaining arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.