SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3058-15T1

KARL HALLIGAN,

Plaintiff-Respondent,

v.

JOHN O'CONNOR and
HARRY HODKINSON,

Defendants-Appellants,

and

H&H REAL ESTATE INVESTMENTS,
LLC,

Defendant.

Argued July 6, 2017 – Decided July 19, 2017

Before Judges Yannotti and Haas.

On appeal from Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. C-55-12.

Andrew R. Turner argued the cause for appellants (Turner Law Firm, attorneys; Mr. Turner, of counsel and on the brief).

Steven L. Menaker argued the cause for respondent (Chasan Leyner & Lamparello,

attorneys; Mr. Menaker, of counsel and on the brief; Kirstin Bohn, on the brief).

PER CURIAM

Defendants John O'Connor and Barry Hodkinson appeal from a February 26, 2016 Chancery Division order finding them in contempt for failing to comply with an earlier order of the trial court, and imposing a $250 sanction on each of them. Defendants also appeal from the court's March 18, 2016 order requiring them to pay a total of $1580 in counsel fees and costs to plaintiff Karl Halligan's attorney in connection with his motion seeking the contempt adjudication. Finally, defendants appeal from the trial court's June 21, 2016 order finding them in contempt for failing to pay the sanctions and counsel fees assessed in the previous two orders in a timely fashion, and directing each defendant to pay another $250 sanction to the court and $411.25 in counsel fees and costs to plaintiff.

On appeal, defendants contend that the trial court abused its discretion in making these rulings because there was insufficient evidence in the record to support the contempt adjudications. Having reviewed the record in light of defendants' arguments and the applicable law, we agree with defendants' contentions and reverse all three orders.

We derive the following procedural history and facts from the record developed before the trial court. Plaintiff and defendants formed H&H Real Estate Investments LLC, (H&H), a limited liability company (LLC), to act as the holding company for a property and building they purchased in which they operated a bar and restaurant. The parties formed a second LLC, Park Avenue Bar & Grill LLC (Park Avenue), to operate and manage the bar and restaurant.

Following a number of disputes between the parties concerning the operation of their businesses, plaintiff sued defendants for breach of their duties and obligations under the LLCs' operating agreements, and he sought to dissolve both of the LLCs. Defendants filed an answer and counterclaim asserting, among other things, that plaintiff had wrongfully limited their access to the business property and its books and records.

Following a multi-day trial, the trial judge rendered a decision on November 14, 2013 requiring plaintiff to cede managerial control over, and dissociate himself from, the two LLCs. The judge also ordered the two LLCs, which were not parties to the lawsuit, to pay plaintiff $793,772.50, representing equity compensation, salary, and tax reimbursement. On March 18, 2014, the judge issued a conforming judgment.

On March 20, 2014, plaintiff and defendants entered into a consent order in which they agreed that each individual party was "barred from selling, mortgaging, renting, leasing, liening, hypothecating or in any manner whatsoever encumbering the property" owned by H&H in which the bar and restaurant had been operated. The next day, plaintiff dissociated himself from the two LLCs.

In November 2014, defendants filed a motion to vacate the portions of the March 18, 2014 order that required H&H and Park Avenue to make monetary payments to plaintiff because neither LLC had been a party to the lawsuit. At oral argument on March 20, 2015, the trial judge acknowledged this mistake and granted defendants' motion. The judge also permitted plaintiff to amend his complaint to add the two LLCs as defendants. The judge signed a conforming order setting out these rulings on April 6, 2015. The judge subsequently denied plaintiff's motion for reconsideration.

On May 8, 2015, the trial judge granted plaintiff's motion for another order concerning the future sale of H&H's property. In pertinent part, this order stated:

> Effective[] immediately and subject to further [o]rder of the [c]ourt, Halligan, O'Connor and Hodkinson (collectively, the "[p]arties") are restrained and barred from selling, mortgaging, renting, leasing,

> liening, hypothecating or in any manner whatsoever encumbering the property [owned by H&H in which the bar and restaurant had been operated].

The order further provided that "[a]ny one of the [p]arties may move to dissolve or modify the restraints contained in the [o]rder upon [seven] days['] notice to the other [p]arties[.]" Significantly, the order only named plaintiff and the two defendants in their individual capacities. Plaintiff had still not named H&H, the LLC which owned the property, as a party to the litigation.[1]

On August 25, 2015, plaintiff filed a "Revised First Amended Complaint" that named H&H as a defendant. In this new pleading, plaintiff sought damages against H&H for breach of contract and other related claims. The amended complaint also continued to name O'Connor and Hodkinson as individual defendants, even though plaintiff was no longer asserting any claims against them.[2]

Thereafter, the trial judge conducted at least one case management conference with the parties. Although the judge could

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[1] By this time, the Park Avenue LLC had filed a petition for bankruptcy and its assets had been sold.

[2] As a trial judge later explained in a June 21, 2016 order and decision transferring the matter to the Law Division, plaintiff "represented that the two individual[] [defendants] were named for consistency in the pleadings, but no[] claims were asserted against them."

not recall the specific conference when this occurred, he stated at a conference on January 13, 2016 that he had previously approved a request by H&H to list its property for sale. Perhaps in connection with that approval, H&H's attorney sent a letter to the trial judge[3] on January 4, 2016 stating "that the building owned by [H&H was] under binding contract for sale with an anticipated closing date at the end of February."

At the January 13, 2016 case management conference that followed, the trial judge asked H&H's attorney if the matter could be resolved once the property was sold. At that point, plaintiff's attorney asserted "that whoever signed a contract of sale for that building has violated" the May 8, 2015 order barring a sale until further order of the court. In response, H&H's attorney stated that since plaintiff's attorney was not objecting to the actual sale of the property, she "hope[d]" the judge "would make the ruling . . . that we can go forward with the sale of the building."

The trial judge noted that there were no motions currently pending before him and plaintiff's attorney then stated that he planned to file an application to hold defendants in contempt of the May 8, 2015 order. The judge replied that if that occurred, H&H's attorney would simply file "a motion . . . to approve the

[3] The attorney also sent a copy of the letter to plaintiff's and defendants' attorneys.

sale." Thus, the judge suggested, but did not require, that the parties confer to attempt to resolve the matter before any motions were filed.

However, plaintiff instead filed a motion on January 19, 2016 seeking an order "[p]ursuant to R. 1:10-3 holding John O'Connor and/or Harry Hodkinson in contempt" for allegedly violating the May 8, 2015 order. Plaintiff asked the trial judge to impose a monetary sanction upon the individual defendants and award him counsel fees and costs. Plaintiff also requested oral argument on the motion. Significantly, plaintiff did not seek to have the sale enjoined.

In a certification attached to the motion, plaintiff's attorney acknowledged that "[i]t is presently unknown whether O'Connor or Hodkinson, both of them, or someone else acting at their direction on behalf of H&H executed the contract, but whoever it was, is in contempt of the" May 8, 2015 order. The attorney also conceded that he did not have a copy of the contract of sale.[4]

H&H did not file a response to this motion, but defendants' attorney submitted a letter in opposition. The attorney pointed

[4] In his appendix on appeal, plaintiff has provided the first page of what purports to be an "agreement of sale" concerning the property. This document is undated and lists H&H, rather than the individual defendants, as the seller. The name of the purported buyer has been redacted and it is not known whether the agreement was signed by either defendant.

out that the property had not yet been sold and that although defendants were the two remaining principals in H&H, the LLC owned the property.

The judge did not conduct oral argument on the motion or a plenary hearing to resolve the factual disputes raised by the parties concerning the identity of the individuals or entities that were responsible for entering into an agreement of sale for the property. Instead, on February 26, 2016, the trial judge issued an order granting plaintiff's motion to hold defendants in contempt. The judge ordered each individual defendant to pay $250 to the court as a sanction, and to pay plaintiff's counsel fees and costs in connection with the motion.

In a one-page statement of reasons appended to the February 26, 2016 order, the trial judge stated:

> After a careful review of the submissions by both parties, the [c]ourt concludes that the execution of the sales contract for [the property] is a clear violation of this [c]ourt's [o]rder dated May 8, 2015. Pursuant to that [o]rder, [d]efendants . . . O'Connor, and Hodkinson were "restrained and barred from selling, mortgag[ing], renting, leasing, liening, hypothecating or in any manner whatsoever encumbering the property."
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> . . . .
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> Plaintiff argues that "O'Connor and Hodkinson have repeatedly demonstrated in the past and continue to demonstrate at present contempt for the process of this court and their self-

> interested disregard of court orders." I agree.

The trial judge's provided no further explanation for his ruling. Thus, the judge did not address the fact that he had previously approved the listing of the property for sale; the absence of an agreement of sale in the record before him; the fact that the property had not yet been sold; the role either individual defendant played in the alleged sale; or the lack of any objection by plaintiff to the sale of the property.

In a March 18, 2016 order, the trial judge determined the amount of the counsel fees and costs ($1580) defendants were required to pay plaintiff's attorney. Defendants then filed a notice of appeal to this court.

When defendants failed to pay the counsel fees to plaintiff's attorney within thirty days as required by the March 18, 2016 order, plaintiff filed another motion "pursuant to R. 1:10-3" to hold defendants in contempt. Plaintiff sought the imposition of additional monetary sanctions upon each individual defendant, and payment for the counsel fees and costs he incurred in the preparation of the motion. Plaintiff again requested oral argument on the motion.

In opposition to this motion, defendants' attorney submitted a certification pointing out that defendants had filed a notice

of appeal from the February 26, and March 18, 2016 orders. The attorney explained that he contacted the trial judge to seek a stay of the two orders pending appeal, but was advised that the judge had recently retired. Defendants' attorney then spoke to plaintiff's attorney to request his consent to the entry of a voluntary stay, but the attorney declined and, instead, filed the contempt motion. Under these circumstances, defendants' attorney argued that his clients had not willfully failed to comply with the two orders.

H&H's attorney also filed a certification in opposition to plaintiff's motion. The attorney asserted that H&H owned the property; was not a party to the litigation at the time the May 8, 2015 order was entered; and the property had not been sold.

A new trial judge was assigned to review the motion pleadings. Without conducting oral argument or a plenary hearing, the judge entered an order on June 21, 2016, granting plaintiff's motion to hold defendants in contempt of the February 26, and March 18, 2016 orders. The judge ordered each defendant to pay an additional $250 to the court and $411.25 in counsel fees and costs to plaintiff.

The trial judge made no specific findings of fact or conclusions of law in connection with this ruling. Instead, the judge merely wrote at the bottom of the order that he was granting

plaintiff's motion "for the reasons set forth in [p]laintiff's April 27, 2016 [c]ertification and May 23, 2016 reply brief." The judge did not mention any of the contentions raised by defendants and H&H. By leave granted, defendants later amended their notice of appeal to include the June 21, 2016 order.

Shortly thereafter, a third trial judge was assigned to the matter. On August 11, 2016, the judge granted H&H's motion to sell its property for $1.1 million and to distribute the proceeds. On August 19, 2016, the judge denied plaintiff's motion for yet another order holding defendants in contempt for failure to pay the amounts due under the February 26, March 18, and June 21, 2016 orders.[5]

On appeal, defendants contend that the trial judges' rulings are "not supported by the record" and "constitute an incorrect application of discretion[.]" We agree.

Plaintiff brought his two "contempt" motions against defendants under Rule 1:10-3, which, in pertinent part, provides that:

> [n]otwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action. A judge shall not

[5] In compliance with the August 19, 2016 order, defendants subsequently paid plaintiff all amounts due under the three orders, while reserving their right to have these funds returned if they are successful on appeal.

> be disqualified because he or she signed the order sought to be enforced. . . . The court in its discretion may make an allowance for counsel fees to be paid by any party to the action accorded relief under this rule.

"[A] proceeding to enforce litigants' rights under Rule 1:10-3 'is essentially a civil proceeding to coerce the defendant into compliance with the court's order for the benefit of the private litigant[.]'" Pasqua v. Council, 186 N.J. 127, 140 (2006) (quoting Essex Cty. Welfare Bd. v. Perkins, 133 N.J. Super. 189, 195 (App. Div.), certif. denied, 68 N.J. 161 (1975)). Thus, an application for relief under Rule 1:10-3 is distinguishable from "[a] criminal contempt proceeding under Rule 1:10-2[,]" which "is 'essentially criminal' in nature and is instituted for the purpose of punishing a defendant who fails to comply with a court order." Ibid. (quoting Essex Cty. Welfare Bd., supra, 133 N.J. Super. at 195). Accordingly, "[r]elief under R. 1:10-3, whether it be the imposition of incarceration or a sanction, is not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of the court order." Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997).

We review a trial court's imposition of sanctions against a litigant pursuant to Rule 1:10-3 under the abuse of discretion standard. Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011). "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.'" Ibid. (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)). Applying these principles, we are constrained to reverse all three orders sanctioning defendants under Rule 1:10-3.

We turn first to the February 26, 2016, and March 18, 2016 orders which sanctioned defendants $250 each for their "contempt" of the May 8, 2015 order barring the sale of H&H's property, and required them to pay plaintiff's attorney $1580 in counsel fees and costs. There was clearly insufficient evidence in the record to support the judge's finding that defendants, as opposed to H&H as a business entity represented by its own counsel, were individually or collectively responsible for the contract of sale. As plaintiff's attorney conceded in his certification supporting the motion, it was not known at that time whether either defendant "or someone else acting at their direction on behalf of H&H executed the contract[.]" In addition, the judge did not address defendants' contention that H&H was not bound by the May 8 order because the LLC was not even a party to the litigation at the time the order was entered.

Moreover, it is not clear on this record whether any willful violation of the May 8 order occurred as the result of the execution of a contract of sale. In this regard, the trial judge

specifically acknowledged that he had earlier approved a request by H&H to list the property for sale. Even so, the judge did not address this approval in his sparse written decision.

H&H's attorney also stated at the January 13, 2016 case management conference that she intended to file a motion with the court to permit the sale to proceed, which was in keeping with the literal terms of the May 8 order. Under these circumstances, there was insufficient evidence in the record to support a conclusion that either individual defendant willfully violated the order.

Finally, we again note that orders entered under Rule 1:10-3 are intended to be coercive, rather than punitive. Ridley, supra, 298 N.J. Super. at 381. Here, plaintiff never asked the trial judge to enjoin the sale of the property and the judge did not do so on his own motion. Instead, the orders merely imposed monetary sanctions upon defendants which, on their face, did nothing "to facilitate the enforcement of the [May 8, 2015] court order." Ibid. Therefore, we reverse the February 26, 2016, and March 18, 2016 orders.

For similar reasons, we also reverse the second trial judge's June 21, 2016 order imposing additional sanctions and counsel fees and costs after defendants failed to pay the initial assessments within thirty days. As explained in defendants' attorney's

certification in opposition to plaintiff's motion, defendants had filed an appeal to challenge the two earlier orders and were in the process of seeking a stay pending that appeal when plaintiff filed another Rule 1:10-3 application. Under these circumstances, we are unable to conclude that defendants' delay in paying the sanctions was willfully contemptuous.

Significantly, the trial judge who handled this application never made such a finding. Indeed, rather than expressly setting forth the facts which led to his decision, the judge merely stated that he was granting the motion for the reasons set forth in plaintiff's pleadings. Such an approach does not constitute adequate fact finding. In In re Trust Created by Agreement Dated Dec. 20, 1961, 399 N.J. Super. 237, 253-54 (App. Div. 2006), aff'd, 194 N.J. 276 (2008), we held that a trial judge may grant or deny a motion for the reasons posited by the parties only if "the judge makes such reliance explicit"; makes "clear the extent of his [or her] agreement with and reliance on [the] proposed findings of fact and conclusions of law"; and "supplie[s] a summary of his [or her] findings in [the] . . . opinion" that clearly demonstrates "that the trial judge carefully considered the evidentiary record and did not abdicate his [or her] decision-making responsibility." Therefore, the June 21, 2016 order must also be reversed.

Reversed.