SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3911-15T1

SUMMIT RESOURCES GROUP, INC.,

Plaintiff-Appellant,

v.

MERCER GROUP INTERNATIONAL OF NEW JERSEY, INC.[1] and FAIRLESS IRON & METAL, LLC,

Defendants-Respondents,

and

SIMS METAL MANAGEMENT, LLC, and SIMS METAL EAST, LLC,

Defendants.

Argued May 18, 2017 – Decided July 10, 2017

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1430-13.

Michael Confusione argued the cause for appellant (Hegge & Confusione, LLC, attorneys; Mr. Confusione, of counsel and on the briefs).

[1] Improperly pled as Mercer Group International.

Lewis J. Pepperman argued the cause for respondents (Stark & Stark, attorneys; Bryan M. Buffalino, of counsel and on the brief).

PER CURIAM

Plaintiff Summit Resources Group, Inc. (Summit) appeals from a February 22, 2016 Law Division order granting partial summary judgment in favor of defendants Mercer Group International of New Jersey, Inc. (Mercer) and Fairless Iron & Metal, LLC (Fairless). Summit also appeals from an April 15, 2016 Law Division order granting defendants' motion for reconsideration and dismissing Summit's complaint in its entirety. This dispute arose from a contract between Summit and Mercer, which guaranteed Summit commission payments from an arrangement it brokered between Mercer and a third party for the delivery of scrap metals. For the reasons that follow, we reject Summit's arguments and affirm.

I.

We discern the following facts from the record, viewed in the light most favorable to Summit, the non-moving party. See Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405-06 (2014). Summit is a broker that identifies sources of steel and other metals and markets the products to buyers. Through its owner, E. Dennis Matecun, Jr., Summit developed a relationship with Covanta Energy Corporation (Covanta). Covanta's business involves converting

municipal solid waste into renewable energy and removing certain metals in the process.

According to Thomas Mazza, an officer of both Mercer and Fairless, Mercer is a New Jersey corporation that "owns and operates a solid waste, construction and demolition debris, and materials recovery facility/transfer station in Trenton." Prior to 2007, Mercer was engaged in the business of scrap metal recycling and processing. Mercer transitioned this business to Fairless, its affiliate, sometime in early 2007. Fairless also engaged in the business of scrap metal recycling from October 2006 to July 2009.

In 2006, Matecun discussed a business opportunity with Mazza where defendants would purchase scrap metal from Covanta. Covanta requested Summit structure the contracts for sale to ensure they were between Covanta and Mercer or Fairless, with Summit receiving commission as the broker.

On October 25, 2006, Matecun sent Mazza a one-page document titled "Commission Agreement for Municipal Scrap and White Goods/Misc. Scrap" (Commission Agreement). After making hand-written alterations, Mazza returned the signed document to Summit. The Commission Agreement stated as follows, in relevant part:

> Tom [Mazza] – I'm writing to confirm our commission agreement for Summit Resources Group for the Covanta Energy scrap metal that you've been awarded, and eventually for

additional facilities such as Union and Newark when we succeed in getting them:

- Summit Resources Group will receive a fee of $5 per gross ton U.S. funds from Mercer beginning November 1st, 2006, for each ton of raw material . . . shipped from Covanta's Delaware Valley and Hempstead plants to/through your companies.

- The commission will be paid once monthly, on or before the 15th of the month for all scrap shipped during the previous month . . . .

- This relationship between Mercer and Summit regarding commission/consulting for these plants will last as long as Mercer, their related companies, or any purchaser of Mercer or related companies receives scrap metal from these plants.

- Sale of Mercer, or sale/transfer of these scrap accounts by Mercer does NOT void the above commission agreement/fees.

Between November 1, 2006, and August 1, 2007, Covanta awarded Fairless five separate contracts for the purchase of Ferrous Materials from Covanta plants (Covanta Contracts). Fairless paid commissions to Summit of $5 per gross ton for four of these contracts, as required by the Commission Agreement. For the fifth contract, Fairless paid Summit $3 per gross ton. Fairless continued to pay commissions to Summit through the beginning of 2009.

However, on July 2, 2009, Fairless entered into an "Asset Purchase Agreement" (APA) with Simsmetal East, LLC (Sims), a Delaware company engaged in the scrap metal business. Sims agreed to purchase certain assets from Fairless, and the agreement listed Sims as the "Purchaser." As part of this transaction, Sims employed Mazza as a "general manager" beginning on or about July 2, where he remained until May 2, 2013. Defendants assert that following this sale, Fairless continued to exist as an entity, but it ceased all scrap recycling operations.

The APA contained a section titled "Certain Included Contracts," which listed the contracts Fairless was assigning to Sims. The Covanta Contracts were initially included in this section; however, according to Mazza, they were removed from the APA in August 2009. Instead, Sims and Covanta executed "new" agreements, beginning October 1, 2009, whereby Covanta agreed to sell scrap metal to Sims. Summit disputes whether these agreements constituted "new" contracts, claiming the parties simply changed the name on the existing Covanta Contracts from Fairless to Sims. Fairless disclosed the Commission Agreement to Sims prior to the asset sale, but the parties did not list it as an included contract in the APA.

Following the execution of the APA in July 2009, Fairless ceased purchasing scrap metal from Covanta. On July 11, 2009,

Mazza informed Matecun the Commission Agreement was no longer in effect, and Fairless no longer existed. Instead, Sims purchased over 400,000 tons of scrap metal from Covanta beginning in July 2009, for which Summit did not receive commissions.

In 2013, Summit filed a complaint against Mercer, Fairless, and Sims, asserting in count one that defendants breached the Commission Agreement by failing to pay commissions owed to Summit. In counts two through five, Summit alleged wrongful interference with contract, unjust enrichment, and sought a declaratory judgment stating the Commission Agreement remained valid and binding.

In October 2013, Summit and Sims entered into a stipulation of dismissal, whereby Summit dismissed its suit against Sims without prejudice. In 2015, Mercer and Fairless filed a motion for summary judgment, contending that under the Commission Agreement, Sims was not a "purchaser" of Fairless, a "related compan[y]" of Mercer, because Sims only purchased certain assets from Fairless. As these assets did not include the Commission Agreement or Covanta Contracts, and defendants ceased receiving scrap shipments in July 2009, the Commission Agreement effectively terminated in July 2009 following the asset sale. In response, Summit contended Sims fell within the definition of "purchaser" due to its acquisition of Fairless' assets. Summit further argued

that at a minimum, this provision was ambiguous, requiring resolution by a jury to determine what the parties meant by "purchaser." Summit pointed to the APA and a 2010 indemnity agreement between Sims and Fairless, both of which identified Sims as the "Purchaser."

On January 8, 2016, after oral argument, the motion judge dismissed counts two through five of Summit's complaint and granted partial summary judgment on count one in favor of defendants. On count one, the judge found that because Sims only purchased the assets of Fairless and not the entity, "Sims [was] not a purchaser of Mercer or Fairless as the term purchaser was used in the [Commission Agreement,] and [d]efendants therefore are not liable for commissions on scrap metal purchased by Sims."

The judge denied full summary judgment, however, because he found an issue of fact as to whether defendants purchased scrap metal from Covanta from July 2009 to December 2009. This issue arose because Covanta erroneously credited certain payments from Sims as being from Fairless. Defendants moved for reconsideration and provided documents showing Fairless did not pay Covanta for scrap metal after July 2009. Summit did not dispute the new documentation but reiterated its opposition to summary judgment.

The motion judge then granted reconsideration and dismissed Summit's complaint in its entirety. This appeal followed.

II.

We "review the trial court's grant of summary judgment de novo under the same standard as the trial court," and we accord "no special deference to the legal determinations of the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Pursuant to this standard, we must grant summary judgment "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." Ibid. (quoting R. 4:46-2(c)).

If no genuine issue of material fact is present, we focus our review on the legal interpretations of the trial judge. DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). Contractual interpretation is a legal matter ordinarily suitable for resolution on summary judgment. Celanese Ltd. v. Essex Cty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009). "When a trial court's decision turns on its construction of a

contract, appellate review of that determination is de novo." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014).

We are obligated to read contracts "as a whole in a fair and common sense manner." Id. at 118 (quoting Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009)). "The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 492 (App. Div.), certif. denied, 127 N.J. 548 (1991). Our review focuses upon "the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain." Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 339 (App. Div.) (quoting Biovail Corp. Int'l v. Hoechst Aktiengesellschaft, 49 F. Supp. 2d 750, 774 (D.N.J. 1999)), certif. denied, 188 N.J. 353 (2006).

If a contract can be construed according to its plain language, then that language governs. Twp. of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 74-75 (App. Div. 2011). "However, 'where there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation, then the doubtful provision should be left to the jury.'" Driscoll Constr. Co.,

Inc. v. State, 371 N.J. Super. 304, 314 (App. Div. 2004) (quoting Great Atl. & Pac. Tea Co., Inc. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000)). Ambiguity exists where the terms "are susceptible to at least two reasonable alternative interpretations." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002) (quoting Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997)). Nonetheless, we construe ambiguous provisions against the drafter of the contract. Kotkin v. Aronson, 175 N.J. 453, 455 (2003).

Summit urges reversal, arguing the motion judge erred as a matter of law because the plain language of the Commission Agreement required defendants to continue paying commission to Summit. Summit further contends even if the Commission Agreement was not clear and unambiguous in favor of its position, it was not clear and unambiguous in favor of defendants; therefore, we should remand for a jury determination. Essentially, Summit contends the Commission Agreement guaranteed it commission from Mercer so long as Sims, as a "purchaser" of Fairless, received scrap metals from Covanta.

In support of this position, Summit argues that contrary to the motion judge's determination, Sims was a "purchaser" of Fairless as defined in the third bullet point of the Commission Agreement. Summit contends the motion judge erred because the

Commission Agreement does not distinguish between "a sale of Fairless the company" and "a sale of Fairless' assets." Summit further asserts that the reference to "your companies" in the first bullet point included asset purchasers such as Sims, especially here, where Sims "simply continued carrying on Fairless' business." Last, Summit argues the language from the fourth bullet point, "Sale of Mercer, or sale/transfer of these scrap accounts by Mercer does NOT void the above commission agreement/fees," shows defendants were bound to continue commission payments to Summit after the Fairless sale.

Having reviewed the language of the Commission Agreement, we reject Summit's arguments and affirm. First, we have noted that selling a "company" as opposed to its "assets" are two different concepts. See Woodrick v. Jack J. Burke Real Estate, Inc., 306 N.J. Super. 61, 74 (App. Div. 1997) ("[T]he crucial inquiry is whether there was an intent on the part of the contracting parties to effectuate a merger or consolidation rather than a sale of assets." (quoting Glynwed, Inc. v. Plastimatic, Inc., 869 F. Supp. 265, 276 (D.N.J. 1994))), appeal dismissed, 157 N.J. 537 (1998). Summit argues the absence of this distinction shows the parties intended the phrase "purchaser" to cover both types of transactions. However, construing the contract against Summit as the drafter, we find Summit's failure to make this distinction

fatal to its argument. See Kotkin, supra, 175 N.J. at 455. The motion judge did not err by concluding, because the asset sale did not qualify Sims as a "purchaser of Mercer or related companies," the relationship between defendants and Summit had terminated.

We further find the clear language from the first bullet point of the Commission Agreement defeats Summit's argument. This section guaranteed Summit a fee from Mercer "for each ton of raw material . . . shipped from Covanta's Delaware Valley and Hempstead plants to/through your companies." Contrary to Summit's claims, no reasonable construction of this agreement could define Sims as one of Mercer's "companies." As such, once Sims began receiving scrap metal from Covanta instead of Fairless,[2] defendants were no longer bound to pay commission fees to Summit.

For similar reasons, we reject Summit's argument that the fourth bullet point is dispositive. This provision stated that a "[s]ale of Mercer" does not void the agreement, but that did not occur here. Furthermore, while it also stated a "sale/transfer of these scrap accounts" would not void the Agreement, it is clear that, after the APA, neither Mercer companies nor a "purchaser of Mercer or related companies" continued to receive scrap metal.

[2] Sims utilized Fairless' recycling operating system for a transition period following the closing of the asset sale. However, Sims paid for these purchases from Covanta.

Therefore, we agree with the motion judge that the Commission Agreement was no longer in effect after July 2009.

Finally, as noted by the motion judge in his oral decision, Summit's position is "inequitable" because it would require defendants to pay Summit commission for scrap metal they no longer receive, for the indefinite period Sims and Covanta choose to maintain their relationship. "Perpetual contractual performance is not favored in the law and is to be avoided unless there is a clear manifestation that the parties intended it." In re Estate of Miller, 90 N.J. 210, 218 (1982). Because we find parties did not clearly intend such a result, we discern no basis to disturb the decision of the motion judge.

III.

Summit also argues defendants breached the covenant of good faith and fair dealing implied in the Commission Agreement by endeavoring to prevent Sims from adopting the Covanta Contracts from Fairless. We find this argument lacks merit.

"[E]very contract in New Jersey contains an implied covenant of good faith and fair dealing . . . ." Wood v. N.J. Mfrs. Ins. Co., 206 N.J. 562, 577 (2011) (quoting Kaloqeras v. 239 Broad Ave., L.L.C., 202 N.J. 349, 366 (2010)). Under this doctrine, "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the

fruits of the contract." Ibid. (quoting Kalogeras, supra, 202 N.J. at 366). The covenant "cannot override an express term in a contract," but "a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term." Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001).

Summit's argument stems from a series of emails between Mazza and another Sims manager regarding Sims' decision not to adopt the Covanta Contracts from Fairless, and an affidavit from a Covanta manager stating Covanta did not believe it entered into "new" contracts with Sims. Summit contends the evidence shows Mazza "concocted a scheme to make it appear that the Covanta Contracts were not transferred to Sims[]." Summit alleges that by pursuing this action, a jury could find Mazza "was attempting to destroy Summit's right to receive the full fruits under the Commission agreement."

However, as Summit admits in its brief, "whether the Covanta Contracts were included in Sims' purchase of Fairless . . . does not affect whether the Mercer [d]efendants remain liable for commission payment to Sims. Mercer's liability for commissions hinges only on whether Sims is a 'purchaser' of Fairless under the [Commission] Agreement." Therefore, by Summit's own admission, Mazza's actions would not have impaired Summit's right to enjoy

the "fruits" of the Commission Agreement. Wood, supra, 206 N.J. at 577. Summit's claim for breach of good faith and fair dealing against defendants thus lacks merit.

Affirmed.