SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4879-15T4

LODI MAURO,

Plaintiff-Respondent,

v.

SEABOARD PAPER AND TWINE, LLC,

Defendant-Appellant.

Argued November 9, 2017 – Decided December 6, 2017

Before Judges Koblitz and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-0557-15.

Mark R. Faro argued the cause for appellant (Piekarsky & Associates, LLC, attorneys; Scott B. Piekarsky, of counsel and on the brief; Mr. Faro, on the brief).

Robert S. Snellings argued the cause for respondent (Snellings Law, LLC, attorneys; Mr. Snellings, on the brief).

PER CURIAM

Defendant Seaboard Paper and Twine, LLC (Seaboard), appeals from an order granting summary judgment in favor of plaintiff Lodi Mauro (Mauro). We affirm.

From our review of the record, we discern the following facts. Since 2006, Mauro sold twine products to Seaboard. In December 2013, Mauro delivered and Seaboard accepted at its business location in Paterson, New Jersey, a shipment of twine with an agreed-upon invoice amount of $99,528.62. Partial payment was made by Seaboard in the amount of $40,528.62. Seaboard advised Mauro that the remaining balance would be paid upon the continuation of the exclusive sales agreement between the parties. Seaboard acknowledged receipt of the goods and confirmed the goods were not defective nor returned or revoked. Credit was given to Seaboard for all payments, counterclaims and set-offs, leaving a remaining balance of $59,000.

In February 2015, Mauro filed a complaint against Seaboard. Seven months later, Seaboard filed an answer, which did not include a counterclaim or affirmative defenses.

The original discovery end date (DED) was March 27, 2016. By order dated February 19, 2016, the DED was extended to May 26, 2016. The order required that depositions of expert parties be conducted by April 30, 2016, and depositions of the parties be

completed by May 10, 2016. Approximately a month prior to the DED, Mauro filed a motion for summary judgment.

Seaboard retained new counsel on May 5, 2016. Two weeks later, Mauro's counsel received a notice to take oral deposition of Mauro on May 26, 2016. Mauro's counsel asserted that this notice was in violation of Rule 4:14-2, and that Seaboard also failed to comply with the May 10, 2016 deadline for party depositions mandated by the February 19, 2016 order. Seaboard did not move to extend the discovery period.

After oral argument, an order was entered granting judgment in favor of Mauro in the amount of $59,000 plus costs. This appeal followed.

On appeal, Seaboard raises the following points:

> [POINT I]
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> SUMMARY JUDGMENT WAS INAPPROPRIATE DUE TO INCOMPLETE DISCOVERY.
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> [POINT II]
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> SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE THE PLAINTIFF HAD UNCLEAN HANDS.
>
> [POINT III]
>
> SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE THE PLAINTIFF BREACHED THE COVENANT OF GOOD FAITH [AND] FAIR DEALING.

Summary judgment is appropriate when "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." R. 4:46-2(c). Under this rule, "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid.; see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts[,]" Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (quoting Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3rd Cir. 1992), cert. denied, 507 U.S. 912, 113 S. Ct. 1262, 122 L. Ed. 2d 659 (1993)), as "[c]ompetent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (quoting Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div.), certif. granted, 183 N.J. 592 (2005)).

This court "employ[s] the same standard that governs trial courts in reviewing summary judgment orders." Prudential Prop. &

Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); Paff v. Div. of Law, 412 N.J. Super. 140, 149 (App. Div. 2010). In doing so, "we consider whether there are any material factual disputes and, if not, whether the fact viewed in the light most favorable to the non-moving party would permit a decision in that party's favor on the underlying issue." Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007). Accordingly, "[o]ur review of the trial court's grant of summary judgment is de novo." N.J. Div. of Taxation v. Selective Ins. Co. of Am., 399 N.J. Super. 315, 322 (App. Div. 2008); Chance v. McCann, 405 N.J. Super. 547, 569 (App. Div. 2009).

Having reviewed the motion record de novo, we are satisfied that the grant of summary judgment in favor of Mauro was proper. Pursuant to the New Jersey Uniform Commercial Code (UCC), a buyer "must pay at the contract rate for any goods accepted." N.J.S.A. 12A:2-607(1). In this case, there is no dispute that Mauro delivered goods to Seaboard and that Seaboard accepted those goods in accordance with the parties' agreement. Seaboard admitted there was no problem with the goods, the shipment had an agreed-upon invoice, and it made partial payment. As Seaboard accepted the goods from Mauro, Seaboard was obligated to pay the contract price for the accepted goods. Ibid.

In addition, we are satisfied that Seaboard's late bid to defeat Mauro's claim for payment based on unpled defenses and an unsupported claim of an oral agreement between the parties was without basis and appropriately rejected by the judge. We have held that a question of material fact sufficient to defeat a motion for summary judgment is not created by the private intent of a party to a contract regarding the interpretation of the contract. See Domanske v. Rapid-American Corp., 330 N.J. Super. 241, 247-48 (App. Div. 2000). We have also held that a party's self-serving assertion alone does not create a material fact. See Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002).

As well, we find no merit to Seaboard's argument that outstanding discovery would have changed the outcome of the motion. "Generally, summary judgment is inappropriate prior to the completion of discovery." Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003); see also, e.g., Crippen v. Cent. Jersey Concrete Pipe Co., 176 N.J. 397, 409-10 (2003); Laidlow v. Hariton Mach. Co., 170 N.J. 602, 619-20 (2002). Indeed, "[w]hen 'critical facts are peculiarly within the moving party's knowledge,' it is especially inappropriate to grant summary judgment when discovery is incomplete." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988) (quoting Martin v. Educ. Testing Serv., Inc., 179 N.J.

Super. 317, 326 (Ch. Div. 1981)); see Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2001). But, a party opposing summary judgment based on incomplete discovery must nonetheless establish, "with some degree of particularity [,] the likelihood that further discovery will supply the missing elements of the cause of action or defense." Wellington, supra, 359 N.J. Super. at 496 (quoting Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977)).

The incomplete discovery, as Seaboard's counsel acknowledged during oral argument before this court, was the deposition of a principal of Mauro who might confirm the existence of the oral exclusivity agreement. Yet, as counsel also acknowledged, nothing in the discovery record would indicate or even suggest that this "admission" would occur at the deposition. To the contrary, Mauro denied the existence of such an agreement throughout the pendency of this matter and Seaboard offered no corroborative proof of the oral agreement's existence in refutation of Mauro's denial.

Further, if the discovery period has ended and the standard for re-opening discovery has not been satisfied, summary judgment may be granted even if the opposing party claims that additional discovery will provide evidence to demonstrate a disputed issue of fact. See Schettino v. Roizman Dev., 310 N.J. Super. 159, 165 (App. Div. 1998), aff'd, 158 N.J. 476 (1999). Here, the discovery

period ended on May 26, 2016, and Seaboard did not move to extend discovery.

Affirmed.