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TULI REALTY, LLC, Plaintiff, v. TOWER SARON TWO 2015, LLC Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET No. C-105-18

OPINION

Argued: November 9, 2018
Decided: November 13, 2018

Appearances: Paul Bishop, (Brach Eichler, LLC, attorneys) for plaintiff
Michael Scully, (Law Offices of Michael R. Scully, LLC, attorneys) for defendants

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HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the court by way of Motion for Summary Judgment, filed by Brach Eichler LLC, attorneys for Plaintiff Tuli Realty, LLC ("Plaintiff") on September 14, 2018. Defendant Tower Saron Two 2015, LLC (Defendant"), by and through its attorneys Michael R. Scully, LLC, filed a Cross Motion for partial summary judgment, as well as opposition to Plaintiff's motion, on October 16, 2018.

BACKGROUND

The underlying dispute stems from the purported termination of a Sale, Purchase and Escrow Agreement (the "Agreement") for the purchase of 34 State Street, Teaneck, New Jersey (the "Property"). The parties entered into the Agreement for the purchase of the Property on January 26,

2018. Counsel Cert., Ex. A, ¶ 3. Pursuant to the execution of the Agreement, Plaintiff delivered a $250,000.00 security deposit to be held in escrow by Chicago Title Insurance as security for the $6,150,000.00 transaction. See id. at ¶ 2-4.

The essential component of the Agreement pertinent to the dispute before the Court pertains to §5.3.2, which permits Plaintiff thirty (30) days from the effective date to "notify [Defendant] that, as a result of the Purchaser's review of title, survey and *environmental matters related to the Property*, it disapproves of any such matter affecting the Property and terminates this Agreement." Id. at § 5.3.2. (emphasis added).

Plaintiff hired Supreme Energy, Inc. to inspect the boiler room of the Property on February 14, 2018, during which time Supreme Energy observed and reported a "non-functioning/abandoned boiler that appears to be lined with asbestos." See Defendant's Counter-Statement of Material Undisputed Facts, at ¶ 7-9. The parties then exchanged a series of letters on February 14, 15, and 19 of 2018 regarding Plaintiff's dissatisfaction with Supreme Energy Inc.'s findings, at which point Plaintiff purportedly exercised its right to terminate the contract due to environmental matters related to the Property under the Agreement.

On March 20, 2018 and April 4, 2018, Defendant filed Notifications of Asbestos Abatement for work to be performed on "boiler insulation." Counsel Cert. Ex. C and D. The boiler of interest was subsequently removed and the Property eventually sold to a third party on or around June 15, 2018 for $6,150,000.00, identical to the purchase price in the Agreement. Id. at ¶ 20-21.

The matter now comes before the Court on dueling summary judgment motions to determine whether Supreme Energy Inc.'s identification of the alleged asbestos on February 14th, 2018 was sufficient to definitively find that Defendant had breached the agreement as to environmental matters

related to the property, and whether Plaintiff properly exercised its right to terminate under the Agreement.

LEGAL STANDARD

Summary judgment is designed to "avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). Thus, the court shall grant a summary judgment motion "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . 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." N.J.S.A. 4:46-2(c).

In order to satisfy its burden of proof on a summary judgment motion, the moving party must show that no genuine issue of material facts exists. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528–29 (1995). Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. Ibid. The non-moving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014). Instead, the non-moving party must respond with affidavits meeting the requirements of R. 1:6-6 as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial.

In determining whether the existence of a genuine issue of material fact precludes summary judgment, 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 fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. Even if there is a denial of essential fact, the court should grant a motion for summary judgment if the rest of the record, viewed most favorably to the party opposing the motion,

demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399–400 (App. Div. 1972).

THE ASBESTOS

Plaintiff argues that the identification of what *appeared* to be asbestos, coupled with proper *notice* to the seller pursuant to the Agreement, was sufficient to properly terminate the Agreement and return Plaintiff's $250,000.00 security deposit. Both Defendant's moving papers and oral argument leaned heavily on the fact that Plaintiff never undertook any specific testing procedure to definitively prove the substance in question was asbestos. That argument – although well-crafted and thorough – was misplaced in relation to the Agreement in question. As outlined below, the facts before the Court demonstrate a clear and uncontroverted existence of an "environmental matter" entitling Plaintiff to termination of the Agreement.

As an initial matter, the Agreement in question does *not* mandate the presence of any specific hazardous condition. Nor does the Agreement require any specific testing mechanism or definitive proof of the substance in question. The Court recognizes that this contractual language is both weak and clearly unfavorable to any seller of real property. Yet, it is "not the function of the court to make a better contract for the parties, or to supply terms that have not been agreed upon." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999). Similarly, "if the terms of a contract are *clear*, [courts] must enforce the contract *as written*, and *not make a better contract* for either party." Id. What Defendant really seeks here is for the Court to make a more favorable contract with more strict provisions.

As written, the Agreement did not contractually obligate Plaintiff to conduct any testing or further analysis of the Property. The Agreement only required Plaintiff to "review" the property. See Tuli Cert. Ex. A. ¶ 5.3.2. Plaintiff was then contractually authorized to terminate the Agreement

– with appropriate notice – upon the disapproval of any "environmental matter related to the Property." Id. So long as notice of the unsatisfactory condition was received within thirty (30) days, Plaintiff was entitled to the return of its security deposit. Id.

It is uncontroverted to this Court that an environmental matter worthy of Plaintiff's reasonable disapproval was present at the February 14, 2018 inspection of the Property. It is also clear that not only was Plaintiff concerned about the abandoned boiler containing asbestos wrap, but in fact, Defendant was as well. Defendant solidified the presence of an obvious "environmental matter" by filing several public documents with the State identifying the asbestos-wrapped boiler and acknowledging the need for abatement. Counsel Cert. Ex. C and D. Moreover, Defendant *actually engaged in asbestos abatement* on the boiler and has produced documentation, which has been reviewed by Defendant's own expert that states that 500 bags of friable asbestos was removed from the Property. Reply Cert. Ex. A. Defendant's own expert further noted that "[t]he well-practiced industry standard of care is if you cannot prove the negative, you must presume [asbestos containing materials.]" Wasserman Cert. ¶ 14.

Although the Court will not go so far as Plaintiff to label Defendant's contention as a "sham" designed to create an issue of fact, the Court is not convinced that Defendant's assertion provides any formidable defense whatsoever. A clear environmental matter existed that posed concern to Plaintiff. That environmental matter was then subsequently remediated by Plaintiff in order to quickly turn around and re-sell the property to a new buyer for the same exact price as the original contract with Plaintiff - $6,150,000.00. Surely if no environmental matter was in fact present, Defendant would not have publicly filed documents seeking asbestos abatement prior to re-selling the property to a new buyer. The case law is clear that Plaintiff "cannot create an issue of fact simply by raising arguments contradicting his own prior statements and *representations*." Mosior v. Ins.

Co. of N. Am., 193 N.J. Super. 190, 195 (App. Div. 1984). There is no genuine dispute of material fact that Plaintiff was entitled to terminate the Agreement, and is therefore entitled to the return of its $250,000.00 security deposit.

ATTORNEYS FEES

Plaintiff argues that it is entitled to receipt of its attorneys' fees and costs for being forced to file a lawsuit against Defendant for return of the Deposit. Specifically, § 16.5 of the Agreement provides:

Attorneys' Fees. Should any party hereto employ an attorney for the purpose of *enforcing* or construing this Agreement, or any judgment based on this Agreement, in any legal proceeding whatsoever, including insolvency, bankruptcy, arbitration, declaratory relief or other litigation, the *prevailing party* shall be entitled to receive from the other party or parties thereto *reimbursement for all reasonable attorneys' fees and all costs*, whether incurred at trial or appellate level, including but not limited to service of process, filing fees, court and court reporter costs, investigative costs, expert witness fees and the cost of any bonds, whether taxable or not, and such reimbursement shall be included in any judgment, decree or final order issued in that proceeding. The "prevailing party" means the part in whose favor a judgment, decree or final order is rendered. § 16.5 of the Agreement

Here, it is uncontroverted that Plaintiff is entitled to reimbursement of its reasonable attorney's fees and costs. Plaintiff was required to bring this lawsuit in order to enforce its rights under the Agreement, and has obviously obtained a favorable final judgment based on the outcome of this summary judgment motion.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is granted in its entirety. Plaintiff is entitled to the return of its $250,000.00 security deposit, as well as reasonable

attorney's fees and costs pursuant to the litigation of this claim. Further, Defendant's Cross-Motion for Summary Judgment is denied in its entirety. An Order accompanies this decision.