SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0402-16T3

ART RESOURCES, LLC,

Plaintiff-Appellant,

v.

HARTZ CARPET II LIMITED PARTNERSHIP,

Defendant-Respondent.

HARTZ MOUNTAIN ASSOCIATES,

Plaintiff-Respondent,

v.

ART RESOURCES, LLC,

Defendant-Appellant.

Argued January 22, 2018 – Decided June 4, 2018

Before Judges Sabatino, Ostrer, and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket Nos., L-5766-13 and L-5349-13.

Walter J. Fleischer, Jr. argued the cause for appellant (Drinker Biddle & Reath, LLP,

attorneys; Walter J. Fleischer, Jr., on the briefs).

Joseph M. Aronds argued the cause for respondents (Horowitz, Rubino & Patton, attorneys; Joseph M. Aronds, of counsel and on the brief).

PER CURIAM

Plaintiff Art Resources, LLC, appeals from an August 25, 2016 judgment after a bench trial, where the trial court found for plaintiff on some counts, for defendant Hartz Mountain Associates/Hartz Carpet II Limited Partnership[1] on other counts, and reversed a prior finding of summary judgment. Because we find the trial judge did not give the parties notice he would be revisiting the issue previously decided by summary judgment, we reverse and remand for a new hearing on the issues of unlawful detainer and trespass, for a proper determination of rent due to Hartz, and for the consideration of the appropriate attorney's fees due.

I.

Art Resources operates a business selling high-end imported rugs wholesale. Hartz is a commercial landlord who owned and

[1] Hartz Mountain Associates is an affiliate of Hartz Carpet II Limited Partnership. For ease of reference, we refer to Art Resources, LLC as "Art Resources", and both Hartz organizations collectively as "Hartz."

leased Art Resources a space in its building at 100 Park Plaza Drive in Secaucus.

Beginning September 1, 2007, and expiring August 31, 2009, Art Resources and Hartz entered a two-year term lease; this was extended to end on August 31, 2013. In 2011, Hartz gave notice to their tenants they intended to repurpose the building; in 2013 Art Resources considered various locations but struggled to find one suitable for its uses.

Hartz began seeking bids for demolition of the building in July 2013, with the goal to have the work completed before December 1, 2013. Interior demolition began in August 2013.

On July 24, 2013, Hartz terminated Art Resources' lease by issuing a notice to quit and demand for possession. In August 2013, Hartz representatives informed Art Resources it was in default and that it owed unpaid rent, fees, and costs.

Hartz sent a general letter on August 14, 2013 to all tenants, offering to relocate any who had not yet found a new location. It offered space at its other building, 50 Enterprise Avenue, free of charge through the end of September, provided that the tenant supplied its own security and signed a short-term lease.

According to an email dated August 22, 2013, the manager of Art Resources' store informed Hartz it might not be able to move out on time. In response, Hartz offered space at 50 Enterprise

Avenue; however, after Art Resources looked at the offered location and expressed interest, Hartz informed Art Resources the space was no longer free and offered a unit at 40 Enterprise Avenue instead.

In an email dated August 28, 2013 Art Resources indicated to Hartz it believed it was entitled to remain on the Park Plaza Drive property at a holdover rate of twice the rent, citing a clause in the lease. The next day, Art Resources emailed Hartz stating that the space at 40 Enterprise Avenue would not work for its purposes, due to the difficulty and high cost of security.

On August 31, 2013, Hartz locked Art Resources out of the building. There was no constable present, Hartz had not sought court approval before changing the locks, and had also padlocked the construction fence around the outside of the property.

On the morning of September 3, 2013, Art Resources' store manager and another employee went to the location, where a Hartz employee denied them access. On September 4, 2013, Art Resources sent Hartz a check for $9386.66, the amount Art Resources would owe as a holdover tenant into September; Hartz did not cash the check and instead returned it to Art Resources.

On September 6, 2013, Hartz moved Art Resources' inventory, including carpets, furniture, shelving, a laptop, and boxes, to 40 Enterprise Avenue and notified Art Resources it had done so. That same day, Art Resources filed a complaint and order to show

cause against Hartz, seeking a temporary restraining order to restore Art Resources to possession of the original leased premises.

On September 9, 2013, the parties appeared before a judge of the Chancery Division, who found Hartz had not given notice to Art Resources the inventory would be moved, and should not have locked Art Resources out without a hearing. The judge ordered defendant to restore the "status quo" and "restore [Art Resources] to whatever they had prior to [Hartz's] removal of the premises," and entered an order to show cause with temporary restraints.

On September 10, a Secaucus building inspector deemed the property unsafe, and issued a notice of unsafe structure. Later that day, Hartz requested a stay of the order from the day before. However, the judge viewed the inspection as a way to "runaround his order," stating, "[Art Resources is] entitled to a hearing. I have already determined that. If you don't agree with my decision, you appeal it. You don't go to the construction official and ask for an inspection." Despite this, he issued an order staying the previous decision, "on the condition that Hartz immediately provide appropriate and comparable premises to [Art Resources] at which [Art Resources] can operate its business without interruption." On September 16, 2013 Art Resources moved into the space at 40 Enterprise Avenue.

Art Resources filed a complaint on September 18, 2013, alleging breach of contract; illegal lockout; forcible entry and detainer; distraint of Art Resources' personal property; conversion; trespass; violation of N.J.S.A. 2A:18-72; breach of duty of good faith and fair dealing; and violation of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20.

On September 27, 2013, Hartz sent Art Resources a notice to quit and demand for possession of 40 Enterprise Avenue, requiring Art Resources to vacate the premises by October 31; Hartz also sent a letter seeking the October 2013 rent and utility payments for 40 Enterprise Avenue.

On October 7, 2013, Hartz Mountain Associates filed a complaint in the Special Civil Part for landlord/tenant matters, making no mention of any prior related court proceedings, seeking unpaid rent and utilities under "an oral agreement." On October 8, 2013, Hartz Carpet II Limited Partnership filed a complaint in the Special Civil Part for landlord/tenant matters, making no mention of related court proceedings, asserting Art Resources was a holdover tenant.

Art Resources vacated the premises at 40 Enterprise Avenue on November 1, 2013.

On November 15, 2013, Hartz Mountain Associates filed a complaint in the Law Division against Art Resources for unpaid rent owed for October 2013.

In December 2013, the court entered an order transferring the Chancery matter to the Law Division and dismissing the September 9 order to show cause with temporary restraints. It also issued an order vacating certain of Art Resources' claims for failure to state a claim. In January 2014, both Law Division matters were consolidated.

On May 1, 2015, the Law Division judge granted in part Art Resources' motion for summary judgment, finding against Hartz for breach of contract, illegal lock-out, and forcible entry. At the same time, the judge denied Hartz's motion for summary judgment in its entirety.

On October 13, 2015, after a bench trial, a different Law Division judge issued a written decision finding for Art Resources on breach of duty of good faith and fair dealing and the CFA claims. The judge found in favor of Hartz in its claim for unpaid rent for September 2013, and on the trespass claim, but also granted Art Resources credit for rent overpaid in the previous building.

Additionally, without any prior notice to the parties, the judge reversed the prior judge's summary judgment determination

in Art Resources' favor regarding the claim of forcible entry and detainer. Noting the previous judge had a limited record and opining that justice required a different result, he found the requisite threat of force was not present to allow a cause of action for forcible entry and detainer.

The judge entered judgment for Art Resources for compensatory damages, including treble damages under the CFA, plus attorney's fees and costs. Judgment was also entered in favor of Hartz in the amount of $9386.66 for unpaid rent covering the period of time Art Resources occupied the original premises pursuant to the order imposing temporary restraints.

Art Resources' motion for reconsideration was denied on October 29, 2015. On August 8, 2016, the court found Art Resources was entitled to $71,266.30 in attorney's fees and costs, out of the $422,036.50 requested. Final judgment for Art Resources was entered on August 25, 2016. This appeal followed.[2]

II.

Art Resources argues that by reversing the previous judge's grant of summary judgment on the forcible detainer claim without

[2] Hartz has already paid the judgment, and has not appealed. However, as the only "outcome could serve to increase but not to reduce the amount of the judgment," Art Resources is not barred from pursuing an appeal. Adolph Gottscho, Inc. v. American Marking Corp., 26 N.J. 229, 242 (1958).

warning the parties he might revisit the determination, the trial judge deprived it of the opportunity to argue against the reconsideration. We agree.

"It is well established that 'the trial court has the inherent power to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment.'" Lombardi v. Masso, 207 N.J. 517, 532 (2011) (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987)). Additionally, under Rule 4:42-2, "any order or form of decision which adjudicates fewer than all the claims as to all parties . . . shall be subject to revision at any time before the entry of final judgment." "[A] party's sense of finality upon summary judgment is just that -- a feeling unsupported by the notion of what is, in fact, interlocutory. Interlocutory orders are always subject to revision in the interests of justice." Lombardi, 207 N.J. at 535-36. Therefore, as a judge retains the power to revise an interlocutory order, the revision here was within the trial judge's authority.

However, parties must have a fair opportunity to be heard on the matter being reconsidered. Id. at 537. Unlike in Lombardi, where the judge initially warned all of the parties of his intentions to revisit a previously closed issue, and then held a

full hearing on the matter, 207 N.J. at 522, the judge here simply reversed the summary judgment order without indicating ahead of time that he might do so. Further, the judge here did not revisit the order of his own volition; he reversed at the urging of Hartz in a post-trial memorandum. While, presumably, Art Resources was aware Hartz had requested the judge to revisit the matter, the trial judge then never gave Art Resources any notification that he would be reconsidering the issue.

As such, the parties were not given a proper opportunity to be heard. Therefore, we reverse the finding on the forcible detainer issue and remand for the trial judge to hold a hearing where Art Resources has the opportunity to present evidence on the issue of forcible detainer under N.J.S.A. 2A:39-1.[3] Pending the outcome of this hearing, the issue of common law trespass should likewise be revisited.[4]

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[3] Because we reverse and remand for further proceedings, we do not address the propriety of the judge's application of N.J.S.A. 2A:39-1.

[4] The judge determined there was no trespass because (1) the violence required under in Mesgleski v. Oraboni, 330 N.J. Super. 10, 28 (App. Div. 2000), was not present; (2) Art Resources was a tenant at sufferance, thus excusing Hartz's actions; and (3) Art Resources was barred by the economic loss doctrine.

Based upon our review of the record we cannot determine whether the judge was correct. It is not clear that actual violence is an essential element of the tort of trespass,

Based on the same grounds set forth above, Art Resources argues the trial judge erred by denying its motion for reconsideration. Motions for reconsideration should not be used "merely because of dissatisfaction with a decision of the Court." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). A litigant must show the court acted in "an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." Ibid. "Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." Ibid. Here, as the judge erred by reversing the prior summary judgment finding without giving Art Resources the opportunity to be heard in opposition, we find the denial of reconsideration to Art was made on "a palpably incorrect or irrational basis," and

notwithstanding the rule as stated in Mesqleski. See Pinkowski v. Twp. of Montclair, 299 N.J. Super. 557 (App. Div. 1997) (citation omitted) (defining trespass as "the unauthorized entry onto another's property, real or personal"); see also Ross v. Lowitz, 222 N.J. 494, 510 (2015) (citation omitted) (defining trespass as "an intentional entry onto another's land, regardless of harm").

we reverse the denial of the motion for reconsideration on the issue of unlawful detainer.

III.

Art Resources argues the trial court erred by awarding Hartz damages on its counterclaim for rent accrued by Art Resources' stay at 40 Enterprise Avenue for the month of October 2013, and by finding against Art Resources on its trespass claim. This court applies a deferential standard to the review of "the findings and conclusions of a trial court following a bench trial" as the trial court "heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 228 N.J. 596, 619 (2017) (quoting Griepenburg v. Township of Ocean, 220 N.J. 239, 254 (2015)). "Reviewing appellate courts should not disturb the factual findings and legal conclusions of the trial judge unless convinced that those findings and conclusions were so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Ibid. (internal citations omitted).

Under a theory of quantum meruit, the trial judge found Hartz was entitled to payment for the unpaid rent. The judge took notice that "there was no lease negotiated for this space, and specific rent was not negotiated — although a rental obligation was

acknowledged by Art Resources' counsel in an October 1, 2014 letter."

"Quantum meruit is a form of quasi-contractual recovery and 'rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.'" Starkey v. Estate of Nicolaysen, 172 N.J. 60, 68 (2002) (quoting Weichert Co. Realtors v. Ryan, 128 N.J. 427, 437 (1992)). "To recover under a theory of quantum meruit, [Hartz] must establish: (1) the performance of services in good faith, (2) the acceptance of the services by [Art Resources], (3) an expectation of compensation therefor, and (4) the reasonable value of the services." Starkey, 172 N.J. at 68 (citations omitted). As a conclusion of law, a finding under the theory of quantum meruit is reviewed de novo by this court. Allstate Ins. Co, 228 N.J. at 619.

While the premises were delivered pursuant to a court order, it is undisputed that Hartz conferred upon Art Resources a benefit by providing access to 40 Enterprise Avenue from the middle of September through November 1, and that Art Resources accepted this benefit by making use of the premises during that time. It is also not irrational for Hartz to expect reasonable compensation from Art Resources during that time. While they had extended an offer to their tenants to provide space free of charge, this offer

was only to last through the end of September, and was contingent on the tenant supplying their own security and signing a short-term lease.

In calculating the "reasonable value of the services," the trial court reasoned "if Art Resources had been restored to the [original premises] and since the lease had been terminated, . . . equity (and the express terms of the lease) would require a payment of double the fixed rent or $9386.66." However, this requirement would have been pursuant to the lease applicable to the original premises, which Hartz locked them out of. As the judge noted, there was no lease or agreed-upon rental payment for 40 Enterprise Avenue. As such, the "reasonable value" of the services should have been the reasonable monthly rental value for that space at that time, not a contractually agreed-upon holdover rate for an entirely different location. Therefore, we reverse the trial judge's award of $9386.66 to Hartz, and remand for a determination of the proper rental value for the space in October 2013. As stated previously, in Section II, supra, the trespass claim should be revisited as well.

IV.

Art Resources argues the trial judge erred by reducing its requested legal fees. "[F]ee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because

of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). A court abuses its discretion "when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (citation omitted).

"The starting point in awarding attorneys' fees is the determination of the 'lodestar,' which equals the 'number of hours reasonably expended multiplied by a reasonable hourly rate.' Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004) (quoting Rendine, 141 N.J. at 335). In considering the rate submitted, the court should look to the prevailing market rate in the community and ensure the rate is "fair, realistic, and accurate, and should make appropriate adjustments." Rendine, 141 N.J. at 337. Further, under the New Jersey Rules of Professional Conduct, "[a] lawyer's fee shall be reasonable," and shall be determined by the consideration of a number of factors. Rules of Professional Conduct, (RPC) 1.5(a).

The court here undertook a full analysis of the fee application submitted by Art Resources, and determined a reasonable rate in light of the prevailing market rates in the community. It then determined that a number of hours spent by Art Resources' attorneys were "excessive, unnecessary, or duplicative"

and eliminated them from consideration. There has been no showing that this was an abuse of discretion. See Furst, 182 N.J. at 22 ("The court must not include excessive and unnecessary hours spend on the case in calculating the lodestar.") (citations omitted). Lastly, the trial court determined that since, out of the nine claims brought to trial, Art Resources prevailed on only three, or one-third, it was reasonable to decrease the lodestar accordingly, and granted Art Resources one-third of their requested fees, plus costs. This too, was not an abuse of discretion. See ibid. ("[A] trial court should decrease the lodestar if the prevailing party achieved limited success in relation to the relief he had sought.") (citations omitted).

On its face, we see no reason to disturb the trial court's award of attorney's fees. However, our determination that the unlawful detainer, trespass, and reimbursement of rent claims must be revisited may necessitate a new look at the attorney's fees, as it would change the level of "success in relation to the relief . . . sought." Ibid.

Given the deferential standard applied by this court, the remainder of the issues Art Resources raises on appeal do not warrant reversal, or discussion in a written opinion, as they are supported by sufficient credible evidence in the record. R. 2:11-3(e)(1)(E).

Affirmed in part, reversed and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.