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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1331-16T3

GLENDA UNGER,

Plaintiff-Appellant,

v.

ASHER HANDLER, 202 MAIN STREET HOLDINGS, LLC, 202 MAIN STREET EQUITIES, LLC, and NAFTALY EISEN,

Defendants-Respondents,

and

BARRY GOLDBRENNER, GOLDEYE, LLC, BNN FUNDING, LLC, and MSZG FUNDING, LLC,

Defendants.

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Argued November 30, 2017 – Decided February 16, 2018

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey, Chancery Division, General Equity, Ocean County, Docket No. C-000087-15.

Jared J. Monaco argued the cause for appellant (Gilmore & Monahan, PA, attorneys; Thomas E.

Monahan, of counsel and on the brief; Jared J. Monaco, on the brief).

David C. Steinmetz argued the cause for respondents Asher Handler and 202 Main Street Holdings, LLC (Steinmetz, LLC, attorneys; David C. Steinmetz, of counsel and on the brief; Levi M. Rand, on the brief).

Allen Weiss argued the cause for respondents 202 Main Street Equities, LLC and Naftaly Eisen.

PER CURIAM

Plaintiff, Glenda Unger, filed a complaint against defendants, Asher Handler and 202 Main Street Holdings, LLC (Holdings), claiming they wrongfully deprived her of title to certain real property that Holdings conveyed to defendant 202 Main Street Equities (Equities). According to plaintiff, Equities, which was controlled by defendant Naftaly Eisen, was aware that plaintiff maintained an ownership interest in the property when it took title. Plaintiff appeals from the Chancery Division's December 13, 2016 order denying her motion for reconsideration of the court's September 2, 2016 order dismissing her claims against defendants with prejudice.[1] The gist of plaintiff's argument on

[1] Plaintiff's notice of appeal incorrectly identifies the order as being dated December 2, 2016, the date oral argument was considered by the motion judge. Despite the fact that this is the only order identified in the notice of appeal, the legal arguments raised in plaintiff's brief do not address the denial of reconsideration. Under these circumstances, we deem any challenge

appeal is that the motion judge gave too much weight to a release plaintiff signed in which she waived any claims relating to the property. According to plaintiff, the judge failed to take into consideration a document Handler signed before plaintiff signed the release in which he acknowledged plaintiff as the owner of the property. She also challenges the motion judge's conclusion that Equities was a bona fide purchaser for value. We find no merit to these arguments and affirm.

The facts set forth in the record, viewed in the light most favorable to plaintiff, Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013), are summarized as follows. In 2014, Gittel Investments, LLC (GI) was the record owner of commercial rental property located on Main Street in Lakewood Township. Plaintiff, an experienced real estate investor, was the sole member of GI and very familiar with real estate transactions and related legal documents, including the effect of deeds and releases.

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to the denial of that motion waived. N.J. Dep't of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015). However, we chose to consider plaintiff's appeal as also being from the court's September 2, 2016 order that granted Handler and Holdings' motion to dismiss under Rule 4:6-2(e) and Eisen and Equities' motion for summary judgement under Rule 4:46-2. Plaintiff's appellate case information statement identifies the order, and all of the parties have fully briefed and argued the issue. See N. Jersey Neurosurgical Assocs., P.A. v. Clarendon Nat'l Ins. Co., 401 N.J. Super. 186, 196 (App. Div. 2008).

Title to the property was encumbered by a mortgage in favor of Eastern Savings Bank (ESB), given by GI to secure a loan of $350,000, which plaintiff personally guaranteed. By 2014, GI had defaulted years earlier in its obligation to make monthly payments to ESB, the bank already obtained a judgment of foreclosure, the court had issued a writ of execution and the property was about to be sold at a sheriff's sale. The total owed to ESB at that time was $779,739.55 consisting of $343,434.05 in principal and the balance in interest and fees.

In order to prevent the sale of the property and her individual liability for the balance of the loan, plaintiff negotiated with ESB a $512,240 payoff. In an effort to secure the funds to pay ESB, plaintiff contacted Handler to discuss a loan at a lower interest rate. According to plaintiff, Handler represented that the only way he could secure the funds to pay ESB was if she conveyed the property to Holdings, an entity that he controlled.

This proposed arrangement was not new to plaintiff. Plaintiff had been involved with Handler in an earlier, similar transaction. In that matter, plaintiff conveyed title of property located on South Clifton Avenue in Lakewood that one of her companies owned to an entity controlled by Handler so that he could secure a new loan to refinance plaintiff's existing mortgage loan. After the

new loan was secured, plaintiff negotiated a sixty-two percent ownership interest in the entity that held title to the property.[2] According to Handler, plaintiff received her interest in the entity "out of the goodness of [his] heart." With that prior experience in mind, plaintiff agreed to have GI convey title to the Main Street property to Holdings.

On the day plaintiff was to attend the closing with Handler's attorney, she first met privately with Handler earlier in the day. At that time, Handler signed a one-paragraph statement at plaintiff's request. The document stated that he "agree[d] and recognize[d the property,] which is deeded to [him] . . . belongs to and is the property of [plaintiff]. . . . [Plaintiff] is the sole owner of the . . . property and [he is] aware that all benefits and obligations are those of [plaintiff]." According to plaintiff's complaint, Handler signed the document and agreed to provide the funds to pay off ESB in consideration for "a proprietary interest in said property at a later time when the property value appreciated."[3] The document was dated March 10,

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[2] The parties have not been provided us with any documents relating to the South Clifton Avenue transaction.

[3] This allegation was inconsistent with plaintiff's deposition testimony in which she stated that the consideration for the loan from Handler was to be a "bigger part" of one of her business ventures. Plaintiff explained "there is a Franklin Street

2014 and never recorded. Handler denied this arrangement and testified that he signed the document without first reading it.

Later on the same date, plaintiff executed a deed on behalf of GI conveying title to the property to Holdings in consideration of its payment to ESB of $512,240 that day.[4] She also signed an affidavit of title that confirmed, other than GI as seller and Holdings as purchaser, no other person or entity had any interest in the property. Holdings recorded the deed from GI on April 14, 2014.

Holdings acquired the closing funds through a loan from BNN Funding LLC (BNN). BNN's principle, Barry Goldbrenner, controlled Goldeye LLC, which was a member of Holdings.[5] Holdings executed a note and mortgage in favor of BNN on the same date that plaintiff conveyed title to Holdings. BNN recorded the mortgage on April 14, 2014.

Before closing, Handler's attorney, at Handler's request, required plaintiff to sign a release in order to render the

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development [Handler] wanted to be a part of. . . . By helping in [the Main Street] venue bringing [her] mortgage rate down and everything, it would enable [them] to go further and develop the sub development together, that's what he wanted."

[4] Plaintiff signed the closing statement that indicated Holdings paid from its own funds an additional $57,760 in closing fees, including $39,900 into an escrow with BNN.

[5] According to Eisen, he introduced Goldbrenner to Handler.

previous document that Handler signed, which named plaintiff the sole owner of the property, "null and void." According to Handler, he would not go through with the transaction unless plaintiff signed the release. The release identified GI as the "Seller," plaintiff as "the sole and managing member of Seller," Holdings as the "Buyer," and BNN as the "Lender." It did not mention Handler.

The release stated that "Buyer" was purchasing the property from "Seller" and that plaintiff "agreed to release the Buyer and the Lender from any and all obligations they may now or hereafter have with respect to the Seller and/or the Property[.]" In the release, plaintiff also agreed to "release and forever discharge the Buyer and the Lender with respect to any and all 'Claims[6]' of or concerning the Property." Plaintiff understood that the closing would not occur if she refused to sign that document, and she does not dispute signing it. However, according to plaintiff, she she did not read the document before signing it.

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[6] In pertinent part, the release defined "claims" as "claims, actions, suits, . . . disputes and controversies of every nature and description in law or in equity, . . . whether asserted directly or in any representative capacity whatsoever, and whether discovered or accrued at any time." Ibid.

After the closing, and despite the execution and recording of the deed, plaintiff continued to collect rents from the tenants at the property.[7] The tenants stopped making payments to her in September 2014, after they received notice that plaintiff no longer owned the property.

On February 11, 2015, Holdings sold the property to Equities for $800,000 after Goldeye LLC became the managing member of Holdings. At the time of the sale, Holdings was in default of its obligation to make payments to BNN. The deed from Holdings to Equities was recorded on February 19, 2015. Subsequently, BNN subordinated its first mortgage to a new mortgage given by Equities to defendant MSZG Funding, LLC to secure a new loan in the principal amount of $550,000.

Plaintiff never had any conversations with Eisen about the property, and Eisen never saw the document signed by Handler regarding plaintiff's alleged ownership interest in the property. However, according to plaintiff, she was aware that Eisen spoke with Abraham Chaim Bursztyn, an individual who attempted to intervene with Handler on plaintiff's behalf, and who informed

[7] According to plaintiff, she also continued to pay the real estate taxes and insurance associated with the property. Defendants contest this allegation and we discern no proof of that fact in the record, other than her unsupported statement.

Eisen that she maintained an interest in the property. Bursztyn became involved in the parties' dispute in September 2014 when plaintiff asked him to contact Handler about the tenants at the property not paying rents to her. According to Bursztyn, Handler told him that Goldbrenner was collecting the rents as required by the loan agreement between BNN and Holdings, even though plaintiff still owned the property. Handler also explained to him how the closing sales proceeds from plaintiff's sale to Holdings were used to pay the first six months of mortgage payments owed to BNN. Later in September, Handler invited Bursztyn to a meeting with him and Eisen. When they met, Bursztyn inquired how much money was needed to either pay off the BNN loan or to bring it current. At that meeting and subsequent ones that he attended, all without plaintiff, Bursztyn referred to plaintiff as the property's owner and neither Handler nor Eisen disputed that reference.

Plaintiff filed her complaint and recorded a lis pendens in April 2015. She amended her complaint twice and defendants filed their answers. In her complaint, plaintiff asserted claims for breach of contract, conversion, fraud, misrepresentation, civil conspiracy and other related claims. Her complaint did not mention the release she signed prior to closing or allege that plaintiff did not intend to have GI transfer title to the property, but rather it stated plaintiff did so with the intention that "she

would . . . retain control and ownership of the property and [the understanding that] transfer to . . . Holdings was [not] for any purpose other than being a necessary step in securing a new mortgage as promised by Handler." It also alleged that the consideration for the loan from Handler was his one day receiving a portion of the anticipated appreciation in the property's value.

Eisen and Equities filed their motion for summary judgment in July 2016 and Handler and Holdings filed their motion to dismiss in August 2016. Plaintiff opposed the motion to dismiss with a letter arguing that the court should not consider it because Handler and Holdings filed an answer to her complaint and the motion also "relie[d] upon facts outside of the pleadings[.]". In opposition to the summary judgment motion, plaintiff submitted Eisen's deposition transcript and a certification from Bursztyn.

On September 2, 2016, Judge Francis R. Hodgson, Jr. considered counsels' oral arguments on the motions[8] before granting both motions and placing his reasons on the record that day. Turning first to Eisen and Equities' motion for summary judgment, the judge found no issue as to any material fact. The judge rejected plaintiff's contentions that Eisen's conversations with Bursztyn

[8] There was a third motion before the court that day as well. Defendant MSZG also filed a motion to dismiss under Rule 4:6-2(e). The judge granted that motion, but that order is not the subject of this appeal.

negated the closing documents that were silent about any ownership being held by plaintiff in the property after GI conveyed its interest to Holdings. Judge Hodgson found that because there were no recorded documents indicating that plaintiff held any interest in the property or in Holdings, her reliance on Bursztyn's conversations or the one-page document signed by Handler did not establish that Eisen knew plaintiff was an owner of the property as she alleged. As a result, Equities was a bona fide purchaser for value without notice of plaintiff's alleged interest, and was therefore entitled to the dismissal of plaintiff's claims.

Turning to Handler and Holdings' motion, Judge Hodgson began by rejecting plaintiff's contention that the motion could not be decided because defendants filed an answer and they relied on information outside of the pleadings, which required movants to file a motion for summary judgment. He explained that he "must convert [the m]otion to one for summary judgment[,]" and proceeded to conduct a summary judgment analysis. Applying that standard, the judge found, again, there were no issues as to any material facts. He concluded that absent any "agreement between the parties or an amendment to the ownership interest of [Holdings,] particularly in light of the release[,]" there was no indicia of plaintiff continuing to own the property after the closing with Holdings. He observed that plaintiff was a sophisticated real

estate investor and knew the effect of the release she signed. The judge stated:

> I started the oral argument with the question . . . what remains of the purported contract signed by Handler and [plaintiff] after the release [was signed?] Nothing remains the [c]ourt finds. There's no way that anyone could find that after . . . that release was signed, which the [p]laintiff recognized that had she not signed it there would be no closing, that once she signs that there is anything remaining of the [c]omplaint.

On September 20, 2016, plaintiff filed for reconsideration. In support of her motion, plaintiff filed her attorney's certification that attached copies of text messages allegedly between her and Handler, copies of the closing documents, including the one-page statement signed by Handler before the closing, Handler's deposition transcript and a copy of the Bursztyn certification she filed in opposition to Eisen and Equities' earlier motion. The judge considered oral argument and denied the motion on December 2, 2016. In his oral decision, the judge cited to the controlling case law and concluded plaintiff did not present any new information or arguments that required him to reconsider his earlier decision.

Plaintiff filed her appeal on December 2, 2016, prior to the entry of the order denying reconsideration, which occurred on December 13, 2016.

"We engage in de novo review of the trial court's decision on the summary judgment motion and the motion to dismiss . . . because the court considered documents outside the pleadings in deciding the latter motion, . . . treat[ing it] as a summary judgment motion." Giannakopoulos v. Mid State Mall, 438 N.J. Super. 595, 599-600 (App. Div. 2014) (citations omitted); see also Conley v. Guerrero, 228 N.J. 339, 346 (2017). Thus, we examine the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law. Ibid. "Summary judgment should be denied unless" the moving party's right to judgment is so clear that there is "no room for controversy." Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399 (App. Div. 2015) (quoting Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1994)).

On appeal, plaintiff argues that had the judge considered parol evidence and not just relied upon plaintiff's signing of the release, he would have been constrained to find an issue of material fact as to the parties' intentions and denied Handler and Holdings' motion. According to plaintiff, parol evidence, "would [establish] that the closing documents alone were not the fully integrated agreement." In support of her argument, plaintiff

relies upon her prior dealings with Handler, the document signed by Handler before the closing and plaintiff's execution of the release, her allegations that she paid the taxes and insurance on the property as well as collected rents after the closing, and Bursztyn's account of his conversations with Handler and Eisen.

Whether the court should have considered parol evidence depends upon whether there was any ambiguity in the scope or terms of the release. Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191-92 (App. Div. 2002) ("A party that uses unambiguous terms in a contract cannot be relieved from the language simply because it had a secret, unexpressed intent that the language should have an interpretation contrary to the words' plain meaning." Id. at 191).

> The scope of a release is determined by the intention of the parties as expressed in the terms of the particular instrument, considered in the light of all the facts and circumstances. A general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties.
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> [Bilotti v. Accurate Forming Corp., 39 N.J. 184, 203-04 (1963) (citations omitted).]

Moreover, when a release's language refers to "any and all claims," as here, courts generally do not permit exceptions. Isetts v. Borough of Roseland, 364 N.J. Super. 247, 255-56 (App. Div. 2003).

Parol evidence "may only be admitted if the language of the writing is unclear [so that] '[a]ntecedent and surrounding factors that throw light upon . . . [the meaning of the contract] may be proved by any kind of relevant evidence'" to establish the parties' intentions. Chance v. McCann, 405 N.J. Super. 547, 563-64 (App. Div. 2009) (second alteration in original) (quoting Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 268-69 (2006)). It cannot be used, however, to alter the express provisions of the agreement. Because "[s]uch evidence is adducible only for the purpose of interpreting the writing--not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said[,]" it cannot be used "to interpret it." Id. at 564 (quoting Atlantic N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301-02 (1953)). Where "there is no ambiguity in the agreement as written with respect to [an] issue, there is no need for parol or extrinsic evidence[.]" Ibid.

Applying these principles, we agree with Judge Hodgson that the release barred plaintiff from bringing any claim against Holdings and Handler relating to the property. This was a commercial transaction between sophisticated business people who understood real estate transactions, loan documents and similar agreements. There was no ambiguity in any of the language used by the parties, see e.g., Potomac Ins. Co. of Ill. ex rel.

OneBeacon Ins. Co. v. Pa. Mfrs. Ass'n Ins. Co., 425 N.J. Super. 305, 324-25 (App. Div. 2012), that required parol evidence to ascertain the parties' intentions as they were clear from the face of the document. Regardless of the import of the document that Handler signed earlier on the closing day about plaintiff owning the property or it being deeded to Handler — neither of which were factually correct — plaintiff agreed at closing to give up any claim against Holdings and its agent Handler when she executed the release. Notably, there was no allegation by plaintiff in her complaint that she signed it without knowledge of its import or under duress. In fact, plaintiff's complaint did not mention the document. If plaintiff did not want to release Holdings and Handler, she could have simply walked away and sought funding elsewhere.

Assuming plaintiff believed that this transaction, like the South Clifton Avenue deal, would have resulted in ESB's loan being satisfied and plaintiff being relieved of her personal obligation for any excess, while she maintained an ownership interest in the property, she never negotiated and secured an interest in Holdings as she did with the South Clifton Avenue entity, nor was there any valid agreement with Handler that she would maintain any interest in the Main Street property after closing. Even if there had

been, it would have been extinguished by plaintiff signing the release and executing the deed without reservation.

Moreover, under plaintiff's version of her unwritten agreement with Handler, he was to have Holdings advance in excess of one-half million dollars in exchange for a hope that he would someday share in the property's predicted appreciation in value or, as she repeatedly testified at her deposition, in exchange for a "bigger part" of the Franklin Street development venture. These suggested arrangements are not only inconsistent with one another, but also strain credulity and are unsupported by the record. We find no error in Judge Hodgson's grant of summary judgment in favor of Handler and Holdings under these circumstances.

As to the dismissal of her complaint against Eisen and Equities, plaintiff contends that she established through her opposition to their motion that Eisen had "actual []or constructive knowledge that [plaintiff] claimed ownership in the subject property[.]" Here, plaintiff relies upon Bursztyn's conversations with Eisen months after the closings as proof of Eisen's knowledge of plaintiff's "claim of disputed ownership," as well as Eisen's role in introducing Goldbrenner to Handler.

We find plaintiff's arguments as to Eisen and Equities to be without any merit. There was no evidence offered by plaintiff

that established Equities, through Eisen, took title subject to plaintiff's alleged interest in the property.

As we have previously explained:

> A purchaser . . . for value without notice, actual or constructive, acquires a title . . . free from all latent equities existing in favor of third persons. Constructive notice may be brought home to a [purchaser] by known circumstances. If a purchaser . . . is faced with extraordinary, suspicious, and unusual facts which should prompt an inquiry, it is equivalent to notice of the fact in question.
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> [Howard v. Diolosa, 241 N.J. Super. 222, 232 (App. Div. 1990) (citations omitted).]

In Howard, we determined that the facts shown to be known by a lender "all but screamed [a borrower's purchase's] irregularity and unenforceability." Id. at 234. We found those facts were sufficient to establish that the lender was not without notice and therefore we affirmed the cancellation of its note.[9] Id. at 232-34. The same type of facts do not exist here.

Suffice it to say, here, there was absolutely no evidence of any recorded documents or unrecorded documents in recordable form

[9] In Howard, a lender was aware that its borrower paid significantly less than the amount stated in the deed when it loaned funds in excess of the purchase price. 241 N.J. Super. at 233. Under those circumstances, we affirmed the cancellation of the lender's note, id. at 235, commenting that the picture presented to the lender was a troubling one that "should have alerted a potential mortgagee with knowledge of the terms described by [the borrower] to the likelihood that [his] purchase was irregular and voidable." Id. at 234.

that evinced any ownership interest by plaintiff supporting her claim that Equities took title with knowledge that plaintiff had an interest on the property or Holdings. See N.J.S.A. 46:26A-12. There were no conversations between Eisen and plaintiff in which her claim to an alleged interest or even the property was ever discussed. Bursztyn's conversations with Eisen did not convey any information that established any irregularity in Holdings' title to the property that warranted the cancellation of Equities' title to the property. Without such proof, summary judgment was warranted in favor of Eisen and Equities.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION