SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4526-15T1

CONDEMI MOTOR CO., INC.,

Plaintiff-Respondent,

v.

HERNANDO J. BAUTISTA,

Defendant-Appellant,

and

JUAN G. ARANGO,

Defendant.

Submitted January 10, 2018 – Decided March 6, 2018

Before Judges Manahan and Suter.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-8992-12.

Piekarsky & Associates, LLC, attorneys for appellant (Justin J. Walker, on the brief).

Vincent J. D'Elia, attorney for respondent.

PER CURIAM

Defendant Hernando Bautista appeals from an order dated March 6, 2015 granting partial summary judgment in favor of plaintiff

Condemi Motor Co., Inc. (Condemi Motor). Bautista also appeals from an order dated April 29, 2016, vacating the dismissal of Condemi Motor's complaint and confirming the arbitration award in favor of Condemi Motor. We affirm.

Anthony Condemi, President of Condemi Motor, is the landlord and owner of real property in Lodi, New Jersey. In 2002, Condemi Motor leased the property to Bautista, as officer and sole shareholder for ESCO Motor Cars, Inc. (ESCO), and Juan G. Arango,[1] for the operation of a car dealership. Bautista also signed the lease agreement (lease) as a tenant. The final page of the 2002 lease contained a personal guarantee provision, which stated:

> HERNANDO J. BAUTISTA . . . does hereby, personally guarantee the performance of the terms of this lease by the [t]enant particularly any and all financial obligations incurred by the [t]enant under the terms of the lease. Guarantor hereby waives any requirement that [l]andlord provided [sic] notice of any default on the part of the [t]enant.

Bautista's signature appears below the guarantee provision.

A rider and addendum to the original lease was signed in 2007, which provided that "The core of the lease will remain as it has been for the past five (5) years with the exceptions[.]"

[1] Service of process was not made against Arango, and he is not part of this appeal.

Seven "exceptions" were listed, one of which noted the lease to begin April 1, 2007 and to end April 1, 2012, for $9166 per month.

The underlying action is the second of two lawsuits wherein Condemi Motor sought unpaid rent arising from the October 2002 lease for the rental of the property.

The first lawsuit arose in June 2010, when ESCO, Bautista's corporation, filed a complaint against Condemi Motor seeking return of the security deposit. The case was tried to conclusion in May 2012, prior to Condemi Motor filing suit against Bautista as guarantor of the lease. Condemi Motor filed a third-party complaint against Bautista, and asserted a counterclaim for breach of contract due to ESCO's failure to pay rent. In June 2012, a bench trial commenced over a ten-day period before Judge Kenneth J. Slomienski. In his decision, the judge held:

> It's undisputed that at the time of the vacating [of] the property, the monthly rent was $9166.09 a month.
>
> . . . it's undisputed that the rent wasn't paid June, July, August, September, and thereforth. . . . I find it highly incredible, a statement made by the plaintiff of the landlord, you don't have to pay rent. . . . Also, there's testimony from the plaintiff that Condemi wanted this property. I find that highly unbelievable since Condemi had enough property to run his business. I find that highly unbelievable. . . . I find it more incredible . . . unbelievable that the tenant indicates that he left May 15[]. It's contrary to the lease, it's a default.

> . . . Mr. Bautista [] tried to say he doesn't really understand what a personal guarantee is; [w]ell I find that not [] believable.
>
> . . . .
>
> In regard to the lease itself, there is no speculation. . . . [Bautista] has not met the burden that [Condemi Motor] acted unreasonabl[y].

The judge entered judgment in favor of Condemi Motor. The claims against Bautista, originally a third-party defendant, were dismissed without prejudice.

The second lawsuit, from which this appeal stems, arose in November 2012. Condemi Motor filed a complaint against Bautista seeking a judgment based on Bautista's signature on the lease as tenant as well as personal guarantor as contained within the lease.[2] Condemi Motor asserted Bautista was personally liable for the payment of outstanding rent, attorney fees and costs, and any repairs made to the property.

Following years of judicial proceedings, on March 6, 2015, oral argument was heard before Judge Lisa Perez Friscia. The judge entered an order for partial summary judgment in favor of Condemi Motor for back rent and expenses. The order also denied

[2] Arango was never served by Condemi.

Bautista's application to dismiss Condemi Motor's complaint without prejudice.

The parties engaged in non-binding arbitration on the issue of attorney's fees and costs, which resulted in an award in favor of Condemi Motor. Due to an illness affecting Condemi's attorney, no timely action was taken upon the arbitration award and the matter was administratively dismissed for the third time.[3]

A year later, Condemi Motor filed a motion to vacate the dismissal and confirm the award. Bautista filed an opposition. Based upon the health issues of Condemi's counsel, the matter was reinstated. On April 29, 2016, Judge Perez Friscia granted Condemi Motor's motion and entered judgment that restored Condemi's complaint and confirmed the arbitration award. This appeal followed.

Bautista raises the following points on appeal:

POINT I

> THE TRIAL COURT COMMITTED HARMFUL ERROR PRODUCING AN UNJUST RESULT BY GRANTING PARTIAL SUMMARY JUDGMENT TO CONDEMI WHERE A MATERIAL DISPUTED FACT WAS RAISED BY BAUTISTA THAT WAS NOT ADDRESSED BY THE TRIAL COURT OR CONDEMI GOING TO CREDIBILITY AND REQUIRING DETERMINATION BY A FACT-FINDER AS TO WHETHER CONDEMI RESPRESENTED TO BAUTISTA THAT IT WOULD

[3] At the time the parties entered into the lease in 2002, N.J.S.A. 2A:24-7, the then controlling statute, required actions to confirm an arbitrator's award to be brought within three months of issuance.

NOT HOLD BAUTISTA LIABLE FOR THE BALANCE OF RENT UNDER THE LEASE.

POINT II

THE TRIAL COURT COMMITTED HARMFUL ERROR PRODUCING AN UNJUST RESULT BY GRANTING PARTIAL SUMMARY JUDGMENT TO CONDEMI WHERE DISCOVERY WAS INCOMPLETE AND BAUTISTA HAD A PENDING MOTION CONCERNING THE INSUFFICIENCY OF CONDEMI'S DISCOVERY RESPONSES.

POINT III

THE TRIAL COURT'S ORDER REINSTATING CONDEMI'S COMPLAINT FOR THE THIRD TIME AND CONFIRMING THE ARBITRATION AWARD IN FAVOR OF CONDEMI SHOULD BE REVERSED SINCE THE BASIS FOR LIABILITY IS ONE THAT REQUIRES A FACT-FINDING DETERMINATION AS TO BAUTISTA'S CONTENTION THAT CONDEMI ASSERTED THAT HE WOULD NOT SEEK RENTAL ARREARAGES FROM BAUTISTA.

We review de novo the trial court's summary judgment decision, applying the same standard that governs the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). We must determine whether the evidence presented, "when viewed in the light most favorable to the non-moving party, [is] sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The evidence must be "competent." Ibid.; see also Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995) ("[E]vidence submitted in support of a motion for summary judgment must be admissible."); R. 1:6-6.

"[B]are conclusions in the pleadings without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014) (quoting Brae Asset Fund, LP v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999)).

It is fundamental that unsworn statements, such as Bautista's letter, do not constitute admissible evidential material for purposes of summary judgment. Gonzalez v. Ideal Tile Importing Co., 371 N.J. Super. 349, 358 (App. Div. 2004) (holding "counsel's unsworn opposing letter was incapable of conveying any facts for summary judgment purposes."). See Oakley v. Wianecki, 345 N.J. Super. 194, 201 (App. Div. 2001) (holding "unsubstantiated inferences and feelings" are insufficient to defeat a motion for summary judgment).

Bautista claims that there was an oral modification of the lease that released him from the personal guarantee. In paragraph "5th" of the lease relating to assignment it is stated:

> That the [t]enant shall not assign this agreement, or underlet or underlease the premises or any part thereof, of occupy, or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra-hazardous on account of fire or other hazards, under penalty of damages and forfeiture without the express written consent of the [l]andlord which consent shall not be unreasonably withheld. Any assignment of this lease shall be subject to [l]andlord's written

> approval including but not limited to the proposed assignee's financial ability to honor the terms of this lease and the proposed assignee's ability to operate the business proposed on the premises. Landlord may require additional security deposit upon any approved assignment. Any said assignment shall not void the personal guarantee made a part of this lease but said personal guarantee shall continue in full force and effect unless otherwise agreed to by the [l]andlord, in writing.

We note that there is no other discrete paragraph in the lease that directly references the manner by which the personal guarantee may be voided or modified. However, a plain reading of paragraph "5th" evinces the parties' intent that the landlord must agree "in writing" to an alteration of the "full force and effect" of the personal guarantee.

It is well-settled that a contract provision requiring modification by writing "may be expressly or impliedly waived by the clear conduct or agreement of the parties or their duly authorized representatives." Home Owners Constr. Co. v. Borough of Glen Rock, 34 N.J. 305, 316 (1961); Lewis v. Travelers Ins. Co., 51 N.J. 244, 253 (1968). "An offeree may manifest assent to terms of an offer through words, creating an express contract, or by conduct, creating a contract implied-in-fact." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 436 (1992) (citing Restatement (Second) of Contracts § 19(1) (1981)). Clear and convincing

evidence is required to prove waiver of a writing requirement. Home Owners, 34 N.J. at 317.

Here, there is no competent proof, other than Bautista's unsworn letter submitted in opposition to the summary judgment motion, that there was an oral modification to the lease agreed to by Condemi relative to the personal guarantee. Given the factual record, the terms of the lease and the applicable law, we discern no error in Judge Perez Friscia's rejection of Bautista's claim of oral modification.

As well, we find no merit to Bautista'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, 359 N.J. Super. at 496 (quoting Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977)).

The incomplete discovery, was Condemi's "insufficient" responses to discovery. Bautista argued that through additional discovery, Condemi might confirm the existence of the oral agreement. Yet, nothing in the discovery record nor the action taken by Condemi to enforce the guarantee would even suggest that this "admission" by Condemi would be forthcoming.[4]

Finally, having considered the remaining arguments raised by Bautista relative to the reinstatement of the complaint, we affirm for the reasons stated in Judge Perez Friscia's order of April 29, 2016.

Affirmed.

[4] Although unclear on this record, 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).