

PREPARED BY THE COURT

HANSEN OREN,

Plaintiff,

v.

HIMANSHU PATEL and the ESTATE
OF GEORGIOS HIONIDIS,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. **BER-L-5740-17**

Civil Action

OPINION

Argued: October 26, 2018
Decided: November 21, 2018

Honorable Robert C. Wilson, J.S.C.

Fred S. Dubowsky, Esq. appearing on behalf of Plaintiff Hansen Oren.

Justin B. Kolbenschlag, Esq. appearing on behalf of Defendant Himanshu Patel (from Greenbaum, Rowe, Smith & Davis LLP).

FACTUAL BACKGROUND

THIS MATTER arises from a dispute regarding a contract for the sale and purchase of real property. On July 6, 2016, Plaintiff Hansen Oren (“Plaintiff” or “Oren”) and Defendant Estate of Giorgios Hionidis (the “Estate”) entered into an agreement for the purchase of two properties located at 200 Route 46 East, Lodi, NJ (the “Property”) and 206 Route 46 East, Lodi, NJ (the “Gas Station Property”) (collectively, the “Properties”). The Estate agreed to sell the Properties to Plaintiff for \$1,300,000. Both parties were represented by counsel during the negotiation, drafting, and signing of the contract for the sale and purchase of the Properties (the “Oren Contract”).

Paragraph 3 of the Oren Contract governed the rights of Plaintiff and the Estate in the event of a title defect. In relevant part, Paragraph 3 states the following:

B. In the event that Buyer shall determine that title is not [good, marketable, and insurable] the Buyer shall notify Seller in writing of the specific defects complained of, whereupon Seller shall have

thirty (30) days to cure the same, failing wherein either party may terminate this Contract, whereupon all monies paid hereunder shall be refunded to Buyer . . .

Once the Oren Contract was executed, Plaintiff and the Estate proceeded toward a closing, which was tentatively scheduled for August 2016. Around this same time, on July 14, 2016, defendant Himanshu Patel (“Defendant” or “Patel”), who was unaware of the Oren Contract, filed a complaint in the Superior Court of New Jersey, Chancery Division in Bergen County (the “Patel Action”) relating to the Properties. In the Patel Action, Defendant sought specific performance of a letter of intent that was previously executed between Defendant and the Estate on November 3, 2015 (the “LOI”). Defendant claimed that this LOI provided him with the right to purchase the Property for \$175,000 and/or the Gas Station Property for \$1,000,000.

On July 19, 2016, Defendant’s counsel sent a *lis pendens* regarding the Property for filing, which was filed on August 2, 2016. This *lis pendens* constituted a title defect relating to the Properties. Counsel for the Estate realized that the *lis pendens* constituted a cloud on title, and therefore, the Estate did not have good and marketable title to transfer the Properties to Oren pursuant to the Oren Contract. While the *lis pendens* originally only attached to the Property, it prevented the Estate and Oren from closing on both of the Properties because they were a “package deal” as set forth in the Oren Contract.

Once it was clear that the closing could not proceed now that a *lis pendens* had attached to the Properties, counsel for the Estate undertook significant efforts to cure the defect. Specifically, counsel for the Estate filed a Notice of Motion to Dismiss Patel’s Complaint in the Patel Action for failure to state a claim on August 31, 2016 (the “Motion to Dismiss”). Counsel also filed an Order to Show Cause (the “OTSC”) in the Patel Action seeking temporary restraints and an order discharging the *lis pendens*.

The Honorable Robert P. Contillo, P.J.Ch., heard oral argument and disagreed with the Estate's position that the LOI was unenforceable as a contract and solely an "agreement to agree." Judge Contillo instead found that the LOI was a binding agreement, and ordered that discovery in the Patel Action proceed in the normal course and ordered the Estate and Patel to attend mandatory mediation.

On January 31, 2017, Patel and the Estate attended court-ordered mediation before the Honorable Peter E. Doyne, J.S.C. (Ret.), where the matter was settled. Pursuant to the settlement agreement, the Estate agreed to sell and Patel agreed to buy both Properties for an agreed upon price (the "Settlement Agreement"). The matter was then dismissed. On January 3, 2018, Judge Contillo entered an Order and Opinion holding that the Settlement Agreement is enforceable and that the Estate shall transfer the Properties to Patel, subject only to Oren's claims in this Action.

Defendant Patel now moves for summary judgment. He claims that the sole question before the Court on this motion is whether the Estate properly terminated Oren's alleged contractual right to purchase the Properties. Oren also cross-moves for summary judgment, arguing that Oren is a bona-fide purchaser for value without notice, and therefore, is entitled to ownership and possession of the properties. For the reasons below, Patel's motion for summary judgment is **GRANTED** and Oren's cross-motion for summary judgment is **DENIED**.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if 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). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for

courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. 4:37-2(b) or R. 4:40-1, or a judgment notwithstanding the verdict under R. 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that “there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a ‘genuine’ issue of material fact for purposes of R. 4:46-2.” Id. at 540.

RULE OF LAW AND DECISION

I. Defendant Patel’s Motion for Summary Judgment is Granted

A. The Estate Properly Terminated Oren’s Contractual Rights to Purchase the Properties

Oren argues that his contract with the Estate for the sale of the Properties is superior to Patel’s. However, this claim fails because: (1) the Estate properly terminated Oren’s contractual right to purchase the Properties pursuant to the plain and unambiguous language of the Oren Contract; and (2) Judge Contillo has ruled that Patel has a valid and enforceable right to purchase the Properties pursuant to the Settlement Agreement, subject only to Oren’s claims in this action.

1. The Clear and Unambiguous Language of the Oren Contract Provides that Either Party may Terminate the Agreement in the Event of an Incurable Title Defect and that Oren was Limited to Out-of-Pocket Damages

Generally, construction of a contract is a question of law to be decided by the court. In re Cty. of Atlantic, 230 N.J. 237, 255 (2017) (quoting Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011)). However, the court must enforce a contract as written when the terms of the contract are clear. Cypress Point Condo. Ass’n v. Adria Towers, LLC, 226 N.J. 403, 415 (2016) (citing Kampf

v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)). When this is the case, it is not the function of the courts to create a better contract for the parties. Id. “When ‘the language of a contract is plain and capable of legal construction, the language alone must determine the agreement’s force and effect.’” Id. (quoting Manahawkin Convalescent v. O’Neill, 217 N.J. 99, 118 (2014)).

This concept of plain interpretation is especially true where both parties to the contract are “sophisticated parties” represented by counsel in the negotiation of the contract. McMahon v. City of Newark, 195 N.J. 526, 546 (2008) (“We envision no reason these obviously sophisticated parties should not be bound by the covenants into which they freely and voluntarily entered.”); BOC Group, Inc. v. Chevron Chemical Co., LLC, 359 N.J. Super. 135, 150 (App. Div. 2003) (“Both plaintiff and defendant are sophisticated business entities, freely entering into a contract which limited defendant’s remedies [w]e find no reason why the parties should not be held to the terms of their bargain.”).

In this matter, the termination provisions in Paragraphs 3B and 3C of the Oren Contract are clear and unambiguous. The provisions in Paragraph 3B stated that in the event a title issue arose after execution of the Oren Contract, the Estate had “thirty (30) days to cure” the title defect, and if the Estate failed to clear title within the thirty-day window, “either party may terminate the contract.”

The clear and unambiguous language of Paragraph 3C also limits Oren to monetary damages in the event the Estate was unable to convey clear title and the Oren Contract was properly terminated pursuant to Paragraph 3B. Paragraph 3C states: “[i]n the event Seller is unable to convey good and marketable title to the Property for any reason whatsoever, Buyer’s sole remedy shall be to terminate this Contract, and receive reimbursement of the Contract deposit and out-of-pocket expenses incurred.”

The clear and unambiguous language of Paragraphs 3B and 3C, along with the fact that Oren is a sophisticated businessman who regularly deals in these kinds of commercial real estate transactions, and was represented by counsel while the contract was being negotiated, support a finding that the terms of the Oren Contract should be enforced as written. Therefore, Oren is limited to out-of-pocket damages because the Estate properly terminated the Oren Contract pursuant to the language in Paragraphs 3B and 3C.

2. The Estate Properly Terminated the Oren Contract Pursuant to Paragraph 3B

The Estate properly terminated the Oren Contract pursuant to Paragraph 3B because: (1) Patel's *lis pendens* created a title defect regarding the Property; (2) the Estate made significant efforts to clear title by making multiple applications to discharge the *lis pendens*; (3) all of the Estate's applications to clear title were denied by Judge Contillo; (4) after the Estate's applications were denied, the Estate and Patel settled at mediation; and (5) the Estate properly terminated Oren's contractual rights to purchase the Properties pursuant to Paragraph 3 of the Oren Contract.

On March 24, 2017, after the Settlement Agreement was executed, real estate counsel for the Estate sent Oren a letter terminating the contract and returning his deposit money pursuant to Paragraphs 3B and 3C (the "Termination Letter"). On March 28, 2017, Oren's attorney sent a letter to the Estate stating that he did not accept termination of the Oren contract, but offered no explanation as to why this was so. However, by invoking the proper provisions of the Oren contract and fully refunding Oren's deposit money, it is clear that the Estate properly terminated the contract with Oren.

3. Judge Contillo Finds that the Settlement Agreement is Enforceable, Subject Only to Oren's Claims in this Action

On January 3, 2018, Judge Contillo issued an Order and Opinion denying Patel's request to consolidate this Law Division action into the Chancery Division action, but granted Patel's motion to enforce the Settlement Agreement, subject to Oren's claim. Therefore, Patel's right to purchase the Property has been confirmed and notified by the Court. As such, Oren cannot be entitled to a declaratory judgment that his right is superior to Patel's, because Oren has no right to purchase the property now that the Oren Contract has been properly terminated, let alone a right superior to Patel's.

B. The Estate Must Transfer the Property to Patel Pursuant to the Settlement Agreement and Judge Contillo's Order

In his cross-claim, Patel seeks specific performance compelling the Estate to transfer the Properties to him pursuant to the Settlement Agreement. The Estate must transfer the Properties to Patel, because: (1) Judge Contillo has so ordered; (2) the Estate does not contest the transfer; and (3) for the reasons set forth above, Oren's rights to purchase the Properties have been properly extinguished.

C. Patel Did Not Commit Tortious Interference with Respect to Oren's Contract, and the Filing of a Complaint and Lis Pendens are Absolutely Privileged Actions Not Subject to a Claim of Slander of Title

Patel is entitled to summary judgment on Oren's claim for tortious interference and the Estate's cross-claim for the following reasons: (1) Patel was unaware of the Oren contract when he filed the Patel Action and *lis pendens*, and thus, Oren cannot prove intentional/malicious conduct; (2) legal pursuit of a contractual right cannot form the basis for a tortious interference claim; and (3) the filing of a complaint and *lis pendens* are absolutely privileged actions not subject to a claim for slander of title.

A plaintiff must prove the following elements in order to succeed on a claim of tortious interference: (1) the plaintiff had some protectable right, a prospective economic or contractual relationship; (2) the interference was done intentionally and with “malice,” (3) the alleged interference caused the actual loss of the prospective gain; and (4) the injury caused damage. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 752 (1989). The plaintiff bears the burden of proving that the defendant “acted intentionally and wrongfully without justification.” Id. at 756 (citing Levin v. Kuhn Loeb & Co., 174 N.J. Super. 560, 573 (App. Div. 1980)).

In this matter, the record is completely devoid of any evidence supporting that Patel knew about the Oren Contract at the time he filed the Patel Action or the *lis pendens*. These actions form the basis of Oren’s claim for tortious interference. Patel only learned of the existence of Oren and the Oren Contract after filing the actions, when he was forced to litigate against the OTSC. Because Patel had no knowledge of Oren or the Oren Contract at the time the Patel Action or *lis pendens* was filed, a reasonable jury could not conclude that Patel acted “intentionally and with malice” in filing the Patel Action. He was solely enforcing his contractual rights according to the LOI.

Furthermore, it should be noted that written and oral statements made by judges, attorneys, witnesses, parties, or jurors in the course of judicial proceedings, which have some relation thereto, are absolutely privileged from slander or defamation actions, even if the statements are made with malice. Rainier’s Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 557-58 (1955). Therefore, the filing of a complaint and *lis pendens* by Patel cannot form the basis for a slander of title action. Lone v. Brown, 199 N.J. Super. 420, 428 (App. Div. 1985) (holding that the filing of a complaint,

lis pendens and notice of appeal were absolutely privileged actions not subject to a slander of title action). Therefore, Oren’s claim for tortious interference must also fail as a matter of law.

II. Plaintiff’s Cross-Motion for Summary Judgment is Denied

A. Each of Oren’s Legal Arguments Relating to the Termination of the Oren Contract Fail as a Matter of Law

1. Patel’s *Lis Pendens* Created a Cloud on Title Regardless of Whether the LOI Would Ultimately have been Found Enforceable

In his opposition brief, Oren argues that “[a]ny interpretation of the Oren Contract as presented by Patel presupposes the legitimacy of the title defect.” Stated more clearly, Oren claims that the *lis pendens* is a title defect only if the LOI is ultimately enforceable and binding. However, this is untrue pursuant to New Jersey law.

“Ordinarily *lis pendens* are filed when a plaintiff asserts an interest in or claim upon specific real property.” Cole, Schotz, Bernstein, Meisel & Forman, P.C. v. Owens, 292 N.J. Super. 453, 461 (App. Div. 1996) (citing N.J.S.A. 2A:15-6). “The effect of the filing of a notice of *lis pendens* is constructive notice of a pending action concerning that real estate, and a purchaser or mortgagee takes subject to the outcome of the lawsuit.” Trus Joist Corp. v. Treetop Assocs., 97 N.J. 22, 31 (1984).

Clearly, as a matter of law, a *lis pendens* is a cloud on title. The party seeking to discharge a *lis pendens* in order to enforce a contract faces a difficult burden. N.J.S.A. 2A:15-7(b). When a written instrument is present, the party filing the *lis pendens* is not required to demonstrate that there is a “possibility that a final judgment will be entered” to maintain the *lis pendens*. Instead, the the party seeking to discharge a *lis pendens* arising out of a written instrument must satisfy the standard of either a motion to dismiss or motion for summary judgment with all “facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted.” Polk v. Schwartz,

166 N.J. Super. 292 (1979). If this were not the case, it would be possible for the plaintiff to “ultimately succeed in establishing their entitlement to [the property]” but be denied “in the interim of their statutory protection of a notice of *lis pendens*.” Id. at 300.

As stated previously in this Opinion, Judge Contillo denied the Estate’s multiple attempts to discharge the *lis pendens*. Therefore, it served as a cloud on title until the claims between the Estate and Patel were resolved via the Settlement Agreement. Furthermore, Oren has repeatedly admitted in pleadings and at deposition that the *lis pendens* constituted a cloud on title. Since it is undeniable that the *lis pendens* served as a cloud on title, the Oren Contract was properly terminated pursuant to Paragraphs 3B and 3C.

2. Patel Does Not Lack Standing to Bring this Action

Oren’s argument that Patel does not have standing to bring this action must also fail. Patel signed the Settlement Agreement with the Estate, providing Patel with a right to purchase the Properties. Patel has an interest in clearing Oren’s asserted right to purchase the Properties, and properly has standing to do so.

Furthermore, the fact that Patel was not a party to, or a third-party beneficiary of the Oren Contract has nothing to do with the fact that the Oren Contract was terminated. Patel has not brought any breach of contract claims against Oren, or sought to enforce any of the Estate’s contractual rights. Therefore, Oren’s argument that Patel lacks standing because he is not a party or third-party beneficiary to the Oren Contract are irrelevant to the issue of standing in this matter.

Finally, Oren’s argument that Patel lacks standing because he was not a party to the Patel Action is also irrelevant for purposes of standing. Considering the foregoing, it is abundantly clear that Patel has an interest in closing on the Properties, and requires the Court to determine if the Oren Contract was terminated so he can close.

3. Oren's Strained Interpretation of the Clear Contractual Language is Rejected

It is clear from the record that Oren agreed to the entire Oren Contract and is bound to it, including the termination provisions of Paragraphs 3B and 3C. Nowhere in Paragraph 3, or anywhere else in the Oren Contract, does it state that Oren must accept the termination for it to be valid, or that Oren has an absolute veto power over the termination. To the contrary, the language of the Oren Contract provides for unilateral termination by *either party* in the event that good and marketable title cannot be conveyed.

Furthermore, neither Oren nor his counsel support their attempt to reject the Estate's termination of the Oren Contract with any legal basis. The response to the Estate's letter notifying Oren of the termination simply states that such termination is "rejected." No reason or justification for the rejection was provided in this response, or in any subsequent depositions.

It should be noted that Oren *did* have a contractual option to close on the Properties notwithstanding Patel's encumbrance, but chose not to exercise that option. Upon receipt and notice of termination by the Estate pursuant to Paragraph 3B due to the title issue, Oren could have "elect[ed] in writing within ten (10) days following the conclusion of the 30-day [cure] period aforesaid to take such title as Seller can convey . . ." It is abundantly clear from the record that Oren did not exercise this option, let alone in writing.

Oren argues that it was the Estate's obligation to inquire whether Oren wanted to close notwithstanding Patel's *lis pendens*. However, Oren again makes this argument without any legal or factual support. Furthermore, Oren, who was represented by counsel, took it upon himself to send a letter "rejecting" the termination, rather than exercising his option to close notwithstanding the cloud on title.

B. Oren is not a Bona-Fide Purchaser for Value Without Notice, and Therefore, Does not have a Superior Interest in the Properties

Oren is not a bona-fide purchaser for value under New Jersey law. New Jersey law requires that an individual actually purchase the property at issue in order to gain bona-fide purchaser for value (“BFP”) status. Scult v. Bergen Valley Builders, Inc., 76 N.J. Super. 124, 133 (Ch. Div. 1962). It is undisputed in this matter that Oren did not actually purchase the Properties, and therefore, he cannot be considered a BFP.

Furthermore, the record supports a finding that Oren had knowledge of Patel’s of the *lis pendens* and Patel’s claim, rebutting a conclusion that Oren holds BFP status. A buyer who purchases with knowledge of the prior contract cannot be a bona-fide purchaser for value. Marioni v. 94 Broadway, 374 N.J. Super. 588 (App. Div. 2005). Therefore, even if Oren did close on the Properties notwithstanding Patel’s *lis pendens*, as was his option pursuant to the Oren Contract, he would still not have BFP status because he acknowledged receipt of the notice of Patel’s claim and *lis pendens*. Considering the foregoing, it is impossible to find that Oren was a BFP with a superior claim to the Properties than Patel.

CONCLUSION

For the foregoing reasons, Defendant’s Motion for Summary Judgment is **GRANTED** and Plaintiff’s Cross-Motion for Summary Judgment is **DENIED**.