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SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
Chancery Division
Docket No. C-144-18

CITY OF UNION CITY

Plaintiff

v. Decision

409-415 BERGENLINE AVENUE UC, LLC

Defendant

Decided: December 14, 2018

Ralph J. Lamparello and Molly Hartman Lustig for the Plaintiff, City of Union City (Chasan, Lamparello, Mallon & Capuzzo, PC, attorneys).

Adolfo L. Lopez, for the Defendant, 409-415 Bergenline Avenue, UC, LLC (LopezNoris, LLC, attorneys).

JEFFREY R. JABLONSKI, P.J. Ch.

Introduction:

This matter concerns the nature and quality of the damage sustained by 409-415 Bergenline Avenue after a fire in December 2012. The Defendant asks this court conclude that the building suffered a total loss as a result of the fire. The Plaintiff

disagrees and believes that the damage, although substantial, did not render the building "totally destroyed" so as to excuse the owner's affirmative obligation to rebuild the premises promptly and to restore the tenants to their homes.

Procedural History:

On September 14, 2018, the Plaintiff, the City of Union City, filed an order to show cause seeking injunctive relief against the Defendants, 409-415 Bergenline Avenue UC LLC. That order sought to compel the Defendant to comply with the rehabilitation provisions included in Union City's municipal code as to property that is located at 409-415 Bergenline Avenue in Union City. Shortly thereafter, the Defendant sued the displaced tenants of that premises and sought a declaration that their tenancies terminated after the fire because the building was completely destroyed by it.

On October 30, 2018, this court signed a consent order in which the Plaintiff agreed to withdraw its order to show cause, to consolidate the current law division matter with the pending chancery division case, and to permit further proceedings to take place before this court.

Previously, the matter was litigated before the Union City Rent Leveling Board. Hearings took place on April 16, 2018, and on May 21, 2018. Transcripts of these hearings were provided to

the court. Before the rent leveling board could decide the matter, however, the Defendant withdrew its application. Therefore, no decision was ever rendered.

Since the Board never decided the matter on its merits, and because the testimonial record was complete and closed, the parties agreed to have this court consider the application de novo on the record and to issue findings of fact and conclusions of law. The parties were invited to made additional arguments in support of their respective positions before and during oral argument that was held on November 30, 2018.

The Parties' contentions:

In support of its application, the Defendant argues that the facts support its argument that the property was completely and totally destroyed by the fire before it purchased it. Therefore, it should be permitted to rebuild the building at its discretion and charge market rent for any new tenancies. It also argues that the existing tenancies were terminated following the total destruction of the premises.

The Plaintiff argues in opposition that the building was not totally destroyed by the December 3, 2012, fire. As such, the City of Union City can compel the Defendant to repair the building and to restore the displaced tenants to their apartments.

Findings of Fact:

Following a review of the transcripts, consideration of the joint exhibits, and oral argument by the parties' counsel, this court makes these factual findings:

409-415 Bergenline Avenue in Union City is a mixed use, 4-story building that contains 23 units. Twenty-one of those units are residential apartments. The remaining 2 are commercial spaces. The residential units are located on the second, third, and fourth floors.

On December 3, 2012, the building was damaged by a fire that started on the 4th floor of the building. Only days afterward, on December 5, 2018, Alexander Itkin, a professional engineer with Maser Consulting, inspected it. He reported that his "objective was to verify the structural condition of the building after the [December 3, 2012] fire." Mr. Itkin notes that "the entire building structure is in generally sound condition, with the exception of the leaning parapets and the unbraced masonry walls above the fourth-floor level." Mr. Itkin did believe that because of the "dangerous condition" of the "buildings parapets" the "access to the building should remain restricted." Repair proposals were made in that report regarding the removal of the leaning parapets and the temporary shoring of the masonry walls to permit the replacement of the roof. The report contained

photographs that detailed the portions of the building that concerned Mr. Itkin- consistent with the notes made in his report.

The City then issued a notice of imminent hazard and required the then-existing owners to "comply with the engineer's report/recommendations to abate the danger to the public." In addition, the City required that the "fire damaged structure . . . remain vacant until architectural plans are submitted and all required permits/inspections are obtained." The occupants were required to vacate the structure immediately.

The Defendant purchased the property on August 27, 2014. At that time, although some remedial work was in progress, the conditions noted in the Union City notices were never abated.

On March 6, 2015, the new owner, the Defendant here, asked the Union City Rent Leveling Board to conclude that the 21 residential units were completely destroyed by the fire. In support of that request, the Defendant argued that any repairs should render the units "new" and, as such, should be excluded from rent stabilization consideration. Consequently, there would be no need for these owners to repair the premises and to re-lease those units to the existing tenants.

The first hearing on this application occurred on April 16, 2018. Acknowledging that it had the burden of proof, the Defendant called Alan Feld, its architect. In his September 24, 2015, report, Mr. Feld noted that he "personally inspected the site after

the fire." Mr. Feld concluded that "the roof was completely destroyed." He took note of the "extensive water damage throughout the three-story structure." "The interior walls were destroyed." Examining the interior, Mr. Feld noted that "it was difficult if not impossible to define the boundaries of each of the former dwelling units." Plumbing, electricity, and heating systems had been removed. To Mr. Feld, "irreparable structural damage" existed throughout the building. Mr. Feld made a number of recommendations about the needed "reconstruction" of the premises. Mr. Feld also acknowledged that the plans that were drawn and that the permits obtained were not for a new building, but "to repair or renovate the existing building" according to the New Jersey Rehabilitation Sub Code.

The Defendant called Sherif El-Far, a professional engineer. In his March 12, 2018, report, Mr. El-Far noted that he was retained by the Defendant to evaluate the building systems at the property that he writes was "damaged" by a fire in December 2012. Mr. El-Far noted specifically that "the purpose of this report is to evaluate the damage to the building as a result of the fire."

Mr. El-Far's report followed his visit to the property on March 5, 2018- slightly more than 6 years after the fire. In it, he notes that new construction was evident at the property reporting that "over 90% of the wood framing was new construction." Despite a relatively recent inspection, Mr. El-Far stated that the

"only wood framing that predates the fire is a small[sic] are in the first floor and some steel and iron framing in the basement." "All windows have been replaced." Mr. El-Far made similar observations about the lack of electrical, plumbing, heating, ventilation, and air conditioning systems. He noted the severity of the damage to the main stairs and his belief as to their required replacement. He also observed the lack of finish work. In summary, he reported that the "the only items in the building that predated the fire are the exterior walls, stair walls, and minor framing."

Employing a "cost breakdown approach" that evaluated the "building componanat [sic]", the "componanat percentage in building construction" and the remaining percentages "after fire [sic] and "in building", Mr. El-Far believed that the "damaged [sic] to the building and the percentage of destruction is approximately 70%." He wrote and similarly testified, without authority, that "it has been the rule in New Jersey Uniform Construction Code that when the cost of the work exceeded 50 percent of the structure's value, the code mandates that the requirements for new structures be applied to the entire building, including portions not planned for alteration or repair."

Christian C. Yegen, a member of the Defendant LLC, testified. He noted that the LLC did not own the building on the date of the fire and that he was personally involved in the negotiation for

purchase price for the admittedly damaged building in 2014. He acknowledged, as well, that the LLC did not receive any of the insurance proceeds that might have been paid at the time of the fire to the prior owners. On cross-examination, Mr. Yegen testified that the LLC only visually inspected the property that it ultimately bought for approximately $800,000.00.

Michael Kallay, an architect, testified for the tenants. Following his review of all of the documents generated about the building regarding the post-fire inspection, he made certain observations. His focus was limited to "distinguish whether the subject property was indeed totally destroyed, as opposed to damaged, as a result of the fire." He highlighted the disagreement between Maser Consultants and Alan Feld as to the degree of damage caused by the fire. He acknowledged that both reports observe that the masonry shell existed and that the floor framing was intact. He reviewed construction plans that were prepared by Mr. Feld and reports, importantly, that the project was designated by Mr. Feld as a reconstruction. Specifically, that a framing plan existed for the roof only, rather than for the entire structure. Stairs and railings were similarly observed to remain in place but must be "repaired as required." His field observations of the building exterior, the interior bearing walls and support structure, the floor and roof construction, the stairways, the interior walls and finishes, the doors, roof construction, and the

electrical, plumbing and heating systems permitted his conclusion that "it is clear that a substantial portion of the pre-existing structure still remains in place and is being incorporated in the current reconstruction project." He made additional observations about the reconstruction work that was currently taking place on the property. Ultimately, Mr. Kallay concluded that

> the exact degree of damage to this structure as a result of the fire, firefighting operations, or subsequent exposure may be difficult to verify; however, it is very clear that a significant amount of the pre-existing construction remains in place and is in serviceable condition. This conclusion is consistent with the initial structural report issued by Maser Consultants and with the construction drawings prepared by Alan Feld Architect.

To Mr. Kallay, "this building, while significantly damaged, was not totally destroyed as a result of the fire that occurred on December 3, 2012."

Pertinent Legal Principles:

The issue presented in this matter is whether the facts support the Defendant's requested conclusion that the building was "totally" destroyed by the fire. The Defendant bears this burden of proof by a preponderance of the credible evidence.

Proof of a claim by a preponderance of the evidence requires that "a litigant . . . establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met." Liberty Mut. Ins. Co. v. Land, 186 N.J. 163,

169 (2004) (quoting Biunno, Current N.J. Rules of Evidence, comment 5a on N.J.R.E. 101(b)(1) (2005). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro Bottling Co., 26 N.J. 263, 274-75 (1958). To prevail, a Plaintiff must provide evidence that "must demonstrate that the offered hypothesis is a rational inference, that it permits the trier of fact to arrive at a conclusion grounded in a preponderance of probabilities according to common experience." Joseph v. Passaic Hosp. Ass'n, 26 N.J. 557, 574-75 (1958). "The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads [a factfinder] to find the existence of the contested fact is more probable than its nonexistence." 2 McCormick on Evidence §339 (Strong ed., 5th ed. 1999).

Credibility assessments are key to a decision as to whether that party who possesses the burden of proof satisfies it. Central to any determination in all litigation (and in this case in particular) is a consideration of the credibility of the witness testimony as to all issues presented. The ultimate outcome of this case centers squarely on the credibility assessments that this court is required to make following the consideration of the overall reasonableness of the positions taken by the witnesses. Although this matter is considered de novo on the record established at the April and May hearings, credibility assessments

can, and must, be made as to the overall reasonableness of the testimony of the four witnesses that testified.

Our model jury charges provide general guidance as to credibility findings. Factfinders are instructed to consider the witness' interest in the case outcome; the accuracy of the witnesses' recollection; and the witnesses' ability to know what he or she was talking about. Model Jury Instructions (Civil) 1.12(L) "Credibility" (Approved November 1998). Additional consideration should be given to contradictions and changes in the witness testimony and the witnesses' demeanor. Ibid. Finally, common sense and overall reasonableness provide substantive lenses though which facts can, and should, be assessed. Ibid.

Disposition of this matter turns on the definition of the term "totally destroyed." N.J.S.A. 46:8-7. That statute provides that "whenever any building . . . erected on leased premises shall be totally destroyed by fire or otherwise, without the fault of the lessee, the rent shall be paid up to the time of such destruction . . . the lease shall cease and come to an end." If the property is damaged by fire, the "landlord shall repair the same as speedily as possible." N.J.S.A. 46:8-6. To address this legal standard and to attempt a definition of the term "totally destroyed", the parties relied almost exclusively on expert testimony provided by architects and engineers. The question then arises as to whether this matter can be resolved without expert

testimony. The answer to that inquiry, therefore, is decidedly: no.

In determining whether expert testimony is necessary in a controversy, a court must consider "whether the matter to be dealt with is so esoteric that [a factfinder] of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982). In this matter, the conclusions made were based on sophisticated concepts as to valuation and percentage destruction for which only an expert in the field of architecture or professional engineering would be competent to provide an opinion. Consideration of the expert opinions presented, therefore, is key to the resolution of this matter.

It is axiomatic and well-settled that "an expert witness may give an opinion on a matter in which the witness has some special knowledge, education, skill, experience or training." Model Jury Instructions (Civil) 1.13 "Expert Testimony" (Approved April 1995). An expert witness may be able to assist the factfinder in understanding the evidence in a particular case and in the performance of the factfinder's duties. Ibid. The weight to be given to an expert's opinion "depends on the facts on which the expert bases his [or] her opinion." Ibid. (quoting Polyard v. Terry, 160 N.J Super. 497, 511 (App. Div. 1978). This fact

combined with the experts' qualifications and overall believability are also relevant considerations as to the overall acceptance or rejection of all or part of an expert's opinion. Ibid. (quoting State v. Spann, 236 N.J. Super. 12, 21 (App. Div. 1989).

Conclusions of Law:

Resolution of this matter turns squarely on the definition of the phrase "totally destroyed." Neither the statute nor interpretive precedent, however, provides guidance.

Case law has provided instruction and a mechanism to address key terms that might be understood colloquially but achieve a different meaning when applied legally. See State v. N.G., 381 N.J. Super. 352, 360 (App. Div. 2005). When a statute is not clear on its face, courts are instructed to first ascertain the legislative intent. State v. Simon, 161 N.J. 416, 455 (1999). When that information is not available, vagueness arises that creates legal uncertainty. Vagueness occurs when "individuals of ordinary intelligence 'must necessarily guess at its meaning and differ as to its application.'" Ibid. (quoting Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983). "[W]hen the average person would understand the words used in a statute and the Legislature provides no explicit indication of special meaning, the terms used in the provision will carry their ordinary, well-understood

meanings." N.G., 381 N.J. Super at 360 (quoting State v. Afanador, 134 N.J. 162, 171 (1993). When a word or expression has both a recognized common meaning and a technical meaning, in the absence of a contrary legislative intent, the term is presumed to be used in its common sense. Newark v. Dept. of Civil Service, 68 N.J. Super. 416, 429-430 (App. Div. 1961).

In construing statutory provisions, a "court will presume that the words thereof, save terms of art, were employed in their natural and ordinary meaning." Lloyd v. Vermeulen, 40 N.J. Super. 151 (Law Div. 1956) affirmed 40 N.J. Super. 301 (App. Div. 1956). To ascertain the ordinary meaning of words used in a statute, courts typically look to a dictionary. N.G., 381 N.J. Super. at 360 (quoting State v. Mortimer, 135 N.J. 517, 532-33 (1994)).

To Webster, "totally" means "wholly." Webster's Ninth New Collegiate Dictionary, 1246 (9th ed. 1988). Another defines that term as "entirely" and "completely." The American Heritage Dictionary of the English Language, 1357 (New College Edition, 1979). In a legal forum, the concept is further described. A "total loss" is "the complete destruction of the insured property by fire, so that nothing of value remains from it; as distinguished from a partial loss, where the property is damaged, but not entirely destroyed." Black's Law Dictionary 1490 (6th ed. 1990). Ballentine provides additional detail as to the completeness of the destruction noting that a "total destruction" occurs when the

"building, though some of it may be left standing, has lost its character as a building and, instead thereof, has become a broken mass, or so far in that condition that it cannot properly any longer be designated as a building." Ballentine's Law Dictionary 1288 (3rd ed. 1959). "Total loss is such destruction of a building as that, after the fire, there remains standing in place no substantial remnant thereof which a reasonably prudent owner, uninsured, desiring to restore the building to its original condition, would utilize as a basis of such restoration." Black's Law Dictionary, 1490 (quoting Crutchfield v. St. Paul Fire & Marine Ins. Co., 306 S.W.2d 948, 952 (Tex. Civ. App. 1957).

Considering the facts and the condition of the building in light of these definitions, therefore, this court concludes that the Defendant has not sustained its burden of proving the total destruction or total loss of 409-415 Bergenline Avenue. The facts presented through the testimony of the experts simply do not tip the proverbial scales to demonstrate the complete destruction of the premises as would be required for the Defendant to carry its burden of proof.

First, immediately after the fire, the City's engineer inspected the property and made certain conclusions about it. Noting that the property was in "generally sound condition" and that there was, nevertheless, a safety issue presented, he did not recommend that the property be demolished. Although, notices of

hazardous conditions were issued, the action required only mandated immediate attention, rehabilitation, and repair, not destruction.

Second, each testifying expert who opined about the current state of the building did so years after the December 2012 fire. This would include the Tenants' expert as well. However, as the Defendant's experts virtually dismissed the import of the notice of hazard and the conclusions made by the City's expert, the Tenants' expert not only acknowledged and reviewed those documents and opinions, but also concluded, consistent with those determinations, that the building, although substantially damaged, still retained the character of a building and was not in such a condition that it should have been ordered demolished. Mr. Kallay adopted a forensic approach to the question presented to him. He appropriately considered the entirety of the record, including the notices of hazards and the Itkin report, and made his conclusions based on the best evidence as to the condition of the premises immediately after the fire, rather than one that existed 6 years afterwards. He further noted that a number of the building's fundamental structures remained intact. Those included the exterior walls, the floor structure, and the mosaic floor. The stairwells were not damaged. The fire escapes attached to the exterior walls remained in place.

In contrast, the Defendant's experts proceeded from the premise that the property was completely destroyed and framed their opinions around that conclusion. This is evident because the testimony was presented with a conspicuous lack of authority and methodology on which the experts based their opinions. The Defendant's experts, by not even acknowledging the conclusions made on December 5, 2012, essentially ignored the orders submitted by Union City that despite the damage, the premises remained structurally sound.

The testimony of the Defendant's experts paled, credibility-wise, to that provided by the Plaintiff's and adversely impacted the overall reasonableness of the Defendant's experts. Mr. El-Far and Mr. Feld give perfunctory and superficial consideration to the best available evidence that existed in temporal proximity to the fire: the report of the City's engineer and the notices of imminent hazard. Mr. Feld, specifically, when confronted on cross-examination as to why he did not evaluate the Itkin report, stated, less-then-credibly, that the report was not helpful- despite being the most immediate assessment of the damage following the fire and before any rehabilitative work was completed on the premises. Further, Mr. Feld said that he did not speak with the City Engineer, any representative of the building department, nor the prior owners as to the position of the City nor as to the removal of pertinent operating systems from the property.

The reports and consequent testimony from both of these experts is only as good on the facts on which their testimony was based. This court concludes that no credible conclusions were made by either Mr. El-Far nor by Mr. Feld, since they appeared to this court to be consistent with the litigation position advanced by the Defendant rather than from an evaluative position that would be more appropriate for an expert. This is best detailed in the attempts to define the percentage of damage of the premises following the fire. Mr. El-Far, in an attempt to trigger what percentage destruction of the property would be sufficient to designate a building as damaged as opposed to destroyed, "diseected the building to 14 items including the foundation, exterior wall, framing, roofing, thermal protection, drywall, ceiling, doors, windows, HVAC, electric/fire alarm, and plumbing." Based on Mr. El-Far's admitted review of "several hundred buildings", he created a table that resulted in a 30% remainder (or 70% destruction) of the premises. This, according to Mr. El-Far, was "well below the 50% threshold that's established by the rehab code . . . ." Despite the lack of authority cited for this proposition, both in his oral testimony on re-cross examination and in his report, the findings stem from a flawed premise that led to an infirm conclusion: The chart only accounts for the present condition of the premises, rather than its condition immediately after the fire. Mr. El-Far further admitted on redirect

examination that the "premise of this table is not really based on any Code", lending support to the speculative nature of his opinion. He acknowledged that he was unaware as to whom removed the operating systems and performed at least a modicum of repair on the building. He has no personal knowledge of anything that occurred at the building before he inspected it in 2018. He appears to have based his opinion on the RSC report, but Mr. El-Far admitted that the percentage calculus was not addressed in that report.

Third, the new owner obtained permits to repair the damage to the premises. Those, as noted, were filed under the pertinent codes for reconstruction, rather than for new construction. Further, the Defendant architect's report is consistent with the plans for "reconstruction of the building"- a tacit acknowledgement that the existing structure could be rehabilitated instead of being destroyed and built anew.

Fourth, a detailed review of the plans proposed by Mr. Feld reveals that he incorporated a number of the existing structures into the rehabilitation of the building. Those include the framing plan for floors 1 through 3, the "physically-intact" existing stairs, and new sheetrock hung on existing wood framing. Reason dictates that if the building were totally destroyed, there would be no usable remnants, and certainly not portions of the building that would be considered important structural components.

Fifth, the Defendant's experts testified that the building systems (the piping, the water lines, the hot water heaters, the furnaces, the boilers, and the sprinkler systems) would have to be replaced. However, no evidence, other than unsubstantiated assumptions that that the systems were removed as a result of the fire, supports this conclusion.

At bottom, it is uncontroverted that the property was substantially damaged by the fire. The evidence, however, is, at best, in equipoise as to whether the property was "totally destroyed." Consequently, the Defendant has not sustained its burden of proving this fact by a preponderance of the credible evidence.

Finally, at oral argument, the Defendant advanced the notion that equity should be employed to grant this relief requested here. Setting aside the facts and the law, the Defendant argues that the cost of remediation and the subsequent returns if the units were to be rented at controlled rates would result in a substantial loss of the value of the investment. The argument is exclusively financial based, and does not adequately address the over-arching issue presented that residents lost their homes and have been displaced for approximately 6 years as a result of the inaction of both the former and new owners.[1] The statutes scrutinized here

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[1] At oral argument, this court asked whether the tenants who were relocated wished to return to the premises. Tenants' counsel

have been adopted for the protection of tenants. Pivnick v. Seaboard Supply Co., 30 N.J. Super. 605, 610 (Law. Div. 1954). Consequently, "they are properly construed liberally in favor of the tenants." Ibid. On balance, equity favors the Plaintiff since the requested relief will restore displaced tenants to their apartments, rather than permit profit maximization by the Defendant.

Conclusion:

The Defendant shall immediately begin efforts to rehabilitate the property to ensure that the displaced tenants are restored to their homes. Further, declaratory judgment is entered denying the Defendant's requested relief that the tenancies have been terminated as a result of the fire.

The Plaintiff's request for the imposition of fines is appropriate in amounts according to the Union City Municipal Code, as are attorney fees sought for the relief requested here.

However, the portion of this court's order permitting the collection of attorney fees and fines shall be stayed for a period of 9 months. The building shall be rehabilitated according to the municipal code on or before September 15, 2019 and any displaced

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reported that, after she spoke with each of the displaced families, at least one-half of those individuals had plans to return to the property once it was rehabilitated.

tenants who wish may return to the premises on or before that date. The tenants' occupancy shall be reinstated under the terms of the leases that existed at the time of the fire.

If the work is complete to permit all the displaced tenants to return to their occupancy by the established date, the award of attorney fees, costs, and fines shall be vacated. This should provide sufficient incentive for the Defendant to meet its obligations imposed under this order. If, however, the work has not been completed by September 15, 2019, attorney fees, costs, fines, and any accrued post-judgment interest shall be imposed and a judgment shall be entered against the Defendant without further order of this court. The Defendant shall also be responsible for any consequential damages suffered by any tenant in reliance on the dates in this order.