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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1107-21**

THE SUPERIOR GROUP, LLC,

Plaintiff-Respondent,

v.

MENDEL DEUTSCH,

Defendant-Appellant,

and

UNIVERSAL TITLE, LLC,

Defendant-Respondent.

Submitted October 11, 2022 – Decided November 22, 2022

Before Judges Sumners and Berdote Byrne.

On appeal from the Superior Court of New Jersey,
Law Division, Union County, Docket No. L-2617-20.

Zachter PLLC, attorneys for appellant (Jeffrey Zachter
and Rickin Desai, on the brief).

Giordano, Halleran & Ciesla, PC, attorneys for
respondent The Superior Group, LLC (Michael J.

Canning, of counsel and on the brief; Peter J. Guastella, on the brief).

PER CURIAM

In a December 18, 2019 contract, plaintiff The Superior Group, LLC agreed to transfer ownership of 120 Mountain Avenue in Springfield (the property) for \$2.4 million to defendant Mendel Deutsch. Per the contract, Deutsch deposited \$500,000 with Universal Title, LLC (Universal) to hold in escrow towards the purchase. The contract gave Deutsch until January 17, 2020, to conduct "such inspections and investigations of the [property] as [Deutsch] deems necessary," including environmental inspections. The contract's time of the essence clause stated, "[u]nder no circumstances shall the Closing Date occur earlier than April 1, 2020 or later than April 15, 2020."¹ The contract also stated "[t]he Closing Date shall not be delayed as a result of [Deutsch]'s pursuit of financing and any risk of delay or postponement of the Closing Date due to [Deutsch]'s financing rests with [Deutsch]."

Deutsch was unable to close on April 15 (allegedly due to the COVID-19 pandemic), therefore Superior informed him by email that he was in default but afforded him a "one-time accommodation" to cure the default by extending

¹ All dates referenced hereinafter occurred in 2020.

the closing date to no later than 3:00 p.m. on April 23. After Deutsch failed to close again, the parties entered into an agreement on May 5, amending their contract of sale to provide a new outside closing date of June 15. In consideration for the amendment, Deutsch agreed to have Universal release \$250,000 of the \$500,000 escrow deposit to Superior.

On June 9, a private lender agreed to finance Deutsch's purchase. Three days later, Deutsch's attorney informed Superior the lender required Deutsch to provide a Phase 1 Environmental Report (environmental inspection) to finance the purchase and, therefore, closing could not be held until later in the week of June 15. For reasons that are unclear, Superior did not allow the environmental inspection to take place.

On June 22, Superior informed Deutsch he was in default because he did not close by June 15, and it would exercise its remedial rights under the contract if he did not present "a concrete proposal to cure [his] ongoing default immediately." On June 26, Deutsch's attorney reiterated to Superior that Deutsch could not close without access to the property for the environmental inspection. If the environmental inspection was permitted, counsel proposed Deutsch could close "within thirty days."

Superior did not respond to the proposal. Instead, it terminated the contract on July 2, and demanded the \$250,000 held in escrow as liquidated damages. Apparently, Universal did not release the money because Deutsch refused to consent to its release. Superior, in turn, sued Deutsch for breach of contract, fraudulent misrepresentation, and negligent misrepresentation.² Superior also made claims against Universal for breach of contract and breach of fiduciary duty for its failure to transfer the remaining escrow deposit.³ Deutsch countersued Superior for specific performance, breach of contract, and unjust enrichment and cross-claimed against Universal for return of the remaining escrow due to Superior's breach of contract.

Prior to the close of discovery, Superior filed a motion for partial summary judgment. The trial court granted the motion, entering an order that terminated the contract of sale; divested Deutsch of his rights and interest in

² Superior's misrepresentation and negligent misrepresentation claims against Deutsch were submitted to arbitration, resulting in an award in Deutsch's favor. The award was deemed final, and the claims were dismissed with prejudice on December 3, 2021.

³ These claims were dismissed with prejudice in exchange for Universal's release of the remaining funds to Superior.

the property; and dismissed Deutsch's counterclaims with prejudice.⁴ After an arbitrator dismissed Superior's remaining claims, Deutsch appealed to vacate the summary judgment order but does not contend he was entitled to summary judgment.

Based upon our de novo review of a summary judgment order, see IE Test, LLC v. Carroll, 226 N.J. 166 (2016), and the interpretation and construction of a contract, In re Balk, 445 N.J. Super. 395, 400 (App. Div. 2016), we affirm summary judgment in favor of Superior. There were no genuine issues of material dispute to prevent summary judgment relief. See R. 4:46-2(c).

We reject Deutsch's argument that Superior had no right to terminate the contract based on his failure to close and was not entitled to the \$250,000 remaining escrow deposit. Deutsch specifically contends Superior waived the contract's time of the essence requirement based on a combination of the following factors: (1) Superior's adjournment of the first closing date from April 15 to April 23; (2) Superior's failure to terminate the contract after April

⁴ The motion for partial summary judgment also requested that Universal release the remaining \$250,000 from escrow to Superior as liquidated damages for Deutsch's breach. However, Universal agreed to release the money to Superior.

23; (3) Superior's adjournment of the closing date to June 15 via their May 5 agreement; (4) Superior's knowledge that Deutsch needed financing to purchase the property; (5) Superior's initial assent to the environmental inspection despite knowing Deutsch would not be able to close on June 15; (6) Superior's June 22 request for a proposal detailing an amended closing date; and (7) Deutsch's June 26 proposal reiterating that he needed the environmental inspection to close. Deutsch further maintains Superior waived the time of the essence requirement by waiting seventeen days after the June 15 closing date to terminate the contract on July 2 and did not respond to his June 26 proposal because it already had half of the \$500,000 down payment and wanted to obtain the remaining balance.

Contrary to Deutsch's contentions, Superior's conduct was consistent with the contract of sale and the mutually agreed upon modifications. The contract's time of the essence closing date of April 15 was pushed back to April 23, by mutual agreement. When the closing did not occur, the parties agreed in writing to extend the closing date to no later than June 15, with Deutsch allowing half of his cash escrow deposit to be released to Superior. Three days before the new closing deadline date, Deutsch obtained financing to purchase the property and advised Superior he could close on an unspecified

date later in the week of June 15 if given access to the property to conduct an environmental inspection. Superior refused to allow the inspection and advised Deutsch he was in default by not closing on June 15, but would allow it to buy the property if he could close "immediately." Despite Deutsch's attorney's June 26 reply that closing could be held within thirty days if the environmental inspection required by the financing was allowed, Superior did not agree to the extension and correctly exercised its contractual rights to terminate the contract due to Deutsch's failure to close. Superior did not waive the contract's time of the essence provision to close in writing nor through its conduct. See Salvatore v. Trace, 109 N.J. Super. 83, 91 (App. Div. 1969) ("[E]ven where the contract explicitly stipulates that time shall be of the essence, the parties may nevertheless later waive that provision by their conduct."). Moreover, even if we agree with Deutsch that Superior waived the time of essence provision, Superior's unwillingness to agree to an additional thirty-day extension beyond June 15 was reasonable, considering their previous agreements to extend the closing date and Superior's demand to "close immediately." See Paradiso v. Mazejy, 3 N.J. 110, 116 (1949) (holding that if the time of the essence requirement is waived, "a reasonable time for the performance of a contract must be allowed").

There is no basis for Deutsch's claim that Superior breached the contract because it did not allow him to conduct the environmental inspection he needed to obtain financing to purchase the property. The contract clearly stated the closing could not be affected by his efforts to obtain financing. Superior was under no obligation to allow the environmental inspection because the time for him to obtain an inspection had expired on January 17, and there was no agreement to extend that date.

In addition, we reject Deutsch's contention that summary judgment was premature because no discovery was conducted to address two triable issues of material fact: (1) whether Superior waived the time of the essence requirement; and (2) whether Superior breached the contract by refusing to allow Deutsch to inspect the property. As mentioned above, there exists no genuine issue of material fact based on the contract's clear terms and its later modifications. Superior had no contractual obligation to extend the closing date an additional thirty days to facilitate Deutsch's request to conduct an environmental inspection to satisfy his lender's condition. Moreover, Deutsch has not demonstrated with particularity the likelihood that further discovery will aid his defense or counterclaims. See Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007) ("A party opposing summary judgment

on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete.") (citation omitted).

Lastly, Deutsch asserts Superior violated Rule 1:6-6 when it failed to include a certification and exhibits with its motion and the court adjourned the motion's return date for two months to allow Superior to remedy the situation and to allow Deutsch to respond. The court properly exercised its discretion under Rule 1:1-2 to relax the requirements of Rule 1:6-6 so that the full breadth of the parties' arguments could be considered. Because Deutsch suffered no prejudice, there is no reason to vacate summary judgment.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION