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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3057-20

JAY SHETH and RAHKEE SHETH,

Plaintiffs-Appellants,

v.

MORRIS BOULEVARD II, LLC, STONEHYRST COMPANY TRUST, LORRAINE MOCCO, PETER MOCCO, GRAND STREET PROPERTY MANAGEMENT, LLC, GRAND & JERSEY, LLC, LIBERTY HARBOR NORTH II URBAN RENEWAL COMPANY, LLC, SEAN YOUNG, and LIBERTY HARBOR NORTH BROWNSTONE CONDOMINIUM URBAN RENEWAL, LLC,

Defendants-Respondents.

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Submitted February 16, 2022 – Decided April 5, 2022

Before Judges Hoffman and Whipple.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-0474-14.

The Feinsilver Law Group, PC, attorneys for appellants (David Feinsilver and H. Jonathan Rubinstein, of counsel and on the briefs).

Scarpone & Vargo, LLC, attorneys for respondent Liberty Harbor North Brownstone Condominium Urban Renewal, LLC (James A. Scarpone and Bruce D. Vargo, on the brief).

Law Offices of Shannon Garrahan, PC, attorneys for respondents Morris Boulevard II, LLC, Stonehyrst Company Trust, Lorraine Mocco, Peter Mocco, Grand Street Property Management, LLC, Grand & Jersey, LLC, Liberty Harbor North II Urban Renewal Company, LLC, and Sean Young, join in the brief of respondent Liberty Harbor North Brownstone Condominium Urban Renewal, LLC.

PER CURIAM

Plaintiffs Jay Sheth and Rahkee Sheth appeal from a March 15, 2021 order confirming an arbitration award under New Jersey's Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S.A. 2A:23A-1 to -30, and a June 4, 2021 order denying motion for reconsideration. Because we have no jurisdiction to provide a detailed review pursuant to the APDRA, we dismiss.

The facts relating to plaintiffs' underlying claims were detailed in Sheth v. Morris Blvd., II, LLC, No. A-2328-18 (App. Div. July 23, 2020) and need not be repeated here except to address arbitration. On July 24, 2012, plaintiffs entered into a Subscription and Purchase Agreement with Liberty Harbor North Brownstone Condominium Urban Renewal, LLC (Liberty) to buy a condominium for $1,085,000. The parties agreed to close on December 1, 2012.

After Superstorm Sandy, the redevelopment project encompassing the condominium was deemed "a site-wide violation," and Jersey City's construction codes prohibited issuance of any certificates of occupancy (COs) until the flood zone issues were resolved. Liberty informed plaintiffs it could not close on time but arranged a one-year lease between plaintiffs and defendant Morris Boulevard II, LLC, for a rental unit.

On May 9, 2013, Liberty obtained a temporary sixty-day CO. On May 23, defendant Peter Mocco, an attorney and owner of Liberty, sent plaintiffs a "time of the essence" letter informing them the closing would take place on June 11. Because outstanding items were not addressed, plaintiffs refused to close on that day. On July 26, an attorney for Liberty sent a letter to plaintiffs terminating the purchase agreement because plaintiffs had not closed on June

11. Plaintiffs responded with a demand to close on August 9, 2013, which Liberty rejected.

Mocco subsequently arranged to transfer the condominium from Liberty to Stonehyrst Company Trust (the trust) for $750,000. In August 2013, title to the condominium was transferred to the trust, the deed was recorded, and the trust listed the condominium for sale at $1,500,000. Plaintiffs filed a complaint in Superior Court disputing the legality of the condominium's sale to the trust. The parties eventually agreed to arbitrate their disputes pursuant to the APDRA. The Superior Court actions were dismissed.

Throughout 2017, the parties participated in arbitration. "[T]he arbitrator determined Liberty unjustifiably terminated the purchase agreement and transferred the condominium to the trust. Finding a breach of contract and fraudulent conveyance, the arbitrator ordered specific performance of the purchase agreement." Sheth, (slip. op. at 4). Plaintiffs appealed, and we remanded, concluding:

> When parties to an APDRA arbitration file a Law Division action challenging such awards, they are entitled to a decision specifically addressing their claims and applying relevant statutory standards. Because the trial court's brief written explanation in this case does not satisfy these requirements, we exercise our supervisory authority, vacate the orders, and remand for oral argument and a new decision.

> The trial court's decision should specifically address plaintiffs' arguments and apply the statutory standards to them.
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> [Id. slip. op. at 1-2.]

On August 21, 2020, plaintiffs served discovery demands in connection with defendants' post-arbitration efforts to comply with the award. On September 3, 2020, defendants filed a motion to quash the irrelevant requests. On September 25, the court heard oral arguments, and found that plaintiffs were not entitled to the information based on the context of the remand, but might be if specific performance was confirmed on remand, so the court reserved decision. On October 6, 2020, the court granted Liberty's motion to quash plaintiffs' post-arbitration discovery requests. The court stated that "[t]he actions or inactions of the parties since the arbitration will have no relevance . . ." because "[w]hether the defendants followed the directives of the arbitrator [via] post-arbitration actions, likewise is of no probative value regarding the soundness of the arbitrator's decision."

Plaintiffs filed a notice of appeal and a motion for reconsideration of the October 6 order quashing post-arbitration discovery, to confirm the scope of the motion court's undertaking, to address remanding to the arbitrator for further findings, and to join Liberty as a party defendant.

On January 11, 2021, the court heard oral arguments. Plaintiffs argued that specific performance must be converted given Jersey City construction official Raymond Meyer's purported change in testimony and alleged changed circumstances. Defendants reminded the court that the parties agreed to and performed a thorough and binding arbitration and that plaintiffs could always build to fix the home, then seek those damages. The court concluded that it did not want to exceed the scope of remand but reserved the decision to write an opinion.

On March 15, 2021, the court entered an order confirming the dismissal of New Jersey Consumer Fraud Act (CFA) claims and the award of specific performance with a price reduction in the amount of $233,192, representing the loss of residential use of the basement and the diminution of value to the unit as whole; joining Liberty as a defendant; and denying plaintiffs' motion for reconsideration of the October 6, 2020 order as to the request to conduct post-arbitration discovery.

We briefly summarize the court's relevant findings. Liberty delayed closing then Mocco directed the fraudulent transfer. The specific performance awarded contemplated defendants would do everything "reasonably necessary to secure a variation"; the inability to include a basement bedroom; Meyer's

testimony that this inability meant specific performance would not give plaintiffs the benefit of the bargain; the failure to deliver the basement as residential use was a material breach; and Meyer's changed position was presented to the arbitrator who did not re-open arbitration because the parties could not agree to return to arbitration.

As to plaintiffs' specific performance claim the court found that

> the arbitrator was certainly within his purview to grant that relief. It was specifically prayed for in the [c]omplaint. The fact that the Sheth[]s wanted to consummate the sale (albeit subject to critical conditions) is patently obvious. The award of specific performance encompassed a substantially reduced purchase price of $750,000. The arbitrator's award contemplated compliance by Liberty to do that which would be reasonably necessary to secure a variation to complete construction of the unit. The testimony of Meyer established that if the cited violations were cured, the temporary CO would be either issued anew or extended. Meyer added that he did not envision any scenario in which the basement would be permitted to be used as residential space beyond possibly a bathroom. That fact alone establishes that the specific performance remedy, while certainly supported by the record, would not make the Sheth[]s whole or give them the benefit of the bargain. The bedroom and bathroom in the basement was a material contractual term for the Sheth[]s. The arbitration record shows that there was no basis upon which Meyer could ever see a residential use of the basement. Specific performance as to that material term can only be described as impossible. That is a breach at the hands of the seller who constructed the

> unit (and, perhaps the whole development) contrary to the flood zone requirements. The Sheth[]s are entitled to compensatory damages for the loss of use of the basement as a residence and any calculable diminution of value of the unit as a whole.

Because the court concluded that the arbitrator erred in finding plaintiffs did not suffer an ascertainable loss, it set a diminution of value damages at $233,192 for the loss of residential use of the basement and reduced the award by that amount. Thus, plaintiffs would pay $750,000 less $42,900 in rent credits for the Morris Boulevard lease, less the $233,192 basement loss, totaling $473,908.

As to CFA, N.J.S.A. 56:8-1 to -2.13, findings, even though the court acknowledged that "[t]he award of specific performance is not an exclusive remedy and does not rule out the finding of either an ascertainable loss under the CFA or consequential damages from the breach. D'Agostino v. Maldonado, 216 N.J. 168 (2013)," the court did not find that plaintiffs met the CFA elements. This was because "Liberty had the right to reasonably rely upon these entities when offering this unit and others like it for residential use . . . [and as] noted by the arbitrator, it was not until well after the [public offering statement] was issued that the storm occurred," which revealed the threat of flooding damage. Thus, "it [could not] be said that Liberty falsely

promised, misrepresented or knowingly concealed what turned out to be a material fact in this transaction - the restricted use of the basement." The court continued that:

> [it] agree[d] with the arbitrator that the CFA claim fails but for a different reason. The CFA claim fails not because there is no ascertainable loss but because the Sheth[]s did not prove a deceptive practice as defined by the statute in the sale or marketing of the condominium.[]
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> The breach occurred when the defective time of the essence demand was made followed by the unwarranted cancellation of the contract and the illegal transfer from Liberty to Stonehyrst. The damage to the Sheth[]s flowing from that breach consists of loss of the benefit of the bargain, i.e., title, use of the property and diminution of value of the unit. The arbitrator restored the title with the award of specific performance and addressed the monetary damages by crediting the Sheth[]s with their deposit on account and the amounts of rent paid awaiting closing while they were out of possession.

The court applied this discussion to the claims under the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 to -56, finding no support for the required elements, and agreeing with the arbitrator that the claim is subsumed into the CFA claim because a successful PREDFDA claim would double proven damages.

Turning to the benefit of the bargain claim, the court found that:

> [t]he Sheth[]s were denied the full benefit of their bargain in that they will not have the residential use and enjoyment of the basement as was their expectation at the time they entered into the contract. That deprivation (loss of use and diminution of value) has been quantified by their proffered expert at $233,192. It does not appear from the record that this claim was addressed by the arbitrator below inasmuch as Paragraph [five] of the Award and Order of Arbitration does not mention it. This amount is yet another item of damages related to the breach for which the Sheth[]s should be compensated. To the extent it was not addressed by the arbitrator the award will be modified to reflect that loss.

As to not enforcing the award, the court reminded the parties that "Liberty's non-compliance with the Award and Order of the Arbitrator is beyond the scope of this decision and may require a separate action against Liberty to enforce the award. It would be during such litigation that the sought[-]after post-arbitration discovery would be appropriate."

Liberty filed a motion for partial reconsideration regarding the further reduction of the purchase price in the March 15, 2021 order. Plaintiffs opposed Liberty's motion and filed a cross-motion for reconsideration, re-asserting claims it felt the court failed to address on remand instructions. Liberty filed a motion to strike the cross-motion and for sanctions. On June 4, 2021, the court denied all the motions, reminding the plaintiffs of each of the arguments it already considered. This appeal followed.

Plaintiffs now argue the court failed to: make adequate findings of fact and conclusions of law on the claims; address three claims; enforce the specific performance award that it confirmed; address post-award change in circumstances; and grant plaintiffs' request to remand non-addressed claims to the arbitrator. Plaintiffs contend the court erred by finding plaintiffs must file another lawsuit for enforcement against defendants instead of enforcing the arbitrator's specific performance award, thus allegedly violating the appellate court's instructions, APDRA, the entire controversy doctrine, and public policy. Plaintiffs also allege the court should have considered "post-arbitration events and changes of circumstances that make specific performance impossible" to "convert the award of specific performance to one for money damages . . . ." Plaintiffs assert that the findings that Mocco committed fraud and defendants' repeated failures to follow the requirements and award means plaintiffs deserve a conversion to monetary damages under a theory of changed circumstances, and that plaintiffs also deserve CFA and PREDFDA damages for defendants' performance of the contract. Plaintiffs maintain that defendants have been able to retain the $42,900 in rents from the plaintiffs and that plaintiffs have not received a final CO.

Because the court provided a detailed analysis in conformance with the APDRA, we dismiss plaintiffs' appeal. The APDRA provides:

> b. In considering an application for vacation, modification or correction, a decision of the umpire on the facts shall be final if there is substantial evidence to support that decision; provided, however, that when the application to the court is to vacate the award pursuant to paragraph (1), (2), (3), or (4) of subsection c., the court shall make an independent determination of any facts relevant thereto de novo, upon such record as may exist or as it may determine in a summary expedited proceeding as provided for by rules adopted by the Supreme Court for the purpose of acting on such applications.
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> c. The award shall be vacated on the application of a party who either participated in the alternative resolution proceeding or was served with a notice of intention to have alternative resolution if the court finds that the rights of that party were prejudiced by:
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> > (1) Corruption, fraud or misconduct in procuring the award;
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> > (2) Partiality of an umpire appointed as a neutral;
> >
> > (3) In making the award, the umpire's exceeding their power or so imperfectly executing that power that a final and definite award was not made;
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> > (4) Failure to follow the procedures set forth in this act, unless the party applying to vacate the award continued with the proceeding with notice of the defect and without objection; or

> (5) The umpire's committing prejudicial error by erroneously applying law to the issues and facts presented for alternative resolution.
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> [N.J.S.A. 2A:23A-13(b)-(c).]

A party to arbitration under the APDRA may seek to vacate, modify, or correct an award by initiating a summary application with the Superior Court. N.J. Mfrs. Ins. Co. v. Specialty Surgical Ctr. of N. Brunswick, 458 N.J. Super. 63, 67 (App. Div. 2019) (citing N.J.S.A. 2A:23A-13). Generally, once the Superior Court makes its decision on a summary action challenging the APDRA award, "[t]here shall be no further appeal or review of the judgment or decree." N.J.S.A. 2A:23A-18(b).

Only in rare circumstances will public policy require appellate review, which would require us "to carry out [our] 'supervisory function over the courts'" to review a court's findings on the arbitration findings and award. See Specialty Surgical, 458 N.J. Super. at 68 (quoting Mt. Hope Dev. Assocs. v. Mt. Hope Waterpower Project, LP, 154 N.J. 141, 152 (1998)).

A party challenging an APDRA decision is "entitled to a ruling applying the relevant statutory standards" and specifically considering its claims. Morel v. State Farm Ins. Co., 396 N.J. Super. 472, 476 (App. Div. 2007); cf. R. 1:7-4(a). Thus, we may exercise our "supervisory jurisdiction to ensure that trial

courts utilize the standards contained in N.J.S.A. 2A:23A-13 when examining an [APDRA] award, and that trial courts articulate an analysis of how those standards apply to the facts and circumstances of a given case." Liberty Mut. Ins. Co. v. Garden State Surgical Ctr., LLC, 413 N.J. Super. 513, 526 (App. Div. 2010). Where the trial court has failed to provide a decision, written or oral, demonstrating its application of the relevant standard or how it reached its determination, "[i]n such a circumstance, we are entitled--indeed, obligated--to exercise our supervisory function and remand for further proceedings consistent with APDRA." Ibid. If a trial court acted within the bounds of the APDRA and provided an adequate explanation, then there is no jurisdiction for appeal, and we are bound to dismiss the appeal. See Fort Lee Surgery Ctr., Inc. v. Proformance Ins. Co., 412 N.J. Super. 99, 103 (App. Div. 2010).

Here, the court's memorandum provided a detailed analysis in conformance with the APDRA. The court made ample findings, specifically addressed plaintiffs' claims, properly confirmed the arbitrator's award of specific performance, and properly modified the award to reflect the price reduction. Because the court's decision was consistent with APDRA's parameters, we have no appellate jurisdiction to review its decision. Ibid.

In addition, because plaintiffs do not brief their appeal of the June 4, 2021 denial of their motion for reconsideration, we deem their appeal waived as to that order. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011).

Dismissed.

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

CLERK OF THE APPELLATE DIVISION