SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0369-21

DAVID COSME,

Plaintiff-Appellant,

v.

MAGDI KHALIL,

Defendant-Respondent,

and

JOHN T. COYLE, ESQ.,
and LAW OFFICE OF
JOHN T. COYLE, ESQ.,

Defendants.

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Submitted January 11, 2023 – Decided June 8, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3065-19.

Freeman Law Center, LLC, attorneys for appellant (Michael Wiseberg, on the brief).

Gray Law Group, LLC, attorneys for respondent (Bruce D. Nimensky, on the brief).

PER CURIAM

Plaintiff David Cosme appeals from an August 16, 2021 Law Division order granting defendant Magdi Khalil summary judgment dismissal of plaintiff's complaint and entering a money judgment on defendant's counterclaim. We affirm in part and remand for further proceedings.

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in the light most favorable to plaintiff. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)).

Plaintiff and defendant are real estate professionals whose business relationship dates back to 2006. In October 2010, defendant approached plaintiff with some real estate investment opportunities that resulted in plaintiff purchasing an investment property located on Minerva Street in Jersey City from Migdalia Martinez for $70,000. The closing occurred in defendant's office at the Coyle Law Firm and was attended by a notary public as well as plaintiff and defendant. In a subsequent certification, plaintiff averred that defendant "acted as [his] representative guiding [him] through the closing and instructing [him]

where to sign." According to defendant's certification, the Minerva Street property "is now valued at $414,000, with an estimated rent roll of $2,350 a month."

Although plaintiff denied receiving any closing documents, he acknowledged that the deed to the Minerva Street property was recorded on December 1, 2010, and that for months following the purchase, he paid $900 per month to Martinez as directed by defendant. Plaintiff also admitted that on March 3, 2011, he met again with defendant at the Coyle Law Firm where he executed a promissory note in the amount of $189,000 in favor of defendant.

In pertinent part, the note, which was notarized, stated that plaintiff's obligation to pay defendant the principal amount of $189,000 was

> [i]n consideration of . . . [defendant's] assistance to . . . [plaintiff] in the purchase of real property . . . at . . . 11 Minerva Street, Jersey City, . . . including but not limited to [defendant's] matching of [plaintiff] to [s]eller, [defendant's] arrangement of financing and [plaintiff]/[defendant's] agreement to hold the property for investment purposes.

The payment terms of the note specified that "the entire sum of $189,000[] [was] due" "[n]o later than two years from [March 3, 2011]." The note further stated that plaintiff had "the right to prepay th[e] [n]ote in whole or in part, prior to maturity, without penalty" and that payments could be made "from the

proceeds of sale of the property, from the proceeds of re-financ[ing] . . . the property, or from [plaintiff's] own account."

The note also contained a default and acceleration clause that allowed defendant, in the event of plaintiff's failure to repay the $189,000 by the March 3, 2013 maturity date, to "declare the unpaid principal balance . . . on th[e] [n]ote immediately due." In that same clause, plaintiff "waive[d] all demands for payment, presentation for payment, notices of intentions to accelerate maturity, notices of acceleration of maturity, protests, and notices of protest, to the extent permitted by law." In his certification, plaintiff admitted he paid defendant $80,000 the same day he executed the promissory note.

On February 28, 2013, plaintiff and defendant met again at the Coyle Law Firm where plaintiff executed another notarized promissory note in favor of defendant. Under the terms of the February 28, 2013 note, plaintiff, "[i]n return for a loan that [he] received, . . . promise[d] to pay [defendant] $10,600[] . . . plus ten percent . . . interest per annum," "a late charge [of] $150[]" in the event of default, and an additional "late charge of $150[] for each month that any amount under th[e] [n]ote is due and owing." To secure payment of the note, on the same date, plaintiff executed a mortgage in favor of

defendant, which encumbered the Minerva Street property. The mortgage was subsequently recorded on March 1, 2013.

On April 9, 2019, plaintiff entered into a matrimonial settlement agreement with his former wife "in which [he] agreed 'to transfer all of his right, title and interest' in the . . . Minerva Street property [to her], unencumbered and free of all liens." In accordance with the settlement agreement, plaintiff delivered to his former wife a quitclaim deed to the Minerva Street property. However, she was unable to record the deed due to defendant's previously recorded lien against the property.

Claiming that he was unaware of the mortgage encumbering the Minerva Street property when he executed the settlement agreement with his former wife, on August 6, 2019, plaintiff filed a complaint against defendant seeking equitable relief to rescind the February 28, 2013 mortgage. The complaint was subsequently amended four times to correct omissions and misstatements of alleged facts and to add claims against John T. Coyle, Esq. and the Law Offices of John T. Coyle (the Coyle defendants).

The complaint alleged violations of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20; the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667f; the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-

2617, and Regulation X, 12 C.F.R. § 1024; the Home Ownership and Equity Protection Act, 15 U.S.C. § 1602(aa), and Regulation Z, 12 C.F.R. § 226; New Jersey usury and lending laws, N.J.S.A. 31:1-1; and the federal and state Racketeer Influenced and Corrupt Organizations Acts, 18 U.S.C. §§ 1961-1968 and N.J.S.A. 2C:41-1 to -6.2. The complaint also alleged claims of common law and equitable fraud as well as unjust enrichment, and sought rescission of the February 28, 2013 note and mortgage based on "lack of . . . consideration" and "fraud."

Defendant Khalil filed a contesting answer that included two counterclaims. In the first counterclaim, Khalil alleged that plaintiff defaulted on his obligations "as set forth in the [March 3, 2011] [n]ote" and owed defendant "the sum of $85,400." In the second counterclaim, defendant alleged that plaintiff defaulted on his obligations "as set forth in [the February 28, 2013] [n]ote" and owed defendant "$39,914.07," including fees and interest. Plaintiff filed an answer to defendant's counterclaims, denying the allegations.

The Coyle defendants moved to dismiss the complaint as to them pursuant to Rule 4:6-2(e), which the judge ultimately granted without prejudice on June 30, 2021. In turn, defendant Khalil moved to dismiss the complaint as to him and for summary judgment on his two counterclaims. In support, he submitted

various exhibits, including original copies of the two promissory notes and the mortgage in dispute. Defendant Khalil also submitted a certification averring that when he executed the two promissory notes and mortgage, plaintiff was a licensed real estate salesman and "a savvy, sophisticated and successful real estate investor." Khalil certified that, in contrast, he was not "a loan originator," a "mortgage broker," a "lender," or a "creditor."

Plaintiff opposed the motions and cross-moved for partial summary judgment, seeking an order voiding the February 28, 2013 note and mortgage ab initio. In a supporting certification, plaintiff averred that defendant Khalil "held himself out to be a savvy real estate investor," and in April 2010, defendant had "introduced his first investment opportunity to [plaintiff] involving a $20,000[] short-term loan to Francis Monahan" that promised a return of the principal plus $3,600 in interest for "a total of $23,600[] five months later." However, plaintiff never received the original promissory note dated April 16, 2010, nor the proceeds of the Monahan loan.

In addition, according to plaintiff, he gave defendant Khalil a check for $80,000 towards an "investment in [a twenty-two]-family unit project" hours after he signed the $189,000 promissory note. Plaintiff certified that he "trusted" and "believed [defendant] when he said the $80,000[] check," "along with the

$23,600[] . . . from the Monahan loan" proceeds, "would be used to invest in the [twenty-two]-family unit project." Plaintiff averred that defendant Khalil also "took advantage" of him when defendant "convinced" him to sign the February 28, 2013 note and mortgage under the pretext that "they were needed" for the twenty-two-family unit project "even though [he] received nothing in return."

During oral argument on the motions, conducted on August 4, 2021, plaintiff argued that summary judgment was premature because there had been no discovery, a contention the judge promptly rejected because the discovery end date had long passed. Subsequently, on August 16, 2021, the judge issued two orders and an accompanying memorandum of decision. One order granted summary judgment on defendant's first counterclaim and ordered plaintiff to pay defendant "$85,400, plus accrued interest through entry of judgment, fees, costs and disbursements." The same order directed dismissal "with [p]rejudice" of "[p]laintiff's [fourth] [a]mended [c]omplaint." The second order denied plaintiff's cross-motion "to void the [February 28, 2013] promissory note and mortgage . . . ab initio."[1]

[1] The judge did not address defendant's second counterclaim regarding plaintiff's breach of the February 28, 2013 note and mortgage, but defendant has not cross-appealed.

In the accompanying memorandum of decision, after reciting the governing standard, the judge rejected plaintiff's contention that there were "disputes of material fact" as to plaintiff's obligation to pay the March 3, 2011 promissory note. According to the judge, "[t]he clear and unambiguous terms of the [p]romissory [n]ote state[d] that the $189,000 was owed" to defendant in consideration for the services defendant rendered to plaintiff "in the purchase of" the Minerva Street property. The judge found that "[t]he parties d[id] not dispute that . . . [p]laintiff signed a [p]romissory [n]ote in front of a notary public on March 3, 2011" and "that [p]laintiff gave . . . [d]efendant $80,000 towards the $189,000 total on the day he signed the agreement."

Turning to plaintiff's cross-motion to void ab initio the February 28, 2013 promissory note and mortgage based on fraud, the judge "decline[d] to make a decision to void the agreement between the parties since the fraud counts [were] currently dismissed without prejudice." Finally, the judge dismissed "[p]laintiff's [fourth] [a]mended [c]omplaint . . . with [p]rejudice" without any explanation to support her decision.

Plaintiff moved for reconsideration of the August 16, 2021 orders, which motion was denied on September 28, 2021. Plaintiff filed a notice of appeal and a case information statement expressing his intention to appeal the August 16,

2021 order granting "[d]efendant's [m]otion for [s]ummary [j]udgment" and the September 28, 2021 order denying "[p]laintiff's [m]otion for [r]econsideration." However, because plaintiff has not briefed the denial of the reconsideration motion, we deem that argument waived. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.").

On appeal, plaintiff argues "[s]ufficient facts were introduced to defeat . . . defendant's motion under the Brill standard" and "[p]laintiff did not receive the benefit of the reasonable inferences that Rule 4:46 contemplates."

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). That standard is well-settled.

> [I]f the evidence of record—the pleadings, depositions, answers to interrogatories, and affidavits—"together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. On the other hand, when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted.
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> [Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016) (citations omitted) (quoting R. 4:46-2(c)).]

Whether a genuine issue of material fact exists depends on "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523. "If there is no genuine issue of material fact, we must then 'decide whether the trial court correctly interpreted the law.'" DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). "We review issues of law de novo and accord no deference to the trial judge's [legal] conclusions . . . ." MTK Food Servs., Inc. v. Sirius Am. Ins. Co., 455 N.J. Super. 307, 312 (App. Div. 2018).

Turning to the substantive principles at issue in this appeal, plaintiff argues the judge's implicit conclusion that the March 3, 2011 promissory note was a valid contractual agreement was erroneous because "no consideration was ever given for [the] promissory note."

Under N.J.S.A. 12A:9-102(a)(65), a "[p]romissory note" is "an instrument that evidences a promise to pay a monetary obligation." A prima facie case to recover on a promissory note is established by proof and offer of the note. See

Fed. Deposit Ins. Corp. v. Miller, 130 N.J.L. 626, 628 (E. & A. 1943) ("[P]ossession of the note raise[s] a rebuttable presumption of non-payment."); Trs. Sys. Co. of Newark v. Lisena, 106 N.J.L. 549, 551-52 (E. & A. 1930) ("The note, bearing the signature of the [payor] and in the hands of the [payee], raised a presumption of law that it was unpaid, and in the absence of contradictory proof . . . , established a prima facie case and warranted a direction of verdict in favor of the [payee] . . . .").

A promissory note, like any other contract, "arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9, 24-25 (1958)). Because "contracts are enforceable only if they are supported by consideration," Sipko v. Koger, Inc., 214 N.J. 364, 380 (2013), when given for consideration, a promissory note is the equivalent of "a contract by the obligor to pay a debt," First Union Nat'l Bank v. Penn Salem Marina, Inc., 383 N.J. Super. 562, 569 (App. Div. 2006) (citing Colton v. Depew, 60 N.J. Eq. 454, 458 (E. & A. 1900)), rev'd on other grounds, 190 N.J. 342 (2007).

The sufficiency of the "consideration does not depend upon the comparative value of the 'things' exchanged." Seaview Orthopaedics ex rel. Fleming v. Nat'l Healthcare Res., Inc., 366 N.J. Super. 501, 509 (App. Div. 2004). The consideration need only "'be valuable in the sense that it is something that is bargained for in fact.'" Ibid. (quoting Borbely v. Nationwide Mut. Ins. Co., 547 F. Supp. 959, 980 (D.N.J. 1981)).

"[C]ourts enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract." Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C., 226 N.J. 403, 415 (2016) (quoting Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014)). When "the language of a contract is plain and capable of legal construction, the language alone must determine the agreement's force and effect." Ibid. (quoting O'Neill, 217 N.J. at 118). In that case, a court "must enforce the contract as written and not make a better contract for either party." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999). As such, construction of a contract may be decided on summary judgment "'unless the meaning is both unclear and dependent on conflicting testimony.'" Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div.

2009) (quoting Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001)).

Applying these principles, there is no genuine issue of material fact as to any essential element of defendant's counterclaim. By producing the original note with its clear and unambiguous terms, and certifying to nonpayment, which plaintiff did not dispute, defendant established through competent evidence a prima facie right to a judgment for the amounts due and owing under the note.

Plaintiff's argument that the note is unenforceable for lack of consideration is contradicted by the note's plain and unambiguous language, which specified that plaintiff's promise to pay the principal amount of $189,000 was "[i]n consideration" for defendant's assistance to plaintiff in acquiring the Minerva Street property. Plaintiff also acknowledged in his certification that defendant introduced him to the investment opportunity, attended the closing, and guided him through the process. While $189,000 may seem disproportionate to the services rendered by defendant, our review of the validity of the March 3, 2011 note "does not depend upon the comparative value of the 'things' exchanged." Seaview Orthopaedics, 366 N.J. Super. at 509.

Plaintiff's argument also ignores the fact that he engaged in conduct that conformed with the express terms of the note by making a partial payment of

$80,000 to defendant Khalil hours after signing the note. See Ajamian v. Schlanger, 20 N.J. Super. 246, 249 (App. Div. 1952) (finding that a plaintiff's continued payments on a note after discovering the defendant's fraudulent behavior was "plenary evidence of an election to abide by the contract; and once made, th[e] election [was] irrevocable").

Equally unavailing is plaintiff's assertion that the $80,000 was not a partial payment towards the $189,000 promissory note, but was instead intended for the twenty-two-unit investment project. It is well-established that "the secret, unexpressed intent of a party cannot be used to vary the terms of an agreement." Domanske v. Rapid-Am. Corp., 330 N.J. Super. 241, 246 (App. Div. 2000). "A contracting party is bound by the apparent intention he or she outwardly manifests to the other party[, and] [i]t is immaterial that he or she has a different, secret intention from that outwardly manifested." Cumberland Farms, Inc. v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 440 (App. Div. 2016) (quoting Hagrish v. Olson, 254 N.J. Super. 133, 138 (App. Div. 1992)). Consequently, plaintiff's secret intention to deliver the $80,000 check to defendant for an unrelated investment opportunity "did not create a material question of fact for purposes of summary judgment analysis." Domanske, 330 N.J. Super. at 247-48.

Plaintiff further argues that the judge erred by dismissing his fourth amended complaint with prejudice, contending that the complaint "remain[ed] viable" for the following causes of action: violations of the CFA and TILA, fraud, and unjust enrichment. Additionally, plaintiff appears to challenge the judge's decision denying his cross-motion as if the judge had granted summary judgment to defendant Khalil in connection with the February 28, 2013 note and mortgage. However, the judge did not grant summary judgment but instead "decline[d] to make a decision to void" the February 28, 2013 note and mortgage, thereby deciding nothing for us to review.[2]

As to the dismissal of the complaint, in her decision, the judge provided no explanation for dismissing the complaint. "In support of an order granting summary judgment, a judge is required to detail the findings of fact and

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[2] In his merits brief, defendant Khalil asserts that he "is in the process of foreclosing the 2013 mortgage," and "[t]he amount due under the 2013 [n]ote" is "being litigated in Chancery Court in the matter of Khalil v. Cosme, Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. SWC-F-5820-21." Thus, even if the judge's denial of plaintiff's cross-motion is "technically 'ripe' [for appellate review], there . . . [are] institutional considerations of potential mootness and other factors that may nevertheless call for judicial restraint." Comm. to Recall Robert Menendez from the Off. of U.S. Senator v. Wells, 413 N.J. Super. 435, 448 (App. Div.), rev'd on other grounds, 204 N.J. 79 (2010). In any event, the judge's order "declin[ing] to make a decision to void" the February 28, 2013 note and mortgage "decide[d] nothing and merely reserve[d] [the] issue[] for future disposition." Gonzalez v. Ideal Tile Importing Co., 371 N.J. Super. 349, 356 (App. Div. 2004).

conclusions of law in a written or oral opinion." Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 299-300 (App. Div. 2009) (first citing R. 1:7-4(a); and then citing R. 4:46-2(c)). "Naked conclusions do not satisfy the purpose of [Rule] 1:7-4." Curtis v. Finneran, 83 N.J. 563, 570 (1980). "Neither the parties nor the appellate court is 'well-served by an opinion devoid of analysis or citation to even a single case.'" Fisher, 408 N.J. Super. at 300 (quoting Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 498 (App. Div. 2000)). Because the judge failed to provide reasons for the dismissal of the fourth amended complaint, we are constrained to "remand[] for a statement of reasons." Id. at 303.

Affirmed in part; remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.