SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0776-21

RASHELLE WILLIAMS,
by assignee MMU, LLC,[1]

Plaintiff-Appellant,

v.

NICHOLAS GERBINO,

Defendant-Respondent.

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Submitted December 21, 2022 – Decided February 6, 2023

Before Judges Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1930-15.

Ragan & Ragan, PC, attorneys for appellant (W. Peter Ragan, Sr., on the brief).

Zucker Steinberg & Wixted, PA, attorneys for respondent (David W. Sufrin, of counsel and on the brief).

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[1] Rashelle Williams assigned her judgment to MMU, LLC, pursuant to Rule 1:4-10.

PER CURIAM

Plaintiff MMU, LLC (MMU),[2] the assignee of a default judgment in favor of Rashelle Williams, challenges a November 10, 2021 Law Division order that denied its motion to vacate a prior settlement of the underlying judgment and the warrant to satisfy judgment. We affirm.

I.

We discern the following facts from the record. In May 2013, Williams was injured while visiting a tenant who resided in a building located in Maplewood that is owned by defendant Nicholas Gerbino. Williams filed a Law Division complaint against defendant seeking damages stemming from her injuries. Former counsel for Williams, Nicholas J. Palma, Esq., represented defendant was served with a summons and complaint by a process server, although defendant claimed the summons and complaint were left with an unidentified household member at a property owned by defendant and his wife Debra Gerbino (collectively the Gerbinos).

[2] The notice of appeal states that "MMU, LLC," represented by Ragan & Ragan, PC, appeals from the November 10, 2021 trial court order. However, its letter brief states the firm represents "Rashelle Williams by Assignee, MMU, LLC" in this appeal. This is not germane to our opinion.

Defendant did not file an answer or otherwise move with respect to Williams's complaint. Default was entered against defendant, and a proof hearing was scheduled. At the conclusion of the proof hearing on March 16, 2016, the court entered a judgment in favor of Williams and against defendant in the amount of $106,315.31, inclusive of costs and pre-judgment interest.

The following year, the Gerbinos retained counsel, David W. Sufrin, Esq., to represent them in connection with the judgment obtained by Williams against defendant, a pending personal injury lawsuit filed by Revenue Exilus, and a tax lien foreclosure judgment held by PRO CAP III, LLC, relating to defendant's two Maplewood properties. Sufrin was able to negotiate a settlement for each matter.

Based on representations from Sufrin that his client was facing "dire financial circumstances," as well as potential challenges to the court's entry of default judgment, Williams, through her counsel, Palma, agreed to compromise her judgment and settle her claims against defendant for $15,000. The settlement was memorialized in a written agreement dated April 18, 2017. The agreement provided that Williams "resolve[d] all outstanding claims and the litigation between the parties and settle[d] any other litigation or claims which may exist or which did exist between the parties and to set forth the entire

agreement and mutual releases entered into by and between the parties hereto as above-captioned or otherwise." Williams was paid the $15,000 sum, and her counsel executed a warrant to satisfy judgment, which was never filed.

For reasons that are not entirely clear from the record, in August 2021, Williams assigned the original $106,315.31 judgment to MMU. On October 19, 2021, MMU filed a motion to void the settlement agreement entered between Williams and defendant and the warrant to satisfy judgment.

In support of the motion, MMU submitted a certification from Williams stating Palma represented to her that defendant "would file bankruptcy and [she] would receive nothing" if she did not accept the $15,000 offer. Williams also certified she subsequently learned after executing the settlement agreement that defendant's "representation of dire financial condition was intentionally untrue" and that he transferred his vacation home in Toms River to his daughter "valued at approximately $500,000 and which was mortgage free" by quitclaim deed for the sum of $1.00 after Williams filed her personal injury case. In addition, Williams certified that she had filed a fraudulent transfer complaint in Ocean

County regarding defendant's alleged fraudulent conveyance of his property to his daughter.[3]

Warren Siderman, a managing member of MMU, submitted a certification in support of the motion to void the settlement agreement and warrant to satisfy judgment. Siderman simply certified Williams assigned her judgment to MMU, and it was "filed on the docket September 7, 2021." He did not certify as to the circumstances leading to the negotiations and execution of the settlement agreement and warrant to satisfy judgment.

Palma also submitted a certification in support of MMU's motion. Palma certified Sufrin expressly indicated to him that defendant "lacked assets sufficient to satisfy the judgment" due to defendant's two Maplewood properties being subject to tax certificate foreclosures. Based on that information, Palma recommended to Williams she accept the $15,000 settlement offer. Palma conveyed to Williams that if her judgment was not settled, defendant "would file for relief under the Bankruptcy Code" and Williams would "get nothing." In addition, Palma stated six weeks after the complaint in the matter under

[3] Williams's fraudulent transfer complaint is not included in the appendices. Plaintiff's counsel states, however, it was filed at the same time MMU's motion to void the settlement agreement and warrant to satisfy judgment was filed.

review was filed, he learned for the first time that defendant transferred his Toms River property to his daughter.

In opposition to MMU's motion, Sufrin submitted a certification. He certified the Gerbinos had two tax sale foreclosure matters that were "post[-] final judgment[s] and [they] were in danger of losing their two Maplewood properties." Sufrin also certified that the Gerbinos had other judgments and pending lawsuits against them, and Sufrin tried to "claw back" their equity and "marshal[] enough money" to pay off creditors, including Williams.

According to Sufrin, he never advised Palma the Gerbinos threatened to file for bankruptcy, and the settlement with Williams was negotiated in "good faith." In addition, Sufrin certified the Gerbinos transferred real estate to their daughter "a full two years before the settlement with . . . Williams was negotiated on a lawsuit that was never served on them." Sufrin also represented to Palma that he was "drafting and would shortly file a [m]otion to [v]acate . . . Williams'[s] [d]efault [j]udgment" because there was a "basis for excusable neglect as well as a meritorious defense" under Rule 4:50-1.[4]

[4] Rule 4:50-1 provides:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal

Additionally, Debra Gerbino submitted a certification in opposition to MMU's motion stating defendant—her husband— wanted to give their daughter a "majority ownership" in the family's Toms River property, involving his brother and sister. Debra also certified the transfer had nothing to do with Williams's claim. According to Debra, at the time of the incident in 2013, Williams told her and defendant that "she was not injured" and Williams "refused medical help." In addition, Debra certified that no fraud was committed because the Gerbinos only transferred one property to their daughter and not the three other properties held in their names. Defendant did not submit an opposing certification.

> representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under [Rule] 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

The court conducted oral argument on the motion. Following argument, the court rendered its decision on the record. The court found Sufrin did not make any misrepresentations to Palma during their settlement negotiations. In addition, the court noted that MMU was not seeking monetary damages; therefore, MMU only had to establish "equitable fraud, not legal fraud." See Nolan v. Lee Ho, 120 N.J. 465, 472 (1990).

The court explained equitable fraud consists of "a material misrepresentation of a presently existing or past fact, the maker's intent that the other party rely on it, and detrimental reliance by the other party." See Liebling v. Garden State Indem., 337 N.J. Super. 447, 453 (App. Div. 2001). The court denied the motion because there was no basis to vacate the settlement agreement and warrant to satisfy judgment. A memorializing order was entered.

Before us, MMU argues:

> I. [The court] abused [its] discretion in denying the motion to void settlement and warrant to satisfy judgment.
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> II. Defendant's equitable and/or legal fraud mandated recission of the settlement agreement.
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> III. The instant motion should have been decided only upon facts properly before the court.
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> IV. MMU's failure to ask or discover defendant's asset transfer is not a defense to the fraud.

II.

"The decision granting or denying an application to open a judgment will be left undisturbed unless it represents a clear abuse of discretion." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. INS., 779 F.2d 1260, 1265 (7th Cir. 1985)). This court "accord[s] no deference to the judge's interpretation of applicable law, which [it] review[s] de novo." Barlyn v. Dow, 436 N.J. Super. 161, 170 (App. Div. 2014).

A court may overturn a final judgment or order for "fraud . . . misrepresentation, or other misconduct of an adverse party." R. 4:50-1(c). "In a claim of equitable fraud, a plaintiff must . . . prove: '(1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party.'" Allstate N.J. Ins. Co. v. Lajara, 222 N.J. 129, 148 n.5 (2015) (quoting First Am. Title Ins. Co. v. Lawson, 177 N.J. 125, 136-37 (2003)). A party asserting an equitable fraud cause of action must establish the required elements by "clear and convincing evidence." N.J. Transit Corp. v. Certain Underwriters at Lloyd's

London, 461 N.J. Super. 440, 465 (App. Div. 2019) (quoting DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 336 (App. Div. 2013)).

"On a disputed motion to enforce a settlement," a trial court must apply the same standards "as on a motion for summary judgment." Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 474 (App. Div. 1997). Thus, the court "cannot resolve material factual disputes upon conflicting affidavits and certifications." Harrington v. Harrington, 281 N.J. Super. 39, 47 (App. Div. 1995). When a court is faced with disputed material facts in a motion to enforce a settlement, a hearing must be conducted "to resolve the disputed factual issues in favor of the non-moving party." Amatuzzo, 305 N.J. Super. at 474-75. However, we have stressed that not every factual dispute on a motion requires a plenary hearing; a plenary hearing is only necessary to resolve a genuine issue of material fact. See Eaton v. Grau, 368 N.J. Super. 215, 222 (App. Div. 2004).

We owe no deference to the "trial court's interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (citations omitted). And we consider de novo the trial court's "interpretation of a contract." Kieffer v. Best Buy, 205 N.J. 213, 222 (2011).

MMU contends the trial court abused its discretion in denying its motion because there were material issues of disputed facts. Specifically, MMU asserts it established defendant committed legal and equitable fraud, since he made a material misrepresentation by omission to Palma in order to persuade Williams to compromise her $106,315.31 judgment "for a mere $15,000." MMU argues that if Williams knew about defendant's "fraudulent transfer" of real property to his daughter, then "there would have been no settlement." Instead of relying on competing certifications, MMU contends the court should have conducted a plenary hearing to make credibility assessments before deciding the motion.

Public policy of this State favors settlement of litigation through written agreements. See Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 253-54 (2013) ("Settlement spares the parties the risk of an adverse outcome and the time and expense—both monetary and emotional—of protracted litigation. . . . [It] preserves precious and overstretched judicial resources." (citation omitted)). Hence, New Jersey courts have refused to vacate final settlements absent compelling circumstances. Brundage v. Est. of Carambio, 195 N.J. 575, 601 (2008) (citing Nolan, 120 N.J. at 472).

"An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of 'fraud

or other compelling circumstances,' should honor and enforce as it does other contracts." Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div. 1983) (quoting Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974)). The party seeking to vacate a settlement must provide "clear and convincing evidence" that the agreement should be vacated. De Caro v. De Caro, 13 N.J. 36, 42 (1953).

"Depending on the remedy sought, an action for fraud may be either legal or equitable in nature." Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 624 (1981). To establish legal fraud, five elements must be satisfied: "(1) a material representation by the defendant of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intent that the plaintiff rely upon it; (4) reasonable reliance by the plaintiff; and (5) resulting damage to the plaintiff." Weil v. Express Container Corp., 360 N.J. Super. 599, 612-13 (App. Div. 2003) (citing Whale, 86 N.J. at 624-25).

On the other hand, to establish equitable fraud, the party asserting the claim is not required to establish all the elements of legal fraud. Whale, 86 N.J. at 625. Specifically, the plaintiff need not prove the defendant's knowledge of the falsity and their intent to obtain an unfair advantage. Rochman, 430 N.J. Super. at 336. "[E]quity looks not to the loss suffered by the victim but rather

to the unfairness of allowing the perpetrator to retain a benefit unjustly conferred." Whale, 86 N.J. at 626. "In an action for equitable fraud, the only relief that may be obtained is equitable relief, such as rescission or reformation of an agreement and not monetary damages." Daibo v. Kirsch, 316 N.J. Super. 580, 591-92 (App. Div. 1998) (quotations omitted).

Here, MMU's submissions in support of its motion failed to prove by clear and convincing evidence, let alone present a genuine issue of material fact, that equitable fraud was committed by defendant through his counsel. At the motion hearing, the court stated the following:

> [I]n this case where . . . defendant['s counsel] said . . . defendant was in dire financial condition, the [c]ourt finds that that is not a material misrepresentation. It's just very common in these cases, and . . . Sufrin explained what that meant on the record.
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> So in this case when . . . Sufrin contacted . . . Palma, he said that in light of filing a motion to vacate the judgment pursuant to Rule 4:50, they were going to try and see if they could settle that case.
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> And a lot of these motions to vacate the judgments that are filed within one year are granted in the interest of justice. So there's a high likelihood that the motion to vacate the judgment was—would have been granted if it had been filed had the case not been settled.
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> So the [c]ourt finds that the defendant['s counsel] in all their communications did not make any

> misrepresentation, and so, accordingly, there is no basis in this matter to vacate the settlement agreement and the warrant of satisfaction.

Based upon our de novo review of the record, we find no error in the court's decision that Williams and defendant, through their respective counsel, reached a binding settlement that was memorialized in writing. We agree with the court's reasoning that Sufrin's stated intention to file a Rule 4:50-1 motion to vacate the default judgment based on excusable neglect and a meritorious defense does not constitute a material misrepresentation. In fact, the record shows Sufrin certified he verified his representation by sending Palma a "confirmation," which stated defendant had recently been granted similar Rule 4:50-1 relief in another pending Law Division matter.

Additionally, we disagree that Sufrin's representation of defendant's "dire financial circumstances" during the settlement negotiations constitutes equitable fraud. Palma certified Sufrin "clearly conveyed" to him that defendant lacked sufficient assets to satisfy Williams's judgment. While Palma interpreted that to mean defendant would file bankruptcy and Williams would "get nothing" if her judgment was not settled, Palma does not allege Sufrin made those assertions himself. The only reference in the record alluding to bankruptcy is an email sent from Sufrin to Palma on February 28, 2017, which stated in part, "[o]bviously

we have given our client[s] our recommendations with regard to their rights and remedies under the [C]ode."

At the time, defendant was confronted with outstanding debts from secured and unsecured creditors. Indeed, Palma certified that defendant's two Maplewood properties had "little or no equity" because they were subject to tax certificate foreclosures, as confirmed by his independent title search. Palma recommended Williams settle for $15,000 based on Sufrin's representation that defendant did not have enough assets to satisfy the judgment and that defendant otherwise intended to move to vacate the default judgment. Further, the record presented to the motion court did not establish, or raise any issues of fact as to whether, there was any misrepresentations concerning defendant's then-extant financial circumstances.

MMU also alleges defendant fraudulently omitted the fact that he transferred his Ocean County property to his daughter. The evidence reveals the quitclaim deed is dated May 21, 2015—almost two years before the execution of the April 18, 2017 settlement agreement. Williams and defendant did not share a fiduciary relationship, expressly repose "trust and confidence" in each other, or contract in an "intrinsically fiduciary" transaction. N.J. Transit Corp., 461 N.J. Super. at 466. Therefore, defendant did not breach any duty to

Williams or her counsel to disclose his transfer of an asset two years prior to the parties' entry into the settlement agreement. Ibid.

Moreover, as the court highlighted, the record indicates that neither Palma nor Williams ever requested an asset search or financial information from defendant or his counsel to substantiate Sufrin's position during settlement negotiations. Palma certified that he conducted a title search to confirm Sufrin's representation about defendant's tax foreclosure issues with the two Maplewood properties. In any event, any purported lack of diligence on Williams's and Palma's parts is not relevant to our decision. See Bilotti v. Accurate Forming Corp., 39 N.J. 184, 205 (1963) ("[T]he law is settled in this State that fraudulent misconduct is not excused by the credulity or negligence of the victim or by the fact that [they] might have discovered the fraud by making [their] own prior investigation.").

We conclude the court properly denied MMU's motion to vacate the settlement agreement and warrant to satisfy judgment. The record failed to contain sufficient proofs to establish defendant and Sufrin fraudulently procured the settlement agreement. Specifically, MMU does not raise adequate fact issues regarding Sufrin's alleged material misrepresentations of potentially filing a Rule 4:50-1 motion and defendant facing "dire financial circumstances."

Considering there was no equitable fraud perpetrated upon Williams or her attorney, it is not our province to "rewrite contracts in order to provide a better bargain than contained in [the parties'] writing." Grow Co., Inc. v. Chokshi, 403 N.J. Super. 443, 474 (App. Div. 2008) (citing Christafano v. N.J. Mfrs. Ins. Co., 361 N.J. Super. 228, 237 (App. Div. 2003)).

III.

We also reject MMU's argument that a plenary hearing should have been conducted before the court denied its motion. See Segal v. Lynch, 211 N.J. 230, 265-65 (2012) (requiring a plenary hearing to resolve "material and legitimate factual dispute[s]"). In such a proceeding, the court has a chance to assess the credibility of the movant's assertions, as tested through the rigors of cross-examination. Spangenberg v. Kolakowski, 442 N.J. Super. 529, 541 (App. Div. 2015).

In the matter under review, the court correctly determined no material factual disputes were demonstrated to warrant a plenary hearing. MMU failed to make a sufficient showing that the settlement agreement was procured by fraud. Since MMU's contention that the settlement agreement is a product of equitable fraud is unfounded, and no material facts are in dispute, a plenary hearing was not necessary.

To the extent we have not addressed any remaining arguments raised by MMU, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION