SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2019-21

MO GEO LLC,

Plaintiff-Respondent,

v.

CITY OF NEW BRUNSWICK,

Defendant/Third-Party
Plaintiff-Appellant,

v.

LEEWOOD MT. ZION HOMES CONDOMINIUM ASSOCIATION, INC.,

Third-Party Defendant.

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Submitted February 28, 2023 – Decided March 23, 2023

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-6537-20.

Finestein & Malloy, LLC, attorneys for appellant (Russell M. Finestein and Daniel L. Finestein, on the briefs).

George W. Barrood, PA, attorney for respondent (George W. Barrood, of counsel and on the brief; Jeffrey Zajac, on the brief).

PER CURIAM

In this action involving the validity of two tax sale certificates for unpaid sewer and water charges that affected the common areas of a condominium building, defendant City of New Brunswick (City) appeals from Law Division orders that granted summary judgment to plaintiff and denied defendant's cross-motion for summary judgment. We affirm in part, reverse in part, and remand.

I.

Plaintiff purchased the tax sale certificates (Certificates) on December 16, 2015. Plaintiff paid $4,669.48 for Certificate No. 15-0189 and $2,367.07 for Certificate No. 15-0208. The Certificates provide a redemption interest rate of eighteen percent. The Certificates were recorded on January 28, 2016. Plaintiff paid the ongoing real estate taxes, sewer charges, and water charges until the filing of the complaint. Certificate No. 15-0189 encumbers Block 189, Lot 5.01 and Certificate No. 15-0208 encumbers Block 197, Lot 25.01 (collectively the Properties).

In July 2020, plaintiff notified the City that the Certificates were invalid and demanded reimbursement for the amount paid for the Certificates ($7,036.55), the subsequent advances it paid (approximately $46,000), interest at eighteen percent per annum, attorney's fees, and costs. The Properties represent the common elements owned by the third-party defendant Leewood Mt. Zion Condominium Association, Inc. (Association). [1]

In September 2020, plaintiff filed this action seeking compensatory damages, including interest at the rate specified in the Certificates, alleging the Certificates were invalid because the water and sewer charges should have been assessed against the individual condominium units, not the homeowner's association which owned the common elements. The City maintains there was no deception because plaintiff, a sophisticated tax sale certificate purchaser, purchased the certificates knowing they stated the water and sewer charges were owed by the association. The City argues plaintiff could have attempted to foreclose after two years but waited for five years to first claim the assessment was incorrect.

[1] The claims against third-party defendant Leewood Mt. Zion Homes Condominium Association, Inc. were dismissed without prejudice by stipulation prior to the summary judgment motion ruling.

Following the completion of discovery, the City moved for summary judgment and plaintiff cross-moved for summary judgment. The City argued this case is more properly considered an action for rescission rather than an action for breach of contract. If considered an action for rescission, the City could have asserted the equitable defenses of laches and estoppel. The City contends plaintiff sat on its rights, in a transparent attempt to collect interest at eighteen percent per annum.

Additionally, relying on our opinion in Tontodonati v. City of Paterson, 229 N.J. Super. 475 (App. Div. 1989), the City argued that even if plaintiff was entitled to judgment, it was only entitled to recover interest at the judgment rate under Rule 4:42-11(a), not at the rate of eighteen percent, and it was not entitled to recover counsel fees or search costs.

Plaintiff cross-moved for summary judgment, arguing the Certificates were void ab initio because they were erroneously assessed by the City to the Association rather than the condominium unit owners, as required by the Association's governing documents. Plaintiff averred it was not until the filing of a foreclosure action that it discovered the invalidity of the Certificates and learned its remedy was against the City, not the Association. Plaintiff sent notice to the City demanding reimbursement of the cost of the Certificates, plus accrued interest in July 2020. Plaintiff noted that none of its prior tax

foreclosure actions involved condominium units. Instead, they involved single family residences, vacant land, and commercial properties.

A supporting certification of plaintiff's managing member stated:

> 5. I had no prior knowledge that the Certificates were erroneously assessed against the common elements of Leewood Mt. Zion Homes Condominium Association.
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> 6. It is expected that the City, as a municipal taxing authority, has properly assessed the municipal charges against the correct individual or entity.
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> 7. A lienholder must wait at least two (2) years before commencing a foreclosure action, but nothing prevents a lienholder from commencing later than two (2) years.
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> 8. It is not unusual for Plaintiff to commence a foreclosure action beyond the two (2) year waiting period prescribed by N.J.S.A. § 54:5-86.
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> 9. It was not until June 2020, when Plaintiff retained counsel and sought to foreclose the Certificates that Plaintiff discovered that the Certificates were erroneously assessed against the common elements of Leewood Mt. Zion Homes Condominium Association.
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> 10. Plaintiff immediately instructed counsel to notify the Defendant of the error and thereafter commence this action when Defendant failed to remedy its mistake.

Following oral argument, the trial court issued an order and oral decision granting summary judgment to plaintiff. The court found plaintiff filed the complaint approximately four and a half years after the Certificates were sold

and rejected the City's contention that the doctrine of laches applied since the complaint was filed within the statute of limitations. It also found that the equities favored plaintiff, not the City. The court stated, "plaintiff should not suffer the wrong of purchasing . . . an invalid lien, one that was sold by [the City] as a valid lien without any remedy."

The court likewise rejected application of equitable estoppel, reasoning:

> Plaintiff's delay in bringing the suit does not implicate equitable estoppel as it was done within the applicable statute of limitations. It was commenced in a timely fashion.
>
> Defendant attempts to argue that plaintiff should have immediately been aware of the deficiencies in the tax sale certificates. We find this argument unavailing. If we were to accept this argument, then we also must accept that defendant should have been aware of the deficiency at the time of the contract formation.
>
> Any harm suffered by the defendant, and we note that the defendant has not put forward any specific harm suffered as a result of this delay, was brought by their own actions. Therefore, defendant has not established that plaintiff's claim should be barred by equitable estoppel.

Noting that the City had not put forward any additional arguments beyond these equitable doctrines, the court found there was no genuine issue of material fact and that the Certificates were void ab initio. The court rejected the City's contention that this was not a contractual dispute.

Regarding the appropriate remedy, the court also rejected the City's argument that the judgment rate of interest pursuant to Rule 4:42-11(a) should be applied, rather than the interest rate stated in the Certificates. The court explained that plaintiff paid the water and sewer charges "with the justifiable expectation of being redeemed at the statutory rate of interest. The City is not without fault here nor the property owner. The City is at fault for forcing the lienholder in the position of an invalid certificate holder." The court found "plaintiff had a legitimate and reasonable expectation to recover interest at the statutory provided rate of eighteen percent." It noted that "award[ing] plaintiff the interest rate set forth in Rule 4:42-11 would undermine the very purpose of the tax sale certificate statute by [discouraging] investments in such certificates."

The court held the City breached the contract and granted summary judgment to plaintiff, awarding plaintiff $89,116.32, comprised of the purchase price of the Certificates, the taxes and charges subsequently paid by plaintiff, interest of $35,678.83 calculated at eighteen percent per annum, and costs of $250.73. The court did not award attorney's fees.

II.

On appeal, the City argues the trial court erred by: (1) declaring this a breach of contract claim rather than a claim for rescission, thereby barring the

defense of laches; (2) not applying the doctrines of laches and estoppel; and (3) granting interest at eighteen percent rather than the post-judgment interest rate.

We review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). Summary judgment will be granted when "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, show there are no "genuine issues of material fact," and that "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). We must give the non-moving party "the benefit of the most favorable evidence and most favorable inferences drawn from that evidence." Est. of Narleski v. Gomes, 244 N.J. 199, 205 (2020) (quoting Gormley v. Wood-El, 218 N.J. 72, 86 (2014)). We owe no special deference to the motion judge's legal analysis. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018). The determination of the applicable interest rate is a legal issue that we review de novo.

III.

The City does not challenge the fact that the Certificates were defective. Instead, it claims that plaintiff's claims are barred by the doctrines of laches

and estoppel. Plaintiff responds that a statute of limitations governs its claims, and the equities favor its position.

The condominium complex is subject to the New Jersey Condominium Act, N.J.S.A. 46:8B-1 to -38, which provides in relevant part:

> All property taxes, special assessments and other charges imposed by any taxing authority shall be separately assessed against and collected on each unit as a single parcel, and not on the condominium property as a whole. Such taxes, assessments and charges shall constitute a lien only upon the unit and upon no other portion of the condominium property.
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> [N.J.S.A. 46:8B-19.]

The unpaid sewer and water charges that resulted in the Certificates are "other charges" under N.J.S.A. 46:8B-19. See Gen. Ceramics, Inc. vs. Borough of Wanaque, 21 N.J. Tax 133, 136 (Tax 2003) ("Water and sewer charges also are liens against the property."). The charges should have been allocated to the respective unit owners rather than asserted in an aggregate amount against the Association. See Troy Vill. Realty Co. vs. Springfield Twp. of Union Cnty., 191 N.J. Super. 559, 563 (App. Div. 1983) ("The purpose of the Condominium Act is to constitute each unit in a condominium 'a separate parcel of real property which may be dealt with by the owner thereof in the same manner as is otherwise permitted by law for any parcel of

real property.' N.J.S.A. 46:8B-4. A separate assessment for each unit facilitates achieving that goal.").

Because the assessment was void, "the tax sale held upon such an assessment is equally void." Pioneer Gun Club vs. Twp. of Bass River, 61 N.J. Super. 104, 108 (Ch. Div. 1960). Because the unpaid assessment was void, the resulting Certificates are void ab initio. Accordingly, plaintiff is entitled to a refund of the purchase price.

We reject the City's argument that plaintiff's claims are barred by the doctrines of laches and estoppel. Plaintiff filed its complaint within the six-year statute of limitations imposed by N.J.S.A. 2A:14-1(a). The Certificates were purchased in December 2015 and the complaint was filed in September 2020. The goal of N.J.S.A. 2A:14-1 "is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend." Hous. Auth. of Union City v. Commonwealth Tr. Co., 25 N.J. 330, 335 (1957). Moreover, plaintiff filed its complaint within a few months of learning of the invalidity of the Certificates.

In Fox v. Millman, the Supreme Court addressed "whether it is appropriate to utilize an equitable remedy to foreclose a claim otherwise governed by a fixed statute of limitations and otherwise filed in compliance with that time constraint." 210 N.J. 401, 417 (2012). The Court answered that

question in the negative, explaining "even were we to agree in principle that laches might be applied so as to shorten an otherwise permissible period for initiation of litigation, we would nonetheless conclude that only the rarest of circumstances and only overwhelming equitable concerns would allow for that result." Id. at 422. The trial court considered "the length [of] plaintiff's delay and the reason for the delay," and was "satisfied it's not one of the rarest circumstances" referred to in Fox. We likewise find no "rarest of circumstances" or "overwhelming equitable concerns" warranting application of the doctrine of laches in this case.

Additionally, as emphasized by the Court in Fox:

> Substituting the equitable doctrine of laches for the clear guidance expressed in statutes of limitations would create a chaotic and unpredictable patchwork in which the only certainty would be the inconsistency of outcomes as different judges or, as in this matter, juries, evaluated timeliness individually. We see no reason to conclude that our regular, predictable, and uniform system of fixing timeliness through application of the statutes of limitations should be replaced with such an approach.
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> [Id. at 423.]

The City's remaining argument that the trial court erred by not applying the doctrine of equitable estoppel lacks sufficient merit to warrant much discussion. R. 2:11-3(e)(1)(E). Equitable estoppel may be applied when the voluntary conduct of a party precludes that party from asserting a claim

"against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse." Clarke v. Clarke by Costine, 359 N.J. Super. 562, 571 (App. Div. 2003). Here, there is no evidence that the City relied upon plaintiff's conduct, which led it to change its position for the worse. Additionally, as found by the trial court: "Any harm suffered by the defendant, and we note that the [City] has not put forward any specific harm suffered as a result of this delay, was brought by their own actions. Therefore, [the City] has not established that plaintiff's claim should be barred by equitable estoppel."

IV.

The trial court awarded interest at the rate of eighteen percent—the rate provided in the Certificates. N.J.S.A. 54:5-43 provides that if a tax sale is "set aside, the municipality shall refund to the purchaser the price paid by him on the sale, with lawful interest, upon his assigning to the municipality the certificate of sale and all his interest in the tax, assessment or other charges and in the municipal lien therefor . . . ." The City argues that "lawful interest" is the rate for post-judgment interest pursuant to Rule 4:42-11(a). We agree.

In Tontodonati, the plaintiff purchased an assignment of an invalid tax sale certificate from the municipality. 229 N.J. Super. at 477. The tax sale certificate was invalid due to the municipality's error. Ibid. The plaintiff sued

the municipality for negligence under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to -12-3. Id. at 478, 481. We held "the assignee [was] entitled to a refund plus lawful interest under N.J.S.A. 54:5-43." Id. at 477. We rejected the plaintiff's claim for interest at eighteen percent, concluding "the City never agreed to pay [the] plaintiff" that amount, and the "plaintiff had no reason to expect" to earn eighteen percent on the money expended. Id. at 484. We noted that "[n]o statute or rule authorizes paying [eighteen percent] to plaintiff under these circumstances." Id. at 485.

In Brinkley v. W. World, Inc., the purchaser of an invalid tax sale certificate sought payment of interest at the eighteen percent rate provided by the tax sale certificates. 281 N.J. Super. 124, 126, 128 (Ch. Div. 1995). The township argued the post-judgment rate provided by Rule 4:42-11(a) governed. Id. at 127. The trial court concluded that when an invalid tax sale certificate is set aside, the amount due the purchaser is the purchase price plus lawful interest from the date of sale, calculated at the post-judgment rate set forth in Rule 4:42-11(a). Id. at 132. The purchaser appealed, reiterating her argument that the lawful interest rate was the rate stated on the tax sale certificate. Brinkley v. W. World, Inc., 292 N.J. Super. 134, 136 (App. Div. 1996). We disagreed and held that interest should be awarded pursuant to Rule 4:42-11(a), calculated at "a fixed rate dependent on the year in which the matter

concludes, rather than . . . the rate applicable for each year from the purchase of the certificates until repayment of the purchase price by the Township." Id. at 137. We were "mindful . . . that the assessment of interest against a municipality requires particular circumspection." Ibid.

"Because [the City] is a governmental entity and interest [at the rate of eighteen percent] is not provided for by statute [in this context], 'particular circumspection' in the granting of prejudgment interest is required, and 'a showing of overriding and compelling equitable reasons' is essential to justify the award." Hudson Cnty. v. Jersey City, 153 N.J. 254, 254 (1998) (quoting Bd. of Educ. v. Levitt, 197 N.J. Super. 239, 244 (App. Div. 1984)). We discern no such overriding and compelling equitable reason to justify the much higher interest rate sought by plaintiff.

In Crusader Servicing Corp. v. Port Auth. of N.Y. & N.J., we held that a tax-exempt entity was entitled to a refund of the principal amount of the realty taxes attributable to an invalid assessment, plus "'lawful interest,' namely that allowed by Rule 4:42-11(a)." 386 N.J. Super. 494, 503 (App. Div. 2006).

Applying these principles, we hold that plaintiff is entitled to an award of lawful interest from the date of purchase, calculated at the fixed rate for 2023 provided by Rule 4:42-11(a).

V.

In sum, we affirm the award of a refund of the purchase price of the Certificates. We reverse the award of interest thereon at the rate of eighteen percent and remand for the court to calculate and award interest on the purchase price, from the date of purchase, calculated at the rate for post-judgment interest for 2023, pursuant to Rule 4:42-11(a). The court shall also award court costs. Plaintiff is not entitled to an award of search fees. Tontodonati, 229 N.J. Super. at 485. The trial court shall enter an amended judgment consistent with this opinion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.