SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2364-20

CITY OF JERSEY CITY,

Plaintiff-Respondent,

v.

JERSEY CITY COMMUNITY HOUSING, a/k/a JERSEY CITY COMMUNITY HOUSING CORPORATION, a/k/a JERSEY CITY COMMUNITY HOUSING DEVELOPMENT CORPORATION,

Defendant-Appellant,

and

SHINING STAR CONSTRUCTION, FUNDINGSTEP, LLC, MORDECHAI GOLD, 108 STORMS LLC, and STATE OF NEW JERSEY,

Defendants.

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Argued November 10, 2022 – Decided January 6, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. F-017453-19.

Kevin C. Watkins argued the cause for appellant.

Elliott J. Almanza argued the cause for respondent (Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys; Keith A. Bonchi, of counsel and on the brief; Elliott J. Almanza, on the brief).

PER CURIAM

Defendant Jersey City Community Housing Corporation appeals from a March 15, 2021 final judgment in favor of plaintiff City of Jersey City. The March 15, 2021 judgment conformed to the court's September 11, 2020 order granting plaintiff summary judgment, affirming plaintiff's right to foreclose on two properties owned by defendant, and dismissing with prejudice defendant's counterclaims sounding in breach of contract and tortious interference with contractual relations. We affirm both the court's grant of summary judgment as well as the final judgment.

I.

This matter arises out of separate contracts, referred to in this opinion as the Development Agreements, entered into by defendant and plaintiff in 2009, to develop two properties for low-to-moderate-income housing. The Development Agreements contained near identical terms, differing only by the respective

properties' locations at 108 Storms Avenue (the Storms Avenue property) and 299-301 Bergen Avenue (the Bergen Avenue property) in Jersey City.

In February 2010, and in accordance with the terms of the Development Agreements, plaintiff conveyed both properties to defendant for one dollar. In exchange, defendant agreed to develop the Storms Avenue property into a four-unit apartment building, and the Bergen Avenue property into a nine-unit complex. Defendant estimated the development of the Storms Avenue property would cost $770,000, and the Bergen Avenue property, $913,500.

The Development Agreements estimated a completion date of April 2011, with an anticipated date when tenants would occupy the apartments of May 2011. The Development Agreements also provided for an option to cure in the event of default.

To facilitate the development, plaintiff loaned defendant $780,000 in affordable housing funds. In exchange, plaintiff received a May 10, 2010 mortgage encumbering both properties. As relevant to this appeal, the May 10, 2010 mortgage included a provision entitled "Permitted Encumbrances and Subordination" that provided:

> Except for the mortgages and security instruments in connection therewith referenced herein below, at no time throughout the term of this [m]ortgage shall [m]ortgagor create, incur, assume or suffer interest,

> encumbrance, attachment, levy distraint or other judicial process and burden of any kind or nature on or with respect to any of the [m]ortgaged [p]remises without the prior written consent of [m]ortgagee.

At some point prior to May 2011, defendant ceased developing both properties. Monthly status reports from May 2011 to November 2012 indicated work at the Bergen Avenue property paused due to: (1) defendant's failure to obtain plan approval and its search for a new contractor; (2) budgetary reasons; (3) the need for new permits; and (4) defendant's delay in communicating with the Division of Community Development.

The Storms Avenue property suffered delays, in part, because plaintiff contemplated separating it from the project to use as a part of another redevelopment venture at McGinley Square in Jersey City. By August 2012, however, plaintiff's plan did not materialize, and the Storms Avenue property was set to proceed as part of the original development plan. Defendant did not resume work on the properties until June 2014, however, and by April 2015 development halted again with defendant recommencing work on the Storms Avenue property in January 2016.

Around this point in the project, plaintiff recommended defendant focus first on developing the Bergen Avenue property and then proceed to Storms Avenue. To meet this objective, plaintiff obtained Department of Community Affairs (DCA) approval to merge the development funds for both properties.

On November 16, 2015, plaintiff entered into a subgrantee agreement with 108 Storms, LLC, an entity owned by Terry Dehere (Dehere), defendant's principal. Under the agreement, 108 Storms would receive an additional $155,880 in HOME[1] funds to facilitate development of the Storms Avenue property, with plaintiff receiving a mortgage on the Storms Avenue property as security for the loan. On July 12, 2017, plaintiff and defendant modified the mortgage to account for additional funding, as well as to identify defendant as the correct mortgagor rather than 108 Storms. Following the modification, the Storms Avenue property-related loans totaled $405,880. On September 21, 2017, plaintiff and defendant again modified the mortgage after plaintiff provided another $293,000 in HOME funds, for a total amount loaned to defendant of $698,880.

On May 11, 2016 defendant applied for and obtained a $60,000 loan from Blue Sky Capital Holdings, LLC (Blue Sky) related to the Bergen Avenue property, and on June 27, 2016, defendant obtained a $500,000 loan from Capital Stack Fund, LLC (Capital Stack) related to the Storms Avenue property. In exchange for the loans, defendant provided both Blue Sky and Capital Stack with mortgages, deeds in lieu of foreclosure, and collateral assignments for any leases for the respective

[1] The "HOME" Housing Project Investment Fund is designed to create affordable housing for low-income households.

properties. It is undisputed defendant did not seek plaintiff's approval before entering the May 2016 and June 2016 agreements encumbering both properties.[2]

On October 12, 2016, plaintiff informed Dehere it had learned defendant mortgaged the Bergen Avenue and Storms Avenue properties without its prior approval. In addition, on December 15, 2016, as a result of defendant's failure to make timely property tax payments, plaintiff issued a tax sale certificate for the Bergen Avenue property. Approximately one year later, plaintiff also issued a tax sale certificate with respect to the Storms Avenue property. On April 5, 2017, the Storms Avenue property was placed on the Housing Code Enforcement's "Abandoned Property List" pursuant to N.J.S.A. 55:19-81. As a result, defendant was notified the property was in need of rehabilitation which had the "same force and effect as a notice of lis pendens." N.J.S.A. 55:19-55(d)(1). In October 2019, defendant paid off a tax lien on the Storms Avenue property, however, less than one month later, plaintiff issued another tax sale certificate on the property for delinquent taxes.

Defendant sought additional outside funding to continue developing the properties and properly obtained plaintiff's permission consistent with the

[2] After defendant defaulted on its payment obligations, Blue Sky recorded its deed in lieu of foreclosure and later conveyed the Bergen Avenue property to a third party.

Development Agreements. As a result of the additional funding, on April 12, 2017, plaintiff passed a resolution to subordinate its first-position May 10, 2010 mortgage on both properties, to be replaced by a mortgage by the Community Loan Fund of New Jersey (CLF), in the amount of $790,120. Plaintiff informed defendant the cash infusion would be its "final investment" in the development projects and it accordingly executed a subordination agreement on July 19, 2017.

On May 1, 2018, defendant agreed with Shining Star Construction, LLC, an entity solely owned by Dehere, to rehabilitate the Bergen Avenue property, for $814,972, secured by a mortgage, in which defendant agreed to repay Shining Star $1,250,000 at a six percent interest rate, even though Dehere stated at his deposition Shining Star had contributed only $400,000 to the development project. Defendant did not obtain plaintiff's permission before encumbering the Bergen Avenue property to Shining Star.

On November 19, 2018, plaintiff mailed defendant a notice of default intended for the Bergen Avenue property. The notice, however, identified the subject property as "108 Storms Avenue, Jersey City, New Jersey" and when explaining the relevant defaults the notice stated, "[y]our client secured outside debt against the property in the form of a loan from [Blue Sky] in the amount of $500,000 and failed to disclose this debt to [plaintiff]." The remainder of the notice correctly informed

defendant its failure to pay taxes in a timely fashion, resulting in "multiple tax liens against the property" also amounted to default. As required by the Development Agreements, defendant was afforded thirty days to cure.

In October 2019, plaintiff filed a foreclosure complaint with respect to both properties. Defendant filed a contesting answer and included counterclaims for breach of contract and interference with contractual relations. In July 2020, plaintiff moved for summary judgment.

In opposing plaintiff's motion, defendant claimed the default notice sent by plaintiff was materially defective because it contained inaccurate information as to the subject property as well as the mortgage amount. Defendant analogized the notice required by the Development Agreements to that required by the Fair Foreclosure Act (FFA), N.J.S.A. 2A:50-53 to -82, and argued because it was deprived of proper notice, plaintiff was precluded from proceeding with the foreclosure action.

Defendant also argued plaintiff purposefully withheld funding, "slow walked" it throughout the entirety of the development project, and also gave defendant the "run around" regarding what steps needed to be done to procure funding. Defendant further contended plaintiff tortiously interfered with its development efforts by falsely advising private lenders defendant was in default, conducting "illegal"

inspections, and improperly issuing a lis pendens on the Storms Avenue property. As a result of plaintiff's actions, defendant asserted it was left "scrambling for funds" which led to its decision to encumber both properties.

In response, plaintiff maintained it was undisputed defendant defaulted numerous times under the terms of the May 10, 2010 mortgage agreement. Plaintiff noted defendant agreed to obtain plaintiff's consent before encumbering the properties but it nevertheless failed to obtain approval with respect to the May 11, 2016, June 27, 2016, and July 9, 2018 mortgages. According to plaintiff, defendant also defaulted under the Development Agreements by failing to pay its taxes which resulted in tax liens on the properties.

Although plaintiff acknowledged it erroneously listed the Storms Avenue property and the mortgage amount in the default notice, plaintiff argued defendant's attempt to "claim . . . [it] didn't know about what the default was, or that it was a default, [was] incredulous." Plaintiff also contended defendant's breach of contract and tortious interference claims were unsupported by the record.

As noted, the court granted plaintiff summary judgment, dismissed with prejudice defendant's counterclaims, and provided its reasons orally on the record. The court determined both the Development Agreements and mortgage document "expressly and clearly prohibited that the mortgagor be restricted from creating,

incurring, assuming or suffering any interest, encumbrance, levy, attachment, levied restraint, or other judicial process and burden of any kind or nature on, or without the prior written consent of, the mortgagee." The court further found defendant violated these "express terms" and entered into default when it (1) mortgaged and executed an assignment of leases, and deeds in lieu of foreclosure on the Bergen Avenue property on May 11, 2016 and the Storms Avenue property on June 27, 2016; (2) when it mortgaged the Storms Avenue property again on July 9, 2018; and (3) failed to pay taxes on both properties resulting in the issuance of tax sale certificates.

As to the default notice, the court did not find it so "palpably erroneous" to prevent foreclosure, relying on both defendant's admission it was aware "prior permission had to be secured from [plaintiff]" before encumbering the collateral, and the fact defendant offered no arguments "as to what efforts to cure the default[s] . . . were in any way hampered by what might be considered a scri[ve]ner's error."

With respect to defendant's counterclaims, the court determined "an independent search and review of the record" failed to identify a genuine issue of material fact to support any claim of a "breach or related contractual liability." The court found while there were some delays in payments made by plaintiff, there was corroboratory evidence that illustrated "the fault was with [defendant]" due to a

failure to "comply with certain project benchmarks that served as a precondition to the authorized draws."

The court further found defendant's claims of "slow walking and intentional delays to hamper development of the project" were simply not supported by the record. The court explained "objectively" and in its "totality" the record illustrated plaintiff "bent over backwards to allow and to encourage every singular opportunity . . . for [defendant] to satisfy the goals [of low-income housing]" established by the Development Agreements. Further, "[plaintiff] scrupulously adhered to its obligations under the [D]evelopment [A]greement[s] as well as under the mortgage, whereas the defendant[] did not."

Accordingly, the court granted plaintiff's motion for summary judgment, dismissed defendant's counterclaims with prejudice, and returned the matter to the Office of Foreclosure to proceed as an uncontested matter. The court memorialized its ruling with a conforming order on that same day. Plaintiff then moved for entry of final judgment, which the court entered on March 15, 2021. This appeal followed.

II.

Before us, defendant raises two principal points. First, it maintains the default notice defendant received was "fatally" defective and "inaccurate in every material respect," as it erroneously listed the Storms Avenue property as

the source of defendant's default, and included the incorrect amount of the mortgage to Blue Sky. As it did before the court, defendant reprises its argument analogizing the notice requirement specified in the Development Agreements to that required under the FFA and maintains plaintiff's error in the notice deprived defendant of its opportunity to cure. Defendant further argues because it never received proper notice, the court improperly entered summary judgment and final judgment.

Defendant also contends the court incorrectly dismissed with prejudice its counterclaims. Specifically, defendant maintains plaintiff violated the implied covenant of good faith and fair dealing in the Development Agreements, through its alleged "coerc[ion]" of the surrendering of the Storms Avenue property to the McGinley Square redevelopment project which resulted in a "loss of over $300,000 [i]n DCA construction funding." Defendant broadly asserts the deprivation of those funds, as well as an alleged delay in receiving other payments affected defendant's ability to pay property taxes and also prevented it from "privately funding the Bergen Avenue and Storms Avenue projects." As noted, defendant also claims plaintiff purposefully withheld funding, "slow walk[ed]" the project, falsely advised private lenders defendant was in default,

conducted "illegal" inspections, and improperly issued a lis pendens on the Storms Avenue property.

III.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). "Summary judgment must be granted if 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment . . . as a matter of law.'" Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting R. 4:46-2(c)). To determine whether there is no genuine issue of material fact, "[t]he essence of the inquiry . . . is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). We accord no special deference to the trial court's conclusions on issues of law. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

We are unpersuaded by defendant's arguments the error in plaintiff's notice of default rendered it "impossible" to cure the numerous defaults. While

we acknowledge plaintiff's notice incorrectly listed the subject property and the amount encumbered, as the Storms Avenue property and $500,000, respectively, we agree with the court's determination this error did not change the fact defendant defaulted numerous times under the Development Agreements and the May 10, 2020 mortgage agreement. We also are satisfied defendant was indisputably aware of its numerous defaults on each property.

As noted, it is not contested defendant encumbered the properties by issuing mortgages in the amount of: (1) $60,000 to Blue Sky on the Bergen Avenue property on May 11, 2016; (2) $500,000 to Capital Stack on the Storms Avenue property, on June 27, 2016; and (3) $1,250,000 to Shining Star on the Storms Avenue property on July 9, 2018. Defendant also does not dispute it burdened the properties without obtaining plaintiff's prior approval, despite its requirement to do so, in contravention of the Development Agreements and the May 10, 2010 mortgage agreement. Defendant also failed to timely pay its taxes, resulting in tax liens on the properties, which also constituted defaults.

As this matter concerns a commercial property rather than a residential property, we find defendant's analogy to the FFA without merit. While we draw this distinction, we find it relevant to note that contrary to defendant's argument, errors contained in a notice of intent (NOI) to foreclose, even in the context of

a residential foreclosure, do not necessarily result in the preclusion of a foreclosure action if the court determines another remedy is appropriate. In U.S. Bank National Association v. Guillaume, 209 N.J. 449 (2012), our Supreme Court overruled our holding in Bank of New York v. Laks, 422 N.J. Super. 201, 213 (2011), which concluded dismissal without prejudice is the exclusive remedy upon the submission of a NOI contrary to N.J.S.A. 2A:50–56(c)(11). In doing so, the Guillaume Court held a trial court "adjudicating a foreclosure complaint in which the notice of intention does not comply with [the aforementioned subsection] may dismiss the action without prejudice, order the service of a corrected notice, or impose another remedy appropriate to the circumstances of the case." Guillaume, 209 N.J. at 476. In crafting an equitable remedy, the Court emphasized a trial court should consider the "impact of the defect in the notice of intention upon the homeowner's information about the status of the loan, and on his or her opportunity to cure the default." Id. at 479.

Applying these principles, we are satisfied any error in the November 19, 2018 default notice did not preclude plaintiff's foreclosure action. The court correctly acknowledged the errors in the notice, but ultimately found defendant's admissions established it was aware of the several bases of default. We similarly conclude the notice did not pose a barrier to defendant curing or attempting to

cure its defaults. As noted, it is undisputed the mortgages defendant entered on the Bergen Avenue and Storms Avenue properties constituted defaults, as defendant neglected to obtain plaintiff's prior consent before encumbering the properties. Defendant was also indisputably aware of these defaults as it admitted it needed plaintiff's approval before impairing plaintiff's security interests. We are also not convinced defendant was in any way confused by the November 19, 2018 notice or what was needed to effectively cure its repeated defaults. Defendant had ample notice of the pending foreclosure action and simply failed to cure as required.

IV.

We also are satisfied the court properly dismissed defendant's claims plaintiff violated the implied covenant of good faith and fair dealing or tortiously interfered with defendant's contractual relations. "To establish a claim for breach of contract, a plaintiff must provide proof of 'a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and a breach causing the claimant to sustain[ ] damages.'" Nelson v. Elizabeth Bd. of Educ., 466 N.J. Super. 325, 342 (App. Div. 2021) (quoting EnvirFinance Grp. LLC v. Env't Barrier Co., 440 N.J. Super. 325, 345 (App. Div. 2015)).

Further, the implied covenant of good faith and fair dealing requires parties to a contract to "refrain from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive' the benefits of the contract." Pollack v. Quick Quality Rests., Inc., 452 N.J. Super. 174, 191 (App. Div. 2017) (quoting Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224-25 (2005)). To prove a breach of the implied covenant, a plaintiff must show a contract exists between the parties and the defendant acted with bad faith and deprived plaintiff of rights or benefits under the contract. See Wade v. Kessler Inst., 343 N.J. Super. 338, 346-52 (App. Div. 2001) (explaining the different ways our courts have defined the covenant, and the importance of proving bad faith to show breach). A defendant may breach the implied covenant without violating any express terms in a contract. Brunswick Hills, 182 N.J. at 226.

Tortious interference with contractual relations occurs when, someone "intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract." Nostrame v. Santiago, 213 N.J. 109, 122 (2013) (quoting Restatement (Second) of Torts: Intentional Interference with Performance of Cont. by Third Person § 766

(1979)). When such interference occurs, that individual "is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." Ibid.

We have conducted a de novo review of the record and agree with the court that defendant's breach of the implied covenant of good faith and fair dealing and tortious interference claims are simply not supported by the record. While it is true plaintiff contemplated the inclusion of the Storms Avenue property in the McGinley Square redevelopment project, plaintiff ultimately decided defendant's project would proceed as low-income housing as originally planned. As to defendant's claims plaintiff failed to send timely payments under the Development Agreements, the court correctly determined any delays in funding by plaintiff was a result of defendant's failure to "comply with certain benchmarks that served as a precondition to the authorized draws." On this point, plaintiff submitted evidence that defendant's voucher requests were processed within one of month of submittance.

Regarding defendant's assertion plaintiff filed an improper lis pendens on the Storms Avenue property, the Jersey City Division of Housing Enforcement concluded several conditions of the property qualified it as abandoned, pursuant to N.J.S.A. 55:19-55. Before us, defendant failed to establish any impropriety

with the Storms Avenue property's placement on this list. As such, we discern no error in plaintiff's filing of the lis pendens. Finally, we find the remainder of defendant's allegations to be conclusory and wholly unsubstantiated.

In sum, we agree with the court that there is an absence of a genuine and material issue of fact establishing "evidence [that] presents a sufficient disagreement to require submission to a jury," and is rather "so one-sided," here, plaintiff "must prevail as a matter of law." Brill, 142 N.J. at 536. Accordingly, we affirm the court's September 11, 2020 order, as well as the March 15, 2021 entry of final judgment.

To the extent we have not specifically addressed any of claimant's arguments, it is because we have concluded they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.