SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2651-21

ALEXANDER SUMMER, L.L.C.,

Plaintiff-Appellant/
Cross-Respondent,

v.

MARSCHALL WAREHOUSE CO.,

Defendant-Respondent/
Cross-Appellant,

v.

THOMAS RYAN,

Third-Party Defendant.

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Argued October 11, 2023 – Decided November 1, 2023

Before Judges Whipple, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-1319-20.

Michael R. Yellin argued the cause for appellant/cross-respondent (Cole Schotz PC, attorneys; Michael R. Yellin, on the briefs).

Robert A. Diehl argued the cause for respondent/cross-appellant (Bittiger Elias Triolo & Diehl PC, attorneys; Robert A. Diehl, on the briefs).

PER CURIAM

Plaintiff Alexander Summer, L.L.C. (ASLLC) appeals from the following orders: a September 17, 2020 order denying its motion for summary judgment; a March 24, 2022 order denying its renewed motion for summary judgment after the close of discovery; and a March 24, 2022 order granting a cross-motion for summary judgment filed on behalf of defendant Marschall Warehouse Co. (Marschall). Marschall filed a protective cross-appeal in the event ASLLC prevails on its appeal. Having reviewed the record, we affirm the entry of summary judgment in favor of Marschall, rendering Marschall's cross-appeal moot.

We recite the facts from the summary judgment motion record. In 1999, Marschall sought to sell or lease four of its commercial properties. It retained ASLLC to serve as its exclusive broker for the four properties.

On October 7, 1999, the parties executed a listing agreement (Listing Agreement). During the negotiation of the Listing Agreement, Marschall had legal counsel. ASLLC was not represented by counsel.

Under the Listing Agreement, Marschall agreed to pay a commission to ASLLC equal to five percent of the gross aggregate lease rental amount on any one of the listed properties. The Listing Agreement further provided Marschall would owe a commission to ASLLC in the event of a lease extension or lease renewal. The Listing Agreement also gave Marschall "absolute discretion" to reject any proposed tenant without incurring a commission obligation to ASLLC. The Listing Agreement further stated the document "constitute[d] the entire agreement between the parties . . . and . . . may not be modified, supplemented or amended, except in writing, signed by all parties hereto."

In 2000, ASLLC procured a tenant for Marschall's property located on Chippewa Street in South Hackensack (Chippewa Tenant). Marschall approved the Chippewa Tenant and, on February 7, 2001, Marschall signed a lease with that tenant (Lease). The Lease provided for a "fixed" fifteen-year term beginning June 1, 2001. Following the preliminary lease term, the Chippewa Tenant had the option to extend the Lease for ten additional five-year terms. On April 26, 2001, Marschall and the Chippewa Tenant executed the First Amendment to the Lease, detailing the payment of rent over a thirty-year term.

On June 13, 2001, Marschall and ASLLC executed a letter agreement (Letter Agreement), modifying the Listing Agreement, confirming the Chippewa Tenant's payment of rent, and outlining the total rental amount.

The Letter Agreement from Marschall's attorney to the then-president of ASLLC, Douglas Haynes, stated:

> I am pleased to advise you that the contingencies for the captioned Lease dated February 7, 2001, amended April 26, 2001, have been satisfied and the Tenant has begun paying rent. Total fixed minimum rental for the fifteen (15) year term based on the First Amendment is $11,326,815.00. Please confirm our understanding that the total commission to be paid to [ASLLC] and its co-broker, Weintraub, Casey, Zurkow & Max, Inc. shall be four (4%) percent of that amount or $453,072.60.
>
> [Marschall] has offered and you have agreed to accept said payment of eighteen (18) equal monthly installments of $25,170.70.
>
> Since we do not have a credit tenant and only have a limited guaranty on the Lease, [Marschall]'s obligation to pay the commission shall be conditioned upon its receipt of rent from the Tenant, Chippewa Street, LLC, until such time as the sub-tenant, Fed-Ex Ground Package Systems, Inc.[,] accepts the premises and commences to pay rent. At that time, your entire commission shall be deemed earned.
>
> If the foregoing properly reflects your understanding, kindly sign the enclosed copy of this letter and return it to me. I will then process the first commission payment.

Haynes signed the Letter Agreement on behalf of ASLLC and returned the document to Marschall's attorney. Prior to returning the document, Haynes made two handwritten revisions to the Letter Agreement. Haynes changed the corporate name in the Letter Agreement to read "Alexander Summer, LLC" instead of "Alexander Summer Company." Haynes made no other changes to the Letter Agreement. In accordance with the terms of the Letter Agreement, Marschall paid ASLLC a commission in the amount of $453,072.60.

Over the course of the Lease, the Chippewa Tenant and Marschall entered into additional lease extensions. Marschall paid no commissions to ASLLC for any of the lease extensions.

In 2020, ASLLC filed a complaint against Marschall, claiming Marschall owed a five percent commission on all rents derived from the Lease, including commissions due for additional lease extensions with the Chippewa Tenant. Marschall denied owing additional commissions, arguing the Letter Agreement resolved the entire commission obligation owed to ASLLC. On July 24, 2020, prior to the end of the discovery period, ASLLC filed its first motion for summary judgment.

On September 17, 2020, after hearing oral argument, the motion judge denied ASLLC's motion and directed the parties to complete discovery. At the

close of discovery, ASLLC again moved for summary judgment and Marschall cross-moved for summary judgment.

On February 18, 2022, a different motion judge heard argument on the motions. In orders dated March 24, 2022 and an accompanying written decision, the judge granted summary judgment to Marschall and dismissed ASLLC's complaint with prejudice. The judge rejected ASLLC's breach of contract claims. She also rejected ASLLC's request for a declaration that Marschall's obligation to pay commissions was governed by the Listing Agreement.

After reviewing the evidence, the judge found:

> the [Letter Agreement] [was] unambiguous and on its face, it is a prior accord of the claims raised by [ASLLC] in this lawsuit. By its own terms, the [Listing Agreement] was "an understanding" between [Marschall], as the owner of the subject property to be leased, and [ASLLC], as the intended broker who promised to use its best efforts in listing, marketing and advertising [Marschall]'s property. The [Letter Agreement] specifie[d] that [Marschall]'s property . . . resulted in the Chippewa Street LLC lease. The two documents are two different agreements that served two different functions. The [Listing Agreement] planned on how [ASLLC] would fulfill its obligations, detailed duties and obligations that may be triggered by any tenant prospect, and it also set forth a commission fee schedule. The [Listing Agreement] also gave Marschall the discretion to reject any tenant [ASLLC] presented and required the renegotiation of terms prior to the acceptance of any tenant [ASLLC] presented. The [Listing Agreement] . . . specifically state[d]

> at . . . Paragraph 15, "The sums and provisions herein contained constitute the entire agreement between the parties hereto and this agreement may not be modified, supplemented or amend[ed], except in writing, signed by all parties hereto."
>
> That is exactly what the parties did: less than two years later, the parties . . . entered into the [Letter Agreement] that specifically and unambiguously cite[d] the procured lease agreement between Marschall . . . and the new tenant Chippewa Street. The [Letter Agreement] specifically state[d], "Please confirm our understanding that the total commission to be paid to [ASLLC] and its co-broker . . . shall be four 4% percent of that amount or $453,072.60." This [Letter Agreement] also state[d], "At that time, your entire commission shall be deemed earned."

The judge found the parties executed the Letter Agreement with only a minor change by Haynes to reflect ASLLC's proper corporate name. There were no other modifications to the Letter Agreement. Thus, the judge concluded the Letter Agreement "addresse[d] all the pertinent terms regarding the commissions owed on the subject lease."

Additionally, the judge determined the Letter Agreement was "not ambiguous and state[d] twice that it constitute[d] an agreement as to the total or entire commission ASLLC may earn." She further found the Letter Agreement "modified the commission to be earned on procuration of the identified lease in writing, as the [Listing Agreement] required." The judge also explained ASLLC

failed to present any admissible evidence refuting that the Letter Agreement "control[ed] the parameters of the commission to be paid for the procuration of [the Lease]."

The judge also wrote:

> Even though the [Letter Agreement] did not reference the prior [Listing Agreement] or that future commissions [were] owed, the [Letter Agreement] made clear and confirmed an understanding of what the total commission to be paid to ASLLC would be, and it provide[d] written confirmation of the commission percentage earned and the total amount of commission earned.

Nowhere in the written decision did the judge conclude the Letter Agreement was a "novation" or "substitute contract" as ASLLC argues on appeal.

On appeal, ASLLC claims the motion judge found the Letter Agreement was a "substitute contract" and she failed to properly apply the law governing substitute contracts. ASLLC further asserts the judge erroneously concluded the Letter Agreement replaced the Listing Agreement and resolved the issue of existing and future commission obligations. In finding the Letter Agreement eliminated future commission obligations, ASLLC also contends the judge improperly credited inconsistent testimony proffered by Marschall's counsel and ignored testimony presented by ASLLC's representatives. Additionally, ASLLC argues the judge's written decision referred to ASLLC's then-president, Douglas

Haynes, as ASLLC's attorney and that error warrants reversal of the summary judgment order in favor of Marschall. We reject these arguments.

"We review a grant of summary judgment de novo, applying the same standard as the trial court." Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 549 (2022) (quoting Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019)). We consider "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 v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "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 first consider whether the judge erred in finding the Letter Agreement controlled the payment of commissions. We review the interpretation of a contract de novo. Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011) (citing Jennings v. Pinto, 5 N.J. 562, 569-70 (1950)). A court should enforce a contract "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)). However, 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 Manahawkin, 217 N.J. at 118 (internal quotation marks omitted)).

"[A] novation substitutes a new contract and extinguishes the old one." Wells Reit II–80 Park Plaza, LLC v. Dir., Div. of Tax'n, 414 N.J. Super. 453, 466 (App. Div. 2010) (citing Fusco v. City of Union City, 261 N.J. Super. 332, 336 (App. Div. 1993)). A novation requires: "(1) a previously valid contract; (2) an agreement to make a new contract; (3) a valid new contract; and (4) an intent to extinguish the old contract." Ibid.

Contrary to ASLLC's argument, the judge never declared the Letter Agreement to be a novation of the Listing Agreement. Rather, the judge found

the documents were "two agreements that served two different functions." Additionally, the judge explained the Letter Agreement constituted a written modification of the parties' commission agreement consistent with the Listing Agreement.

Moreover, ASLLC relies on an unpublished case in support of its arguments on appeal. We note that unpublished opinions do not constitute precedent and are not binding upon any court. R. 1:36-3; Lippman v. Ethicon, Inc., 222 N.J. 362, 385 n.5 (2015). Thus, we reject ASLLC's argument that our unpublished decision in Century 21-Main St. Realty, Inc. v. St. Cecelia's Church, No. A-2506-15 (App. Div. Sept. 6, 2017) warrants reversal of summary judgment in favor of Marschall.

We also reject ASLLC's contention that the judge was required to consider circumstantial evidence regarding the Letter Agreement to deduce the parties' intent in executing that document. When reviewing a contract, a court must "read the document as a whole in a fair and common sense manner[.]" Cypress Point Condo. Ass'n, Inc., 226 N.J. at 415 (quoting Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009)). "[W]hen the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement

as written, unless doing so would lead to an absurd result." Quinn v. Quinn, 225 N.J. 34, 45 (2016).

Here, the judge found ASLLC failed to proffer any competent evidence to contradict the plain and unambiguous language of the Letter Agreement. None of ASLLC's witnesses had any personal knowledge relevant to the negotiations leading to the execution of the Letter Agreement. Further, the judge found the Letter Agreement's "unambiguity [wa]s corroborated with the absence of any other cross-outs or proposed language, or added terms by [Haynes], who approved the [Letter Agreement] basically as is on behalf of [ASLLC]."

For the first time on appeal, ASLLC also asserts the Letter Agreement lacked consideration and the judge erred in finding the Letter Agreement governed Marschall's payment of commissions. We "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions . . . go to the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). We are satisfied that ASLLC's argument on this point does not concern a matter of great public interest nor does it go to the jurisdiction of the court.

We also reject ASLLC's argument that the judge's mistaken identification of Haynes as ASLLC's counsel in her written decision warrants the reversal of summary judgment. In her decision, the judge also correctly referred to Haynes as the majority owner of ASLLC. Having reviewed the record, we are satisfied that the judge's misstatement concerning Haynes' role at ASLLC had no bearing on her ultimate summary judgment decision.

To the extent we have not addressed any of ASLLC's arguments, we are satisfied those arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Because we affirm the March 24, 2022 order granting summary judgment to Marschall, plaintiff's appeal from the September 17, 2020 order denying its motion for summary judgment and Marschall's protective cross-appeal are moot.

Affirmed as to ASLLC's appeal and dismissed as moot as to Marschall's cross-appeal.