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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2812-21**

**DANIEL FITZPATRICK and
SARAH FITZPATRICK,**

Plaintiffs-Appellants,

v.

**YUSUF QASIM and CARLY
ANN HORNING,**

Defendants-Respondents.

Argued January 25, 2023 – Decided September 13, 2023

Before Judges Accurso, Vernoia and Natali.

On appeal from the Superior Court of New Jersey,
Chancery Division, Monmouth County, Docket No.
C-000046-22.

Gregory B. Pasquale argued the cause for appellants
(Schaffer Shain Jalloh PC, attorneys; Gregory B.
Pasquale, on the briefs).

Michael J. Connolly argued the cause for respondents
(Davison Eastman Muñoz Paone, PA, attorneys; James
A. Paone, II, and Michael J. Connolly, on the briefs).

Barry S. Goodman argued the cause for amicus curiae New Jersey Realtors (Greenbaum, Rowe, Smith & Davis LLP, attorneys; Barry S. Goodman, of counsel and on the brief; Conor J. Hennessey, on the brief).

F. Bradford Batcha argued the cause for amicus curiae New Jersey State Bar Association (New Jersey State Bar Association, attorneys; Jeralyn L. Lawrence, of counsel; F. Bradford Batcha and Mathew J. Schiller, on the brief).

PER CURIAM

This is a dispute over the sellers' cancellation of a residential real estate contract during attorney review. Judge Joseph P. Quinn held, on an undisputed record, that the sellers effectively cancelled the contract by providing the buyers' attorney and real estate broker actual notice of cancellation via telephone. Given the factual circumstances, we agree and affirm the rulings of the trial court, largely for the reasons expressed by Judge Quinn in his opinion from the bench.

In Spring 2022, plaintiff-buyers Daniel and Sarah Fitzpatrick made an offer on a house in Spring Lake Heights for \$1,475,000 — \$126,000 over the asking price. Although the sellers, defendants Yusuf Qasim and Carly Ann Horning, accepted the buyers' offer and the parties entered into a New Jersey REALTORS Standard Form Contract, the sellers continued to solicit other

offers during the three-day attorney-review period — a fact of which the buyers were aware.

On the day before the end of attorney review, sellers' counsel called the attorney for the buyers and sellers' real estate agent called the broker for the buyers, advising the contract was cancelled — a fact neither one disputes.¹ The sellers had received a new \$2.1 million offer, which they intended to accept. Although the sellers' counsel drafted and signed a letter the same day, cancelling the contract to the buyers' attorney, with a copy to the sellers and the real estate agents for both parties, he inadvertently failed to send it. Three days later, the buyers' attorney wrote to counsel for the sellers advising that "[a]s the contract has not been disapproved in accordance with Section 35 of the [New Jersey REALTORS Standard Form] contract, it is my clients' position that they have a binding contract for the purchase of this property."

On receipt of that letter, the sellers' counsel immediately emailed the buyers' attorney stating, "As you are well aware, I called you on the [day before the end of attorney review] and specifically advised that the matter was

¹ Or, at least, didn't in the trial court. The buyers now contend sellers' counsel's advice "that his clients 'were going to accept another offer' does not express final and definitive rescission" of the sales contract. We address this argument later in the opinion.

cancelled," and attached his letter cancelling the contract. The lawyers next spoke by phone, with the buyers' attorney saying he never received any letter disapproving the contract. The buyers' attorney followed up with a letter to sellers' counsel the next day, stating:

Upon review of the letter attached to yesterday's email, be advised that, even if your letter had been received during the attorney review period, it does not release your clients from their contract with [the buyers]. The letter does not state that the contract is disapproved based upon legal review of any of its terms or conditions. Instead, it merely states that your clients "have reviewed the Contract and . . . find same unacceptable." This does not satisfy the requirements of paragraph 35 of the contract, and it is not a basis for cancellation.

Furthermore, your clients' attempt to exploit the attorney review period and cancel the contract for economic reasons breaches the implied covenant of good faith and fair dealing. The mandatory attorney review period is only intended to compensate for the fact that parties usually execute these contracts prior to consulting an attorney. It is not intended to allow one side of an otherwise binding contract an unconditional escape hatch. Therefore, the [executed] contract between our clients is binding and enforceable.

Three days later, the buyers filed a verified complaint and order to show cause against defendant-sellers, seeking specific performance, damages for breach of contract and the covenant of good faith and fair dealing, and

injunctive relief to prevent the sellers from conveying the property to anyone else pending resolution of the action.

Judge Quinn signed the order to show cause the next day, denying the buyers' request for temporary restraints, finding "no immediate irreparable harm," and setting a return date on their application for a preliminary injunction. The sellers thereafter tendered a certified check for the deposit to the buyers' counsel, which was returned uncashed.

We granted the buyers' application to file an emergent motion to stay sale of the property, pending the return date on their order to show cause, and temporarily enjoined sale of the property pending our resolution of the motion. After review of the motion papers, we denied leave to appeal and lifted the restraint against sale.

The sellers thereafter filed an order to show cause seeking the discharge of the notice of lis pendens and a notice of settlement filed against the property by the buyers without notice to the sellers or their counsel.² Following

² Upon learning of the filing of the lis pendens and notice of settlement days before the sellers were to close on their \$2.1 million contract, counsel for the sellers sent the attorney for the buyers a detailed safe-harbor letter demanding discharge of those filings and a voluntary dismissal of the complaint pursuant to Rule 1:4-8. Counsel for the buyers addressed the Court's holding in Conley v. Guerrero, 228 N.J. 339 (2017), a case not cited to the trial court by buyers'

argument on the buyers' application for a preliminary injunction and the sellers' application to discharge the lis pendens, Judge Quinn denied the buyers' request for an injunction, ordered the discharge of the lis pendens and granted the sellers' oral motion to dismiss the complaint.

In a thorough and thoughtful opinion from the bench, Judge Quinn reviewed with counsel the familiar terms of the New Jersey REALTORS Standard Form of Real Estate Sale Contract, focusing on the all-caps notice at the top of the Contract's first page advising the document is "A LEGALLY BINDING CONTRACT THAT WILL BECOME FINAL WITHIN THREE BUSINESS DAYS," and the attorney-review provisions in section 35 and 36:

35. ATTORNEY-REVIEW CLAUSE:

(1) Study by Attorney.

Buyer or Seller may choose to have an attorney study this Contract. If an attorney is consulted, the attorney must complete his or her review of the Contract within a three-day period. This Contract will be legally binding at the end of this three-day period unless an attorney for Buyer or Seller reviews and disapproves of the Contract.

counsel, and warned that the buyers' continuation of the suit with no likelihood of success on the merits was putting the sellers' ability to close a sale of their home in jeopardy. In addition to advising the sellers would seek sanctions for frivolous litigation pursuant to Rule 1:4-8, the sellers' counsel advised the sellers would file suit and seek damages for any loss. The record does not reveal whether the sellers pursued either course.

(2) Counting the Time.

You count the three days from the date of delivery of the signed Contract to Buyer and Seller. You do not count Saturdays, Sundays or legal holidays. Buyer and Seller may agree in writing to extend the three-day period for attorney review.

(3) Notice of Disapproval.

If an attorney for the Buyer or Seller reviews and disapproves of this Contract, the attorney must notify the Broker(s) and the other party named in this Contract within the three-day period. Otherwise this Contract will be legally binding as written. The attorney must send the notice of disapproval to the Broker(s) by fax, e-mail, personal delivery, or overnight mail with proof of delivery. Notice by overnight mail will be effective upon mailing. The personal delivery will be effective upon delivery to the Broker's office. The attorney may also, but need not, inform the Broker(s) of any suggested revision(s) in the Contract that would make it satisfactory.

36. NOTICES:

All notices shall be by certified mail, fax, e-mail, recognized overnight courier or electronic document (except for notices under the Attorney-Review Clause Section) or by delivering it personally. The certified letter, reputable overnight carrier, fax or electronic document will be effective upon sending. Notices to Seller and Buyer shall be addressed to the addresses in Section 1, unless otherwise specified in writing by the respective party.

The judge also reviewed the facts we've set forth, providing counsel the opportunity to correct any fact they believed he'd misstated, which neither did. Satisfied the facts were undisputed, Judge Quinn found the case came "down to simply a legal argument of whether there was a valid cancellation of the contract" by virtue of the oral notice to the buyers' counsel and real estate agent during the three-day attorney-review period, "or must there be a written document in order to cancel."

The judge began his analysis by rejecting the buyers' contention that there was anything "illegal, untoward or unreasonable" about the sellers soliciting higher offers during attorney review. Judge Quinn found that question settled in Trenta v. Gay, 191 N.J. Super. 617 (Ch. Div. 1983), where Judge Cohen held the parties in New Jersey State Bar Association v. New Jersey Association of Realtor Boards, 93 N.J. 470 (1983), as well as our Supreme Court, which approved and modified their settlement in that case, "believed that the attorney review clause permitted attorney disapproval for any reason, that there was no duty to explain the reason, and that courts were not expected to review the disapprovals for reasonability." See Levison v. Weintraub, 215 N.J. Super. 273, 277-78 (App. Div. 1987) (approving the holding in Trenta that the possibility of a contract buyer being outbid during

attorney review "is a possibility contemplated and legitimated by the attorney review clause").

Judge Quinn also rejected the buyers' contention that the sellers' continuing to solicit bids during the three-day attorney-review period was a breach of the duty of good faith and fair dealing inherent in every contract. See Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997). In addition to noting the express holding in Trenta permitting the conduct, Judge Quinn found the sellers could not breach the covenant of good faith and fair dealing inherent in every contract because there was no enforceable contract during the three-day attorney-review period. See Carmagnola v. Hann, 233 N.J. Super. 547, 550 (App. Div. 1989) (explaining "the attorney review clause renders enforceability of realtor-drawn contracts illusory, at least during the three day review period").

Turning to the central question of whether the sellers validly cancelled the contract by oral notice to the buyers' counsel and real estate agent during the three-day attorney-review period, Judge Quinn was guided by Conley v. Guerrero, 228 N.J. 339, 342 (2017), where the Court considered "whether the attorney-review provision of a standard form real estate contract must be strictly enforced."

In Conley, the parties used a standard form real estate contract, and both the offer and acceptance were transmitted via e-mail or fax. Id. at 342-43. A bidding war ensued before the three-day attorney-review period expired, and the seller accepted a higher bid from a third party. Id. at 343. Instead of employing certified mail, a telegram, or personal delivery, the only approved methods of termination at that time, the seller's attorney "e-mailed and faxed" a disapproval letter to the buyers' attorney and realtor during the review period. Id. at 342-43. The buyers sued, claiming the contract was enforceable because the seller's disapproval notification was sent improperly. Id. at 342. The Court disagreed, ruling the notice was valid. Id. at 342, 344.

After examining the history of the attorney-review clause, the Court concluded that strict enforcement of the contract's notice provision would result in forfeiture of the right to attorney review, undermining the review's purpose. Id. at 347-49. The Court noted the buyers had received actual notice of disapproval within the three-day period by a communication commonly used in the industry. Id. at 356. Thus, to hold that fax and e-mail notice was deficient "because of the manner in which it was transmitted would elevate form over the protective purpose" of the provision. Id. at 356. Thus, the Court held, exercising its constitutional authority, id. at 342, that "notice of

disapproval of a real estate contract may be transmitted by fax, e-mail, personal delivery, or overnight mail with proof of delivery." Id. at 356.

Comparing this case to Conley, Judge Quinn found both concerned "the modality of communication of rejecting the contract and accepting a new one." Finding the lesson of Conley to be that a court confronting a dispute over cancellation of a contract during attorney review is not to exalt form over substance, Judge Quinn had no hesitation in finding the contract "validly cancelled" based on the undisputed facts in the record.

Specifically, the judge found the buyers did not dispute that both their lawyer and their realtor were advised by telephone during attorney review that the sellers were cancelling the contract and "going to accept the \$2,100,000 offer." Although the judge acknowledged the sellers' counsel did not send written notification to the buyers' attorney or realtor until after the attorney-review period had expired, he found it very clear the buyers' representatives had actual notice during the period that the sellers were cancelling the contract with the buyers in order to accept the higher offer.

Judge Quinn found "indeed, the information as to why [the contract] was being terminated," that is because the sellers got an offer for over \$600,000 more, "was not only communicated, but understandably communicated," as

demonstrated by the response from the buyers' attorney, who asked, "do these people understand that this is a [house] in Spring Lake Heights and not Spring Lake." In light of the buyers' representatives' actual knowledge of the cancellation of the contract, the judge found it "hard to imagine that a court of equity would enforce a contract for \$625,000 less . . . and about which there was communication during the attorney review process."

The buyers appeal, reprising the arguments they made to the trial court that oral cancellation of the contract is not permitted, and that there is a duty of good faith and fair dealing in a residential real estate contract notwithstanding it is subject to cancellation during the attorney-review period. They also add an argument not raised, that is that the trial court erred in "dismissing the complaint without considering whether the oral communication relied upon by sellers conveyed a future intention to cancel the contract."

The sellers counter that the buyers' arguments as to notice were rejected by the Supreme Court in Conley, which is not distinguishable from this case, and the doctrine of good faith and fair dealing is not implicated as the law is clear that either party to a residential real estate contract may cancel the contract for any reason during attorney review. They contend we should refuse to consider the buyers' belated argument that the trial court should not

have dismissed the complaint, both because it was not raised and because sellers' counsel submitted a sworn certification to the trial court recounting his telephone conversation with the sellers' counsel "wherein he advised me that his clients had received an offer significantly higher than my clients' contract price and that his clients were accepting that offer."

We granted amicus curiae status to New Jersey REALTORS and the New Jersey State Bar Association. REALTORS supports the buyers' arguments and urges us to enforce the terms of the attorney-review provision approved by the Court in Conley, requiring written notice of disapproval during the three-day attorney-review period. REALTORS contends permitting telephone calls as a method for disapproving a real estate sales contract will create confusion and uncertainty for buyers and sellers and invariably lead to lawsuits over whether "there was a valid disapproval of the sales contract based upon he-said-she-recounts regarding what was said during the telephone call."

The State Bar supports the sellers. Although not advocating for any change in the attorney-review clause "and its prescribed methods of

disapproving a residential real estate contract,"³ the Bar contends that "when a practitioner deviates from the prescribed methods of communication of disapproval under the attorney-review clause, the disapproval should still be effective if the practitioner can prove that all parties received actual notice."

Because the question presented requires a resolution of a strictly legal issue, that is whether the sellers' oral notice to the buyers on this undisputed record was effective to cancel the real estate sales contract, our review is de novo. See Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

The buyers contend the issue they present is one of first impression, that is "whether a residential real estate contract can be cancelled orally during the attorney review period." We see the case differently. In our view, the issue is "whether strict enforcement of the notification provision" under the circumstances presented in this case "would result in the significant forfeiture of Seller's right to review the contract with counsel and disapprove it within the attorney-review period." Conley, 228 N.J. at 355 (quoting Conley v.

³ The State Bar's position echoes that of the sellers, who maintain they "are not advocating for a change in the terms of New Jersey's standard form real estate contract," nor requesting we "set an iron-clad rule that a telephone call is always sufficient to serve as notice of disapproval." The sellers maintain "[t]his case is solely about whether notice of termination that is timely, actually, and indisputably received suffices despite an objection as to the manner of notification."

Guerrero, 443 N.J. Super. 62, 69 (App. Div. 2015)). The novelty here lies in the facts, not the law. We agree with Judge Quinn that Conley dictates the outcome.

The Court in Conley reiterated that disputes over cancellation of a residential sales contract within the attorney-review period should be resolved by "effectuating the purpose of the attorney-review clause above all else." Id. at 353. And it made clear that purpose is "to 'give the parties an opportunity for attorney review and consultation' before a real estate contract becomes enforceable." Id. at 355 (quoting Romano v. Chapman, 358 N.J. Super. 48, 54 (App. Div. 2003)).

The Conley Court made plain it was not the Court's intent in accepting the settling parties' three agreed methods of disapproving a residential sales contract in New Jersey State Bar Association v. New Jersey Association of Realtor Boards, 93 N.J. 470 "to convert them into the focus of the Bar Ass'n opinion" or hold that "strict adherence" to those methods was "necessary." Id. at 353. The Court explained that since Bar Ass'n, a trial court has had "the flexibility to grant relief to the parties before it without strictly adhering to the settlement agreement's terms," including the modes of delivery

of a cancellation notice, which flexibility the Court found appropriately exercised by the trial court in Conley. Ibid. (citing Bar Ass'n, 93 N.J. at 474).

Here, in the face of actual notice by the buyers' attorney and realtor that the sellers cancelled the contract during attorney review in order to accept an offer \$625,000 higher than that of the buyers, we conclude Judge Quinn appropriately intervened by excusing the failure of the sellers' attorney to give written notice of cancellation as required by the contract. Insisting on "strict enforcement of [the] contract provision" on this record "would frustrate the contract's overarching purpose." Id. at 355. As in Conley, "holding that the notice here — which was actually and indisputably received by Buyers within the three-day window — was deficient because of the manner in which it was transmitted would elevate form over the protective purpose for which the attorney-review provision was adopted in Bar Ass'n." Id. at 356.

That is not to say that oral notice of cancellation will always be sufficient, and this opinion should not be read as effecting any change to the four methods of disapproving a residential sales contract the Court set out in Conley. We agree with REALTORS that oral notification of cancellation is fraught with risk, and an attorney who relies on oral notice proceeds at her — and her client's — peril. Lost opportunity in a volatile market and the expense

of litigation may well result in only a Pyrrhic victory for the prevailing party. Our holding is a narrow one. We conclude — based on the facts presented in this case — that Judge Quinn correctly determined the sellers' oral notice during the three-day attorney-review period was sufficient to effectively cancel the sellers' sales contract with the buyers. We agree with him it's hard to imagine a court of equity ruling otherwise here.

The buyers' remaining arguments require only brief comment, and, as to their contention that the sellers breached their duty of good faith and fair dealing by soliciting other offers during the attorney-review period, no comment. See R. 2:11-3(e)(1)(E). The law in New Jersey has been clear for forty years that a residential seller may continue to solicit offers during attorney review, and that either the buyer's or seller's attorney may cancel for any reason during that period, including the seller's receipt of a higher offer, as here. Trenta, 191 N.J. Super. at 622 ("There is no occasion for this court to evaluate the reasons why defendants' attorney rejected the proffered contract. He was entitled to do so, on his clients' instructions, for any reason. The reasonability of his advice is not subject to judicial review.").

That leaves the buyers' newly raised argument that the court erred in granting the sellers' oral motion to dismiss the complaint, "ignor[ing] the

factual issue as to whether the words the sellers' attorney used were sufficiently definitive to disapprove the contract." Buyers' counsel acknowledges the argument was not "technically . . . raised below," but asserts "the posture of the case and the court's dismissal on defendants' oral motion prevented" him from making the argument in the trial court. We reject his claim because it is contradicted by the record.

Buyers fail to note that Judge Quinn set forth his understanding of the facts based on his review of the motion papers at the start of the argument. The judge stated he didn't "know whether [his] recollection [was] accurate, inaccurate, but that [was his] recollection of the facts," and he invited the buyers' attorney to "correct anything [the judge] may have misstated."

Buyers' counsel took issue with the judge having misstated a procedural point and later corrected the court about the date the contract was signed, which he conceded was of no moment, but otherwise gave no indication the buyers disputed the facts. Likewise, after the sellers' counsel asserted the sellers said "we changed our mind," and that there was "[n]o doubt there's been actual notice here," buyers' counsel did not dispute those facts. Instead, he argued the contract required notice of cancellation to be in writing, and that "a phone call is [not] sufficient to cancel a contract to sell real estate."

Finally, when the judge placed his decision on the record, he reiterated there was no dispute that "[d]uring the attorney review period, . . . the broker for the sellers contacted the broker for the purchasers and said we're not accepting your offer, we're going to accept the \$2,100,000 offer. And [sellers' counsel] communicated that to [the buyers' attorney]." Again, buyers' counsel did not assert his clients took issue with those facts. And despite the subsequent lengthy exchange between the court and counsel over the dismissal of the complaint, buyers' counsel never asserted the court should not dismiss the complaint without a hearing.

Because it is abundantly clear the buyers never raised this point in the trial court despite being provided several opportunities to do so by the trial judge, we decline to address it for the first time on appeal. US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 483 (2012) (noting "our appellate courts 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 so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest") (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). The issue does not go to jurisdiction or concern a matter of great public interest, as it simply applies controlling Supreme Court precedent

to a particular set of facts on an undisputed record. It has no broader application.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION