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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2871-21**

FOLEY, INCORPORATED,

Plaintiff-Respondent,

v.

**CONSTRUCTIVE CONCEPTS INC.
and EDWARD J. DEGAETANO,**

Defendants-Appellants.

Argued June 6, 2023 – Decided September 1, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-1666-20.

Vincent P. Manning argued the cause for appellants (Manning, Caliendo & Thomson, PA, attorneys; Vincent P. Manning, of counsel and on the briefs).

Andrew R. Turner argued the cause for respondent (Turner Law Firm, LLC, attorneys; Andrew R. Turner, of counsel and on the brief).

PER CURIAM

In this construction equipment rental dispute, the motion court granted partial summary judgment to plaintiff Foley, Incorporated, finding defendants Constructive Concepts Inc. and Edward J. DeGaetano were liable to Foley for rental of a CAT Model 272 Skid Steer Loader (the equipment) from September 9 to November 4, 2019. The court, in turn, denied defendants' cross-motion for summary judgment. Eight months later, the court entered judgment for plaintiff in the amount of \$16,372.23, plus costs, in accordance with the parties' "consent order of disposition" in which defendants "agreed to the quantum of damages only." Defendants appeal summary judgment, contending the court "erred . . . by finding a valid rental agreement . . . existed" because the parties never agreed to one.¹

Appellate review of summary judgment is de novo. Giannakopoulos v. Mid State Mall, 438 N.J. Super. 595, 599 (App. Div. 2014). Summary judgment is granted "if the pleadings, depositions, answers to interrogatories and

¹ On October 17, 2022, we denied plaintiff's motion for summary disposition of the appeal. Plaintiff maintained that after the "consent order of disposition," defendants did not seek a stay or post a bond pending appeal, allowing it to obtain a writ of execution to levy on a bank account, thereby satisfying the judgment. Plaintiff argued the judgment satisfaction made the appeal issues moot, entitling it to summary disposition of the appeal. We rejected that argument because the consent order of disposition stated defendants "agreed to the quantum of damages only."

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 judgment or order as a matter of law." R. 4:46-2(c). To determine whether there are genuine issues of material fact, we consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). Summary judgment should be denied when a determination of material disputed facts depends primarily on credibility evaluations. Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011).

Applying these principles, we reverse and remand because, for the reasons that follow, there are disputed material facts regarding whether the parties entered into rental agreement. That determination must be made by the factfinder at trial.

The motion court granted summary judgment to plaintiff, because, in its view, "there was clearly an agreement in place" to rent the equipment based on Foley previously granting a line of credit to Constructive Concepts—personally

guaranteed by DeGaetano—allowing it to rent equipment from Foley without prepayment. Scott Sarfert, Foley's General Line Account Manager, certified that at DeGaetano's request, he "prepared a standard rental agreement for the equipment rental." The court rejected DeGaetano's certification stating:

(1) Constructive Concepts did not rent the equipment, but, due to its cost, Foley loaned it "to assure [him] that the equipment would operate as [Foley] represented and would be suitable for the various building projects of [Constructive Concepts]";

(2) "the [line of] credit application and [personal] guarantee was for the purchase of a trailer [from Foley] in 2017";

(3) the purported rental agreement proffered by Foley was not signed by "anyone authorized by [Constructive Concepts] to rent this particular piece of equipment," and he did not employ anyone named Chris, which appears to be the name of the person on the purported rental agreement with Foley;

(4) there was no equipment rental given the lack of "the standard checklist as to the condition of the equipment such as the inspection/safety report that would indicate that a rented piece of equipment was going out fully fueled and without damage and condition upon return"; and

(5) "[he] contacted Foley on numerous occasions to have them come and pick up the equipment," but it took them until October 29, 2019 to send "an outside hauler to return the loaner."

The court also did not consider a transcribed recording between DeGaetano and Scott Weiss, a Foley salesman, a month after Constructive Concepts received the equipment, which DeGaetano contends evinces a loaner agreement, because Weiss said Foley would replace four bald tires on the equipment if Constructive Concepts bought it.²

Viewing the facts set forth in DeGaetano's certification in the light most favorable to defendants, we disagree with the motion court's ruling that "there's simply no competing evidence to suggest other than a reference to a conversation, [and] there's no documentary evidence on which any factfinder could draw a reasonable conclusion" that the equipment was loaned to Constructive Concepts rather than rented. DeGaetano's certification raises substantial factual issues regarding the existence of a rental agreement sufficient to preclude the granting of summary judgment to Foley. See Brill, 142 N.J. at 540. The facts presented by Foley concerning the line of credit and the purported rental agreement signed by "Chris" do not clearly warrant the conclusion that defendants are liable as a matter of law to Foley for renting the

² The record does not indicate whether the recording was from a telephone conversation, and, if so, who placed the call. In addition, given the transcript suggests some of the conversation was not transcribed, there is no indication whether a recording of the entire conversation exists.

equipment. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, 142 N.J. at 536).

To find the parties had a legally enforceable contract "requires mutual assent, a meeting of the minds based on a common understanding of the contract terms." Morgan v. Sanford Brown Inst., 225 N.J. 289, 308 (2016). The motion court found defendants' factual assertion that there was no rental agreement lacked credibility. Summary judgment was not appropriate because without assessing the parties' credibility, it is questionable whether the parties "agree[d] on essential terms and manifest an intention to be bound by those terms, . . . creat[ing] an enforceable contract." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). As noted, weighing the parties' credibility is the duty of the factfinder at trial, and is beyond the court's purview in deciding summary judgment. See Petersen, 418 N.J. Super. at 132.

At trial, Foley may ultimately persuade a factfinder that a binding equipment rental agreement was signed by defendants' representative. Alternatively, Foley may prove there was an implied-in-fact contract based on the parties conduct or a quasi-contract based on Constructive Concepts' use of the equipment. See Weichert, 128 N.J. at 435. That said, there is a genuine

issue of material fact regarding defendants' use of the equipment that cannot be resolved by summary judgment.

Reversed and remanded for trial. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION