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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3618-20**

OLIVER V. SHORT,

Plaintiff-Appellant,

v.

**LYNN M. BIRCSAK and
FRANKLIN BAKKA, JR.,**

Defendants-Respondents.

Argued March 20, 2023 — Decided March 29, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey,
Law Division, Union County, Docket No. L-1297-21.

Oliver M. Short, appellant, argued the cause pro se.

Louis A. Chiafullo argued the cause for respondents.

PER CURIAM

Plaintiff Oliver V. Short appeals from a June 21, 2021 order granting defendants Lynn M. Bircsak's and Franklin Bakka, Jr.'s motion to dismiss

plaintiff's complaint with prejudice. Plaintiff also challenges a July 23, 2021 order denying his motion for reconsideration. We affirm.

Plaintiff disputed the sale of property located in Scotch Plains previously owned by his mother, Marie Semple. In 2000, Semple, as settlor, created the Marie Semple Qualified Personal Residence Trust and conveyed the property to the trust. The trust's term was ten years, or until Semple's death if she died before the end of the term. If she survived the ten year term, "the [t]rustee [would] continue to hold the then remaining principal, in further trust, until the death of [Semple]" If Semple did not survive the ten-year term, the trustee would evenly divide the remaining principal of the trust among Semple's four children, which included plaintiff, his brother, half-sister, and half-brother. The half-sister served as trustee.

Semple died in 2012. In 2014, plaintiff and his brother filed a Chancery Division complaint naming the half-siblings and the estate as defendants. The complaint alleged the trustee improperly administered the trust and breached her fiduciary duty to plaintiff and his brother, and sought, among other things, a partition through sale of the property.

On March 11, 2015, the parties entered a consent order for the sale of the property, which stated:

1. Plaintiffs hereby withdraw any objection pertaining to the . . . finalization of sale of the property [The trustee], in her fiduciary capacity . . . is . . . authorized to take any and all action necessary . . . to immediately enter into and/or execute the proposed contract of sale

2. . . . [The trustee], in her [f]iduciary capacity, is hereby granted the authority to act and to take any and all steps as may be required to execute any and all documents that may be required now or in the future in order to complete the sale of the property, including but not limited to, any and all documents as may be necessary to complete closing of title on the property

3. Plaintiffs and [the d]efendants hereby re-affirm that it is their mutual decision to effectuate closing of title on the property . . . to the current potential buyer^[1] . . . as soon as is feasible. As such, neither the plaintiffs nor the defendants shall take any action, or engage in any efforts or behavior that would, or potentially could, frustrate or potentially harm the sale of the property . . . to the current buyer

. . . .

7. Upon completion of closing of title to the property, the net proceeds of sale shall be transferred into the [a]ttorney [t]rust [a]ccount of [the] defendants' attorney Same shall remain held in escrow pending further agreement of the parties and/or [o]rder of the [c]ourt.

¹ The "current potential buyer" were the defendants on this appeal.

Pursuant to the consent order, the trustee sold the property to defendants. The deed named the half-sister, the fiduciary of the trust, as grantor and defendants as grantees and was recorded on March 31, 2015.

On June 6, 2016, the court entered a judgment authorizing the trustee to pay the estate's legal fees from the sale proceeds and making various agreed upon distributions from the proceeds to all four siblings. Plaintiff and his brother unsuccessfully challenged this order, including seeking appellate review and petitioning the Supreme Court of New Jersey. Thereafter, the estate's attorney proposed a final distribution of the sale proceeds. However, plaintiff and his brother continued the litigation against the estate for an accounting, to name a successor trustee, and disputing the legal fees. The court entered various orders not relevant to this appeal in 2016 and 2017, culminating in the entry of a final judgment on December 31, 2018. The final judgment released funds from the proceeds to pay the executor, each sibling, legal fees, and required the disputed balance to be paid into court. In 2019, the court denied two attempts by plaintiff to challenge the final judgment.

Plaintiff then filed a complaint in lieu of prerogative writs and an order to show cause for temporary restraints, challenging the final judgment. He argued the "[c]ourt did not fulfill Semple's expressed intent for the ultimate

disposition of her property following her death." The court denied the order to show cause and dismissed the complaint finding the proper recourse was to appeal from the final judgment, not institute a separate proceeding.

In 2021, plaintiff filed the complaint in this matter asserting he had a one-fourth interest in the property because the litigation against the estate neither adjudicated the partition nor extinguished his right to have the court determine his interest in the property under N.J.S.A. 2A:35-1. He alleged the property's sale and the deed did not transfer his interest in the property to defendants because the trust had terminated before the sale, and the trustee no longer had the power to transact the property on behalf of the trust. As a result, plaintiff alleged the transaction violated the Statute of Frauds because the contract, closing documents, and deed did not identify his interest in the property.

Defendants moved to dismiss the complaint for failure to state a claim and argued plaintiff was judicially estopped from claiming ownership in the property because he agreed to sell the property when he entered the consent order. Judge Thomas J. Walsh heard arguments and held plaintiff's claims were barred by the doctrine of judicial estoppel. Following a detailed recitation of the law explaining judicial estoppel, the judge found the issues

raised in the complaint were settled by entry of the consent order in which plaintiff agreed to sell the property. He concluded as follows:

Under those circumstances it is improper for [plaintiff] to file another action against the subsequent buyers, having signed [a] consent order that approved the sale of the property regardless of whether . . . the property . . . should have been sold by coming out of the [trust] and going to the siblings and then being transferred. I find that it's absolutely of no moment as to these defendants . . . and for that reason I do find that they are entitled to a dismissal of this action and that judicial estoppel would represent the futility prong of [Rule 4:6-2] and Printing Mart[-Morristown] v. Sharp[Electronics Corp., 116 N.J. 739 (1989),] and so the dismissal will be with prejudice.

Plaintiff moved for reconsideration, arguing the judge overlooked and misinterpreted key facts and law. Judge Walsh issued a written opinion, concluding plaintiff did not show the court overlooked either evidence or law, and reiterated

these issues have previously been ruled on by the [c]ourt . . . by virtue of the [c]onsent [o]rder entered in March 2016[.] Plaintiff obtained the relief he sought. Specifically, the [c]onsent [o]rder clearly states that

"[p]laintiffs and [d]efendants hereby re-affirm that it is their mutual decision to effectuate closing of title on the [p]roperty As such, neither the plaintiffs nor the defendants shall take any action, or engage in any efforts or behavior that would, or potentially could, frustrate or

potentially harm the sale of the property
...."

The parties then executed a settlement agreement in June 2016, which was included in [the] June 6, 2017 order confirming the terms of the settlement, where [p]laintiff agreed to an initial distribution of the sale proceeds [The court's o]rder on [f]inal [j]udgment was a culmination of those previous agreements and [o]rders. The [p]roperty was sold pursuant to the [c]onsent [o]rder; thus, [p]laintiff is judicially estopped from seeking ownership of the [p]roperty in this litigation.

[P]laintiff has now had four bites of the same apple. The court finds this motion is not only lacking merit, it is frivolous. It is therefore denied.

[(Tenth alteration in original).]

Plaintiff argues the following points on appeal:

POINT I

IT IS SETTLED LAW THAT THE UNDECIDED ISSUE OF OWNERSHIP AT [THE] TIME OF BARGAIN AND [SALE] DEED . . . OR AUTHORITY FOR THE SELLER TO ACT AS FIDUCIARY OF THE [TRUST] AND [ONE HUNDRED PERCENT] OWNER IN PRIOR LITIGATION CANNOT BE DISMISSED IN THE LAW DIVISION AS BEING DECIDED BY VIRTUE OF SETTLEMENT IN THE PRIOR LITIGATION.

POINT II

THE COURT BELOW ERRED BY FINDING, "THE PROPERTY WAS SOLD PURSUANT TO THE

CONSENT ORDER; THUS, PLAINTIFF IS JUDICIALLY ESTOPPED FROM SEEKING OWNERSHIP OF THE PROPERTY IN THIS LITIGATION[,"] WHEN IN FACT THE DOCUMENTED RECORDED AUTHORITY FOR THE SALE WAS THE TERMINATED TRUST NOT THE CONSENT ORDER. IT WAS [THE TITLE AGENCY] NOT THE CONSENT ORDER OR BY AGREEMENT OF THE PARTIES THAT MISTAKENLY DECIDED THE PLAINTIFF'S PROPERTY WOULD BE SOLD BY THE "FIDUCIARY OF THE [TRUST,]" AS [ONE HUNDRED PERCENT] OWNER OF THE PLAINTIFF'S PROPERTY AND COULD RECORD THE AUTHORITY UNDER WHICH THE SELLER ACTED [ON BEHALF OF THE TRUST,] NOT THE CONSENT ORDER. DISMISSAL WITH PREJUDICE CANNOT BE AWARDED ON THE SOLE BASIS OF THIS OBVIOUS DOCUMENTED MISTAKE OF MATERIAL FACT.

POINT III

NO CONTRACT, AGREEMENT OR COURT ORDER EXISTS THAT AUTHORIZED THE SELLER TO EXTINGUISH THE PLAINTIFF'S LEGAL TITLE BY MISREPRESENT[ING] HERSELF AS OWNER OF . . . PLAINTIFF'S PROPERTY, OR AS FIDUCIARY OR TRUSTEE OF THE TERMINATED [TRUST] IN THE SUBSEQUENT CONTRACT OF SALE AND DEED OF TRANSFER. WHETHER THE CONSENT ORDER APPOINTED THE SELLER FIDUCIARY FOR THE TERMINATED [TRUST] AND [ONE HUNDRED PERCENT] OWNER EMPOWERED TO CONVEY THE PROPERTY UNDER THE AUTHORITY OF THE TERMINATED TRUST OR AS AGENT FOR THE TRUE OWNERS TO

CONVEY THE PLAINTIFF'S PROPERTY UNDER THE CONSENT ORDER IS AN UNANSWERED QUESTION OF LAW IN THIS OR THE PRIOR LITIGATION.

POINT IV

THE PLAINTIFF HAS STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER AN ESTABLISHED STATUTORY RIGHT OF ACTION. THE INTENT OF THE LEGISLATURE DEFINED BY N.J.S.A. 2A:35-1 ENTITLES THE PLAINTIFF TO HAVE HIS TITLE DECIDED BEFORE THE SUPERIOR COURT. THE DISMISSAL WAS PREMATURE[;] WHO OWNED THE PROPERTY AT THE TIME OF THE SALE MUST BE DETERMINED SO AS TO NOT TO VIOLATE THE PLAINTIFF'S CONSTITUTIONAL RIGHT TO PROPERTY BY DISMISSAL[.]

POINT V

THE CONTRACT OF SALE AND DEED OF TRANSFER ARE UNENFORCEABLE PURSUANT TO THE STATUTE[] OF FRAUDS, THE RECORDING ACT AND VOID FOR ILLEGALITY. THE SELLER AND THE CLOSING ATTORNEY MADE FRAUDULENT MISREPRESENTATIONS ON THE RECORDED DEED TO CREATE A FALSE CHAIN OF TITLE FROM THE TRUST TO . . . DEFENDANTS WITHOUT THE PLAINTIFF'S KNOWLEDGE OR CONSENT AND WITHOUT AUTHORITY UNDER THE CONSENT ORDER.

We review the adjudication of a motion to dismiss for failure to state a claim upon which relief can be granted de novo. Baskin v. P.C. Richard &

Son, LLC, 246 N.J. 157, 171 (2021). Like the trial court, we "examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of" all reasonable inferences of fact. Ibid. (quoting Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019)). The test for determining the adequacy of a pleading is "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Dismissals should be made with prejudice only where the factual allegations are "palpably insufficient to support a claim on which relief can be granted," or if discovery will not give rise to such a claim. Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987); Dimitrakopoulos, 237 N.J. at 107.

Having thoroughly reviewed the record de novo, we affirm substantially for the reasons expressed in Judge Walsh's opinions. We add the following comments.

The gravamen of plaintiff's claims is that judicial estoppel was not an option because his claims were never adjudicated by a court. The doctrine of judicial estoppel does not apply when the first proceeding has been resolved by way of a settlement. This is because "[a] settlement neither requires nor

implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel." Kimball Int'l v. Northfield Metal Prods., 334 N.J. Super. 596, 607 (App. Div. 2000) (alteration in original) (quoting Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980)). "Stated differently, the doctrine does not apply when the matter settles prior to judgment because no court has accepted the position advanced in the earlier litigation." Bhagat v. Bhagat, 217 N.J. 22, 37 (2014). However, "[a] consent order is, in essence, an agreement of the parties that has been approved by the court." Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 292 (App. Div. 2014). For these reasons, Judge Walsh correctly considered whether to apply the doctrine.

Judicial estoppel exists so that "[w]hen a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events." Kress v. La Villa, 335 N.J. Super. 400, 412 (App. Div. 2000), certif. denied, 168 N.J. 289 (2001). "The principle is that if you prevail in [s]uit [number one] by representing that A is true, you are stuck with A in all later litigation growing out of the same events." Kimball Int'l, 334 N.J. Super. at 607 (quoting Eagle Found., Inc. v. Dole, 813 F.2d 798, 810 (7th Cir. 1987)). Judicial estoppel

should be invoked only "when a party's inconsistent behavior will otherwise result in a miscarriage of justice." Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996) (quoting Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 424 (3d Cir. 1988), cert. denied, 488 U.S. 967 (1988)); see also Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990) ("Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement."). Thus, as with other claim and issue preclusion doctrines, judicial estoppel should be invoked only in those circumstances required to serve its stated purpose, which is to protect the integrity of the judicial process.

[Kimball Int'l, 334 N.J. Super. at 608.]

Here, the consent order entered by the court approved plaintiff's agreement to sell the property and not impede the transaction. His after-the-fact assertion of claims to the property, especially after unsuccessfully challenging the consent order on appeal, not only constituted an inconsistent position, but would work a miscarriage of justice. Indeed, permitting plaintiff's complaint to proceed would harm the parties involved in a valid arms-length real estate sale that is now seven years old. Moreover, it would harm the integrity of the judicial process by rendering the consent order entered by the court at plaintiff's behest meaningless. For these reasons, Judge

Walsh properly applied judicial estoppel, and the with-prejudice dismissal of the complaint pursuant to Rule 4:6-2(e) was appropriate.

We reach a similar conclusion regarding the denial of plaintiff's motion for reconsideration. Our standard of review for an order denying reconsideration is deferential. Pitney Bowes Bank, Inc v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). Reconsideration "is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion" Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010). Rather, reconsideration lies where "1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Ibid. (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). We discern no factual or legal error in the judge's adjudication of the reconsideration motion; let alone an abuse of discretion warranting our intervention.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION