2023 WL 3359522
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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Superior Court of New Jersey, Appellate Division.

PARADIGM HEDGE, LLC and
PARADIGM DEVIATION, LLC,
Plaintiffs-Appellants/ Cross Respondents,
v.
MARIE CERLIONE, MARY ANN FOLCHETTI, MICHAEL J. FOLCHETTI, ASHLEY L. FOLCHETTI, and JAMES FOLCHETTI,
Defendants-Respondents/ Cross-Appellants.

DOCKET NO. A-1161-21
|
Argued May 3, 2023
|
Decided May 11, 2023

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2934-18.

Attorneys and Law Firms

Michael Confusione argued the cause for appellants/cross-respondents (Hegge & Confusione, LLC, attorneys; Michael Confusione, of counsel and on the briefs).

Louis E. Granata argued the cause for respondents/cross-appellants (Louis E. Granata, PC, attorney; Louis E. Granata, on the briefs).

Before Judges Haas and Mitterhoff.

Opinion

PER CURIAM

*1 Plaintiffs, Paradigm Hedge, LLC and Paradigm Deviation, LLC, appeal from the Law Division's November 22, 2021 order, which—among other things—dismissed their breach of contract claim. Defendants cross-appeal from the court's October 22, 2021 denial of attorney's fees. We affirm in part and remand for a statement of reasons on the issue of attorney's fees, in conformity with Rule 1:7-4.

We discern the following facts from the record. On or about February 28, 2014, plaintiffs [1] entered into a contract for the purchase of defendants' approximately eleven-acre property, located on the Holmdel tax map as Lots 6 and 7 in Block 59, for residential and retail development. The subject property, which was historically used for agricultural purposes, including farming, orchard activities, and commercial farm equipment sales, was jointly owned by defendants, Marie Cerlione, [2] Mary Ann Folchetti, Michael Folchetti, Ashley Folchetti, and James Folchetti. At the time of the transaction, two buildings and a garage remained on the property.

Paragraph 2 of the contract set the minimum purchase price of the subject property at $1,600,000 and provided for a $250,000 increase for each acre in excess of six acres that the New Jersey Department of Environmental Protection ("NJDEP") would determine, by way of a Letter of Interpretation ("LOI"), was clear of protected wetlands and could be developed. At the time the contract was entered, no LOI application had yet been made and NJDEP had not yet determined the area of protected wetlands that the subject property contained. [3]

Plaintiffs allege that the agreed-upon purchase price was arrived at based in part on the representations and warranties that defendants made about the environmental condition of their property. Specifically, they point to paragraph 10 of the contract, which—in pertinent part—provided:

> (a) Seller warrants and represents that (i) to the best of their knowledge, no hazardous or toxic materials or substances or hazardous waste, residual waste or solid waste ... are present on the Property (including, but not limited to, surface and ground

> water); ... (iii) Seller does not have any knowledge of the use, discharge, storage, transfer, handling, disposal or processing over, in, on or under the Property of any substances regulated by such [environmental, hazardous or solid waste] laws; ... [and] (v) there is an underground gas tank and at least one underground oil tank at the Property.

*2 Paragraph 16, which dealt with utilities, further assured that the property was "serviced by municipal sewer services." The contract went on to state that "[a]ll representations and warranties shall be true and correct as of the date of [c]losing," "shall survive [c]losing," and that the above representations and warranties relating to environmental matters "shall continue until the expiration of the applicable statute of limitations period including extensions thereof, plus 60 days."

In addition, paragraph 11 provided that defendants would be responsible for the remediation costs of certain environmental matters. Specifically, the contract stated:

> Buyer shall have sixty (60) days from the [e]ffective [d]ate to ascertain at its own expense: (i) whether the underground oil tank leaked; and if it has, Seller shall pay at [c]losing all cost for the removal and remediation of the affected soil; and (ii) the cost to remove the landfill material; and if the removal cost ... is in excess of $2,000, Seller shall pay the excess over $2,000 at [c]losing.

During the "[d]ue [d]iligence [p]eriod" provided for in the contract, plaintiffs hired EcolSciences to apply for the LOI from NJDEP and to perform a Phase 1 environmental site assessment to identify any unknown environmental hazards that the property might contain. Ultimately, NJDEP issued a February 11, 2015 LOI, which determined that the developable area of the property was limited to 6.2 acres.

Meanwhile, in conducting its **environmental assessment**, EcolSciences reviewed historical records related to the ownership and operation of the subject property; interviewed the property owner, Marie Cerlione; performed an on-site inspection; and reviewed available documentation concerning earlier completed environmental studies. In so doing, EcolSciences was provided with and reviewed the report of one such study, an April 25, 2008 Opinion of Probable Cost drafted by GeoTechnology Associates, Inc. ("GTA"), which was prepared in connection with a prospective sale of the subject property to another entity in 2007 or 2008.

The GTA report detailed multiple recognized environmental conditions on the property which would require further investigation and/or remediation, including three underground storage tanks ("UST") buried beneath the property, two of which were for heating oil and one for gasoline; benzene in groundwater in an amount above the New Jersey Class II-A Groundwater Quality Criteria near the gasoline UST; pesticide chlordane in an amount above the New Jersey Residential Direct Contact Soil Clean Criteria in an approximate one-acre area on the southern portion of the property; a suspected former pesticide mixing and storage area within the chlordane-impacted area in which contaminated soil required remediation; and an approximate one-acre area contaminated by arsenic above the New Jersey Residential Direct Contact Soil Clean Criteria. The GTA report further set forth recommendations for the remediation of these environmental conditions, along with an opinion of probable cost, which included $89,000 for the remediation of the pesticide contamination and $111,000 for the removal of the USTs and remediation of the contaminated soil. [4]

In conducting its site inspections of the subject property on May 6 and 19, 2014, EcolSciences corroborated GTA's prior findings. EcolSciences supplemented its site inspections by interviewing Marie Cerlione, who reported that garden supplies, including fertilizers, were stored on site and maintained on the property. Cerlione further reported that the buildings on the subject property, and the greenhouses formerly on the subject property, were heated by two USTs and that she knew there was a gas tank used to fuel farm equipment.

*3 On or about June 3, 2014, EcolSciences delivered its report to plaintiffs. One area the report specifically addressed was the utilities serving the property, which were identified through visible observation and discussion with site representatives, municipal officials, and utility company officials, opining that, "[t]he existing building is currently connected to the municipal sanitary sewer system; however, Ms. Cerlione indicated that the building was historically served by a septic system."

On January 11, 2016, plaintiffs received a report from Lawes Environmental Services, LLC, whom they retained to conduct a soil boring test on the subject property. The testing confirmed the presence of gasoline in the soil, likely as a result of the gas UST leaking, and recommended removal and remediation.

By late fall 2016, defendants wanted to close on the sale. At that time, plaintiff's development plans were not yet approved by the municipality. [5] In order to accommodate defendants' request to close prior to obtaining the planning approvals, plaintiffs agreed to determine the estimated scope and cost of the UST remediation and to address those obligations at closing.

Having already determined that the gas UST had indeed leaked, plaintiffs obtained an estimate from ECC Horizon for the cost of removing the 550-gallon gas UST and for replacing the tank envelope with uncontaminated soil, which valued the specified work at $11,004.85. Under the "[a]ssumptions" section, the ECC Horizon estimate went on to state:

> This proposal assumes that the soil and groundwater data produced by our investigations will not present evidence of impacts exceeding NJDEP criteria. If corrosion holes are observed in the UST or subsurface gasoline impacts contamination is found, we will report these conditions to the NJDEP as required. In addition, the responsible party will be required to retain a Licensed Site Remediation Professional ("LSRP") to investigate and remediate the conditions in accordance with New Jersey's environmental regulations. In regards to further delineation investigations and remedial activities, the associated costs could range between $50,000.00 and $150,000.00+.

With a complete understanding of the environmental conditions of the subject property, the parties proceeded and entered into a closing agreement, which was prepared by plaintiffs' counsel, on March 23, 2016. The closing agreement defined the scope of the remediation work under the "[p]erformance of [r]emediation [w]ork" section, which stated:

> (a) The Buyer Parties shall proceed with the removal of the [UST] and remediation work as set forth in the report and estimate from ECC Horizon .... This work shall, without limitation, include: (i) submittal of the application to and obtaining permit from the NJDEP for the removal of the [UST] and the required initial work; (ii) testing of the soil and water around and at the bottom of the removed tank and submittal of results to NJDEP; and (iii) based on the results, engaging a [LSRP] and conducting the required level of remediation and decontamination of the site (collectively, the "Remediation Work").

Therefore, the agreement clearly identified defendants' responsibility as the cost of removing the gas UST and remediating the contaminated soil caused by its leakage, along with the "removal of landfill material and debris" on or under the subject property. The agreement further established that, "[t]he Buyer Parties shall be solely in charge of the performance of the Remediation Work and shall keep Seller informed of the progress," and that the "costs and expenses of the Remediation Work shall be solely the responsibility of Seller but shall be paid by the Buyer Parties and shall be a credit against the amounts due under the Mortgage Note[.]" (emphasis added).

*4 Paragraph 4 of the closing agreement set forth the terms of the purchase money financing. [6] That paragraph began by stating that, "Seller shall provide purchase money financing to [plaintiffs] for the purchase of Lot 7 in the total amount

of $500,000.00 secured by a first mortgage on Lot 7." The principal amount of the mortgage note was $500,000, as shall be adjusted—in the form of a credit—for plaintiffs' expenses regarding the agreed upon remediation work, with a one-year term and at an interest rate equal to four percent per annum.

The closing agreement concluded with the following language, "[e]xcept as expressly modified herein, the terms and provisions of the [c]ontract remain unchanged and continue in full force and effect. This [c]losing [a]greement shall survive the [c]losing."

Within months of the closing, defendants requested a modification of the mortgage to receive an advance of the balance earlier than it would have been due. Plaintiffs again accommodated defendants' request, this time by agreeing to make a $300,000 advance toward the $500,000 principal balance, along with an additional payment of $20,000 in interest. The parties formally modified the mortgage note by signing an amendment, which confirmed payment of the above amounts and provided that, "[t]he remaining [p]rincipal of $200,000.00, less the costs and expenses of the Remediation Work at the [p]roperty, as defined in the Closing Agreement, ... plus accrued interest, shall be remitted to Lender within thirty (30) days of the completion of the Remediation Work at the [p]roperty." This printed language was followed by a handwritten provision, allegedly inserted by defendants' counsel, stating, "or March 21, 2018, whichever is sooner." [7]

Soon after the amendment was signed, defendants began demanding payment of the remaining principal, citing the purported maturing date that defendants' counsel allegedly had handwritten into the amendment. Plaintiffs refused because the remediation work had not yet been completed and, pursuant to the terms of the amendment that plaintiff alleges to have agreed to, the remaining balance was not due until thirty days after the completion of the Remediation Work.

On August 14, 2018, plaintiffs filed a complaint, suing defendants for breach of contracts (count one); breach of the duty of good faith and fair dealing (count two); fraud in the inducement (count three); violation of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -137 (count four); specific performance (count five); and secondary recourse for the Hazlet Property Loans (count six). Defendants responded by serving a notice of frivolous litigation, along with filing an answer and counterclaim, seeking to collect the balance due on the note and foreclosure on the mortgaged premise, plus attorney's fees.

Pertinent to this appeal, plaintiffs' complaint alleged that defendants breached the contract in various ways, including: by not providing copies of environmental reports in their possession; by not removing the UST and remediating the property by the scheduled closing date; by "allowing" the release of hazardous substances onto the subject property; and by failing to cure and "restore the property, including the building affected by the demolition required for the remediation work."

*5 A bench trial was held in the matter on three consecutive dates, beginning on July 20, 2021. In an October 22, 2021 oral opinion, the judge began by outlining plaintiffs' knowledge of the environmental conditions of the subject property and their failure to address any such concerns at closing, stating:

> The Court finds that during the due diligence period and as evidence by the environmental reports, the condition of the property was fully explored and disclosed. Furthermore, the parties agreed that the costs of remediation ... [shall] be paid at closing. It seems apparent that the plaintiffs were aware of the nature and extent of the environmental conditions on the property at the time of closing and agreed to proceed with the transaction.
>
> ....
>
> The plaintiffs purchased the property after conducting various environmental studies and reviewing an environmental study commissioned by a previous prospective purchaser .... These studies acknowledge one, possibly two, underground fuel storage tanks and noted a gasoline tank under the garage door was leaking. It was also noted areas containing concentrations of arsenic and chlordane would require remediation. The [EcolSciences] report recommended that plaintiff conduct further samplings of the garage area and storage area and a groundwater investigation be conducted to delineate the extent of the leaking has tank.
>
> A soil test boring results from [Lawes] on January 11th, 2016, advised the plaintiffs that the gas [UST] was leaking

> into the groundwater and recommended the removal of the tank. Plaintiffs received estimates from ECC Horizon for the removal and remediation of the [UST]. The plaintiffs did not follow any of the recommendations set forth in the report and proceeded to closing title to the property.
>
> At the closing, the parties entered into a closing agreement prepared by plaintiffs' counsel. The closing agreement made specific reference to provisions in the contract detailing the seller's responsibility and a credit was applied towards the purchase price for the estimated costs identified as seller's responsibility, i.e., the removal of the [UST] and remediation of soils contaminated by leakage of the tank, together with the removal of landfill material ....
>
> Although plaintiffs were informed and aware of other areas of environmental concern on the property as identified in the GTA report and the [EcolSciences] report, they did not obtain an estimate for remediation or otherwise specifically address these items at closing.

Then, the judge continued by summarizing plaintiffs' contentions in the instant matter, stating:

> Plaintiffs contend they are entitled to reasonable remediation costs as follows, $99,935 to remediate soil contaminated with pesticides and conduct final testing; $13,845, that's $4,615 for each of the three [UST] present on the property; $151,536 for the testing and remediation of all contaminated soil under and surrounding the ... removed [USTs]; $73,780 to import and replace or remove contaminated soil, ... including proper compaction; $109,650 for administrative requirements and reporting costs; $150,000 for the alleged breach of representation in Paragraph 16 of the contract regarding municipal sewer service.
>
> In short, plaintiffs are seeking $598,746 or one-third of the entire purchase price for the property. Plaintiffs also allege that the mortgage can continue in perpetuity so long as the principal and interest eventually get paid. Such a finding would neither be fair or reasonable. The parties never contemplated such a result.

*6 The oral opinion went on to explain the rationale underlying the judge's decision before ultimately denying plaintiffs' claims in their entirety:

> This Court finds that defendants agreed to pay and paid $40,000 towards the cost of obtaining the [LOI]. The defendants also agreed to and paid for the removal and remediation of landfill material. And, finally, the defendants contemplated and agreed to pay for the removal of the three [USTs] for an estimated cost of $11,004.85.
>
> This Court finds that [the "Performance of Remediation Work" section] of the closing agreement pertains to the removal and remediation of areas surrounding the [USTs], not the entire [eleven]-acre site. What wasn't contemplated was that the removal of the [USTs] would be put off indefinitely. The longer they sit in the ground the worse the possible contamination becomes and the more expensive the work becomes and more expensive, when I say not only because of the potential contamination but, also, as plaintiff's expert candidly testified to, the cost of the remediation work has dramatically increased over the years.
>
> The mortgage payment was contemplated to be for one year, which would have been more than sufficient time to remove and remediate the [USTs]. This Court specifically finds that the defendants did not misrepresent the status of the sewer connection. As previously indicated, the June 3rd, 2014, [EcolSciences] report opines that, "The existing building is currently connected to the municipal sanitary sewer system.["]
>
> However, Ms. Cerlione indicated [that] the building was historically serviced by septic system. So, there was no affirmative misrepresentation by anybody from the [defendants'] side of the transaction.
>
> Plaintiffs concede[ ] and defendants have proven that they are entitled to repayment of the mortgage in the amount of $20,000, together with simple interest at the annual rate of four percent for March 20th, 2017. And that is what I am going to order.

Finally, the judge denied both parties' application for attorneys' fees without providing any reasoning.

In a November 22, 2021 order, the judge entered judgment on behalf of defendants and against plaintiffs on plaintiffs' complaint; entered judgment on behalf of defendants and against plaintiffs on defendants' counterclaim; and ordered

plaintiffs, within thirty days, to pay defendants $200,000 together with interest at the rate of four percent per annum from March 21, 2018 to October 22, 2021 in the total amount of $228,712.33 and a daily rate of $21,9178 from October 22, 2021 until paid. These appeals followed.

On appeal, plaintiffs present the following arguments:

POINT I

THE TRIAL COURT ERRED BY FAILING TO ENTER JUDGMENT FOR PLAINTIFFS ON THEIR BREACH OF CONTRACT CLAIM AGAINST DEFENDANTS.

A. Plaintiffs Demonstrated that Defendants Breached Unambiguous Terms of the Parties' Contract by Failing to Reimburse Plaintiffs for the Costs of the Remediation Work Required for the Property.

B. Plaintiffs Demonstrated that Defendants Breached Paragraph 16 of the Parties' Contract by Misrepresenting that the Property was Connected to Municipal Sewer Service.

C. The Trial Court's Errors.

*7 D. Plaintiffs Proved with Reasonable Certainty the Damages Sustained for Defendants' Breaches.

The scope of our review of a bench trial verdict is limited. See D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013) ("Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review[.]" (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011))). The law is clear that factual determinations made by a judge hearing a bench trial "must be upheld if they are based on credible evidence in the record." Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017) (citing D'Agostino, 216 N.J. at 182); see also Zaman v. Felton, 219 N.J. 199, 215-16 (2014) (holding that a trial court's determinations are afforded deference when they "are substantially influenced by [the judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." (alteration in original) (quoting State v. Johnson, 42 N.J. 146, 161 (1964))). Thus, a trial court's factual determinations will not be disturbed unless those findings and conclusions were "so manifestly unsupported by or inconsistent with the competent, relevant[,] and reasonable credible evidence as to offend the interests of justice." Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 228 N.J. 596, 619 (2017) (quoting Rova Farms Resort v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). By contrast, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995).

A plaintiff must satisfy four elements to establish a claim for breach of contract: (1) "[t]he parties entered into a contract containing certain terms"; (2) the plaintiffs "did what the contract required [them] to do"; (3) the "defendant[s] did not do what the contract required [them] to do," defined as a "breach of the contract"; and (4) the defendants' breach caused a loss to the plaintiff. Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016) (alterations in original) (quoting Model Jury Charge (Civil), 4.10A, "The Contract Claim—Generally" (approved May 1998)).

Here, the issue on appeal relates to the third element: whether defendants breached the contract as alleged by plaintiffs. We agree with the judge's decision and find that, under both asserted theories, plaintiffs failed to establish a breach on the part of defendants.

Prior to closing, plaintiffs clearly had knowledge of the environmental concerns occurring on the subject proper, pursuant to their discoveries during the due diligence period, but chose to proceed anyway. A plain reading of the closing agreement, which was prepared by plaintiffs' own counsel, establishes two things, both of which are fatal to plaintiffs' argument: (1) defendants were only obligated to credit plaintiffs for the cost of removing the gas UST, remediating the soil contaminated by leakage of that tank, and removing landfill material on Lot 6; and (2) it was plaintiffs' exclusive duty to proceed with the remediation work outlined in the closing agreement, which they have yet to do, before defendants credit their obligation under the mortgage note. Instead, plaintiffs chose to initiate suit before fulfilling their preceding condition.

*8 In addition, we agree with the judge's finding that "there was no affirmative misrepresentation" regarding the subject property's utility service by anyone from defendants' side of the transaction. The EcolSciences report, which the judge properly identified as being completed on June

3, 2014, incorrectly found that "[t]he existing building is currently connected to the municipal sanitary sewer system," but went on to state, "however Ms. Cerlione indicated that the building was historically serviced by a septic system." This report establishes that, after defendants' misrepresentation in the contract—which was made "to the best of [defendants'] knowledge"—and before proceeding with the closing, plaintiffs were put on notice of conflicting information concerning the property's utility service yet still chose to proceed with the closing without additional inquiry into the matter.

Finally, we agree with defendants that a limited remand is warranted for purposes of issuing a statement of reasons on the issue of attorney's fees, in conformity with Rule 1:7-4. Here, defendants brought a counterclaim seeking to collect the balance due on the note and to foreclosure on the mortgaged premise, plus attorney's fees. Pursuant to the terms of the mortgage, in the event of default, "[plaintiffs] must immediately pay the full amount of the unpaid principal, interest, other amounts due on the Note and this Mortgage and the [defendants'] cost of collection and reasonable attorney fees." (emphasis added). In addition, defendants point to Rule 4:42-9(a)(4), which expressly allows for the collection of attorney's fees in an action for the foreclosure of a mortgage and sets forth the calculation of the amount to be awarded.

Affirmed in part and remanded for the issuance of a statement of reasons on the denial of defendants' counterclaim for attorney's fees. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2023 WL 3359522

Footnotes

1 Cherry Hill Acquisitions originally entered into the contract with defendants but, at closing, transferred its rights to plaintiffs, Paradigm Hedge, LLC and Paradigm Deviation, LLC, all of which are New Jersey limited liability companies formed by Dr. Johnny Makhoul for the purpose of acquiring and developing land in New Jersey. Dr. Makhoul delegated all authority and responsibilities to his brother, George Makhoul, to study, negotiate, contract for land acquisition (including the subject property), and perform due diligence on all purchases and development.

The court found that the Makhouls are "sophisticated real estate developers" and entered into the instant transaction "with their eyes wide open."

2 Defendant Marie Cerlione died on November 10, 2018 and a motion to amend defendants' answer to substitute Mary Ann Folchetti as Executrix of the Estate of Marie Cerlione as a defendant/counterclaimant was filed on November 15, 2018.

3 The contract was contingent upon a determination by NJDEP that at least six acres could be developed.

4 These figures were based on 2008 prices.

5 Following the closing, plaintiffs submitted a plan to the Holmdel Township, seeking a zoning change which would allow construction of 184 senior housing units and 3,400 square feet of commercial space. Plaintiffs received final approval for the development project on December 22, 2020.

6 Plaintiffs allege that they did not take a purchase money mortgage from the defendants to close on the property but, rather, they withheld $500,000 from the purchase price to ensure that defendants would remedy their default and perform the remediation the parties' contract required them to perform.

7 Plaintiffs alleged that this handwritten addition was not contained in the amendment when they signed it and that they never agreed to this provision.

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