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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1354-09T3

ANDREW RITSCHEL,

Plaintiff-Appellant,

and

ALLIED REALTY ASSOCIATES, LLC,

Plaintiff,

v.

SPENCER SAVINGS BANK, SLA,

Defendant-Respondent.

Argued November 3, 2010 – Decided May 16, 2011

Before Judges Wefing, Payne and Baxter.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-145-05.

James K. Webber argued the cause for appellant.

Diane A. Bettino argued the cause for respondent (Reed Smith, attorneys; Ms. Bettino and Meghan O. Offer, on the brief).

PER CURIAM

Plaintiff sued defendant for breach of contract and breach of the covenant of good faith and fair dealing. After a nine-

day bench trial, the trial court found for plaintiff and awarded him damages of $181,876.75, with pre-judgment interest of $67,051.89, for a total judgment of $248,928.64. Plaintiff has appealed, contending that the manner in which the trial court calculated his damages was erroneous. Defendant has not cross-appealed from the finding of liability. After reviewing the record in light of the contentions advanced on appeal, we affirm.

The dispute between the parties arises out of an attempted real estate transaction that was never consummated. Defendant owned a 2.78-acre parcel of land on Passaic Avenue in Fairfield, and on January 18, 2001, plaintiff signed a contract to buy this land for $1,220,000. He intended to erect a building of approximately 32,000 square feet in which he would house his business, Electronic Office Systems (EOS), which was engaged in the sales and service of office equipment, and lease the remaining space to other tenants. His projected cost for construction was $3.6 million. This was plaintiff's first venture into real estate development.

As part of his due diligence leading up to closing, plaintiff had the land examined with respect to its environmental qualities and learned that it was significantly contaminated. Defendant had a similar examination performed,

with similar results. After a period of negotiation, in July 2001, the parties signed an amendment to their contract under which defendant undertook responsibility for the environmental cleanup of the land in return for plaintiff's agreement not to terminate the contract for any reason other than a default by defendant. The contract amendment was drafted by defendant's attorneys and signed by both parties.

Once defendant was involved in the remediation process, it learned that the extent of the contamination was significantly greater than it had anticipated and that its costs, as a consequence, would be far greater than it had expected, approaching almost $600,000. Based upon this discovery, defendant informed plaintiff in May 2002 that it was terminating the contract.

In 2002, plaintiff filed suit, alleging breach and seeking damages. For reasons that are not apparent from the record, the matter was not reached for trial until 2009. We limit our description of the evidence presented at trial to that dealing with damages, since that is the only issue presented on appeal.[1]

Plaintiff presented one witness with respect to his damage

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[1] Plaintiff's claim at trial was joined with a claim by the real estate broker for commissions lost as a result of defendant's termination of the contract. The trial court found defendant responsible for commissions in the sum of $40,000. That ruling is not challenged on appeal.

claim, Frank D. Tinari, Ph.D., an economist. Defendant presented two witnesses on damages, Robert McNerney, a real estate appraiser, whose professional designations included both an M.A.I. and S.R.A.,[2] and Conrad Druker, C.P.A. Dr. Tinari's expert report set plaintiff's total economic loss as a result of defendant's breach at $2,186,371. Mr. McNerney, on the other hand, set plaintiff's lost profits at $98,000.

Initially, at the conclusion of trial, the trial court found for plaintiff and awarded damages of $484,671, which included damages for both lost profits and for out-of-pocket damages. Defendant argued that plaintiff was not entitled to both forms of damages. The trial court agreed and, turning to plaintiff, inquired which remedy he chose. Not surprisingly, plaintiff elected to receive the higher amount which, under the trial court's methodology, was out-of-pocket expenses. Plaintiff has appealed, arguing that the trial court incorrectly rejected its theory of damages.

Before proceeding to an analysis of the competing theories, we note that we reject defendant's argument that the appeal is moot in light of plaintiff's election of out-of-pocket damages. Plaintiff did not, contrary to defendant's contention, waive

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[2] The Appraisal Institute offers these designations--Member, Appraisal Institute, and Society of Residential Appraisers--to suitably qualified individuals.

anything by responding to the trial court's query; he certainly did not waive his right to argue that the trial court erred as a matter of law in calculating his damages.

Clearly, Tinari and McNerney approached the question of plaintiff's damages from different perspectives. Tinari included the following elements in his calculation of plaintiff's lost profits: the net cash flow he would have realized from leases with third-party tenants and with EOS, plaintiff's own company; litigation costs; the net cash flow loss he incurred from relocating EOS to another site; costs for what he termed management diversion, that is, the time plaintiff had to spend on this dispute that he would have been able to direct to more productive activities; and recoverable interest.

Tinari totaled these losses in excess of $2 million. Tinari admitted on cross-examination that he did not include in his calculations the capital cost of completing the project or investigate whether plaintiff or EOS had the financial ability to complete the project with assets on hand or to secure any necessary financing. He testified he was told to assume plaintiff had that financial ability.

Mr. McNerney, on the other hand, estimated the hypothetical value of the project if it had been completed to be $5,107,000.

He said the cost of the project would be $5,009,000, leaving an "entrepreneurial profit" of $98,000.

There were additional differences in their approaches. Tinari calculated damages over a twenty-nine year period, a figure he selected because Ritschel had secured a day care center as a tenant that signed a fifteen-year lease, with an option for three five-year extensions. McNerney, on the other hand, said the standard governing appraisal practice was not to go beyond a ten-year period. In addition, Tinari, after calculating damages over the twenty-nine year period, discounted the figure to the time of trial to come up with the present value of plaintiff's damages. McNerney, however, after calculating damages over a ten-year period, discounted that figure to the time Spencer breached the contract, as opposed to the present-day approach utilized by Tinari. In essence, they used different end points: Tinari estimated plaintiff's damages as of the time of trial while McNerney estimated his damages as of the time of the breach.

Defendant's other expert, Druker, did not testify directly with respect to plaintiff's damages. Rather, his testimony focused on criticizing Tinari's assumptions and methodology. Druker, for instance, reviewed financial records of EOS and Ritschel and concluded that plaintiff would not have had the

ability to raise the additional $1.5 million that would be needed to complete the project in the first instance. He also noted that Tinari made no provision in his calculations for any cost overruns that the project might incur. Additionally, he considered Tinari's report incomplete because he did not factor in any uncertainty associated with the contaminated state of the property. Finally, Druker disagreed with Tinari's decision to fix damages as of the time of trial; in Druker's opinion, the damages should be calculated in 2002 dollars, with interest added in accordance with the court rules.

Following the trial, the trial court gave an oral opinion, setting forth its conclusion that defendant breached the contract when defendant refused to complete the remediation, and the court proceeded to analyze the proofs presented on damages. It outlined the problems it perceived with the damages calculation presented by Dr. Tinari, noting the failure to account for the possibility of cost overruns, the lack of proof that plaintiff had the financial wherewithal to complete the project, the uncertainty attendant to the environmental contamination and the prospective leases, as well as the fact that the development project was an entirely new business for plaintiff. The trial court concluded that McNerney's figure of $98,000 as plaintiff's lost profits was the more reasonable

opinion. The trial court then went on to tally what it considered plaintiff's out-of-pocket expenses as a result of the bank's termination of the contract, $386,671, for a total award of $484,671.

Plaintiff thereafter moved for a new trial, arguing that the trial court had incorrectly accepted the defense calculation of lost profits. As noted earlier, plaintiff agreed during the course of this motion that he was not entitled to collect both lost profits and his out-of-pocket expenses and elected the higher, out-of-pocket expenses.[3] The trial court denied plaintiff's motion, and this appeal followed.

Plaintiff presents several reasons why, in his view, the trial court erred when it accepted the damages calculation of defendant's expert, McNerney. The first is that plaintiff's right to cross-examine McNerney was unfairly truncated. A close examination of the trial record leads us to reject this contention. McNerney appeared as a witness on Thursday, January 29, 2009. His cross-examination on that date takes up approximately forty pages of the transcript. At the point at which the trial ended on that day, plaintiff's attorney was

[3] The bulk of the difference between the trial court's original tally of out-of-pocket expenses of $386,671 and the $181,876.75 stated in the judgment reflects an adjustment for counsel fees. That adjustment is not disputed on appeal.

cross-examining McNerney with respect to the impact upon his calculations if there were a change in the discount rate, and McNerney said he could not do the calculations in the courtroom but would have to go to his office. The trial ended at 4:30 p.m. because the person operating the court room's sound recording system had to leave, and there was no one available to step in. McNerney could not return the following day because he had a commitment to testify in another matter, in the Tax Court. The trial court stated that if that matter settled, it would rearrange its schedule and resume with McNerney.

The transcript of Friday, January 30, contains the testimony of the defense witness Druker. At the conclusion of that testimony, plaintiff's attorney referred to McNerney returning on Monday for the balance of his cross-examination. Defendant objected, saying that plaintiff was attempting to solicit an opinion from McNerney with respect to potentially higher damages by having him use figures with which he did not agree. At the conclusion of this discussion, the following colloquy occurred:

> **THE COURT:** Well, to the extent that both Dr. Tinari and Mr. McInerny [sic] have said they disagree -- Dr. Tinari disagrees with the propositions they put to him[,] and Mr. McInerny [sic] disagrees with the propositions you put to him. What, in effect, you would be doing is having him based on a set of factors that he disagrees

> with prepare a number. I don't know that that's fair. It's a straight math calculation, --
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> **[PLAINTIFF'S ATTORNEY]:** That's --
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> **THE COURT:** -- but I don't know that it's fair to have him come up with the conclusion based on a set of factors that he disagrees with and has testified. The same thing would be true if they asked Dr. Tinari to redo his numbers based on their cross-examination and what they proposed as factors that he disagrees with.
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> **[PLAINTIFF'S ATTORNEY]:** Again, respectfully, if the methodology remains the same and it's even the same sources of information, but --
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> **THE COURT:** But it's not the same sources of information. For instance, Mr. McInerny [sic] yesterday, we worked out a different -- you and he worked out of different locations in the Corpass (phonetic) directory as to what year to use, as to, you know, leveraged or unleveraged. There were a lot of variations that you and he discussed yesterday. His report from his testimony is what he believes the best are. He's got to live or die with it. The same thing with Dr. Tinari. We've heard testimony today about why it's felt that his report isn't accurate. He's living and dying with his theories and his numbers. So I'm not going to make him come in prepared to recalculate his numbers.

Plaintiff made no contention that day that the remainder of his cross-examination extended any further than the calculations to which he had referred. That day's transcript contains no further discussion of McNerney's cross-examination. When the

attorneys reported to the trial court for the purpose of hearing the trial court give its oral opinion, plaintiff's attorney made no protestation that the record had not closed and that he had additional cross-examination to pose to McNerney. In this context, we see no basis to conclude that plaintiff was in some manner deprived of a fair trial.

Plaintiff also argues that the trial court should not have accepted McNerney's opinion on damages because his approach, which calculated damages as of the 2002 breach, rather than the 2009 trial, was erroneous. The correct approach, he contends, is that used by Tinari, who estimated plaintiff's damages as of the time of trial, not the time of breach.

Plaintiff finds support for his position in a decision of the Court of Appeals for the Federal Circuit, Energy Capital Corp. v. United States, 302 F.3d 1314 (Fed. Cir. 2002). The plaintiff in that case had signed a contract with the Department of Housing and Urban Development ("HUD") to create and administer a program to provide loans to owners of HUD-subsidized properties to make the properties more energy efficient. Id. at 1317-18. The program, called AHELP (Affordable Housing Energy Loan Program), provided for the plaintiff to borrow up to $200 million from the Federal National Mortgage Association (Fannie Mae) to make loans to eligible

owners and then sell those loans back to Fannie Mae. Id. at 1318. The program envisioned the plaintiff borrowing the funds from Fannie Mae at the Treasury rate, lending to the eligible owners at the Treasury rate plus 3.87%, and selling the loans back to Fannie Mae at the Treasury rate plus 1.87%; plaintiff's profit would be the difference. Ibid. Approximately five months after the AHELP contract was signed, the Wall Street Journal carried a front-page article noting that several principals of the plaintiff had been significant fund-raisers for President Clinton and stating that the plaintiff had received this contract in return for those efforts. Id. at 1319. HUD cancelled the contract several days later, and the plaintiff sued for its lost profits. Ibid.

The plaintiff received a judgment for more than $10 million in the Court of Claims, and the government appealed. Id. at 1324. One of the arguments the government presented on appeal was that the Court of Claims had erred in discounting the plaintiff's anticipated lost profits to the date of trial, rather than the date of breach. Id. at 1330. The government contended that doing so was the equivalent of awarding the plaintiff prejudgment interest which it could otherwise not recover from the United States government. Ibid. The Court of Appeals recognized that damages are generally measured from the

time when performance should have been rendered, saying that "[i]n many cases, the appropriate date for calculation of damages is the date of breach." Ibid., citing Estate of Berg v. United States, 687 F.2d 377, 380 (1982). It went on to state that that principle

> does not apply, however, to anticipated profits or to other expectancy damages that, absent the breach, would have accrued on an ongoing basis over the course of the contract. In those circumstances, damages are measured throughout the course of the contract. To prevent unjust enrichment of the plaintiff, the damages that would have arisen after the date of judgment ("future lost profits") must be discounted to the date of judgment.
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> [Id. at 1330.]

The contract at issue in Energy Capital, however, envisioned a continuing relationship between the parties, with performance over an extended period of time during which plaintiff anticipated it would earn profits. Here, in contrast, the contract was for the sale of a parcel of real estate, with no provision for any future involvement between the parties if the sale had closed. We do not consider Energy Capital persuasive in this context.

We have already set forth in this opinion the reasons the trial court gave for rejecting Tinari's opinion with respect to the quantum of plaintiff's damages, and we will not repeat them

here. All find evidential support in the record. In essence, the trial court concluded that plaintiff had failed to prove "proximate damages in an amount greater than those existing as of the date of the breach." We have no basis to assign greater weight or value to plaintiff's evidence than did the court which heard it directly.

Affirmed.

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