NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3010-09T3

NANCY FOULKE and EVAN FOULKE,
as husband and wife,

Plaintiffs-Appellants,

v.

STAVAL, INC., E&S SALES/KITCHEN
CLASSICS, L.L.C.,

Defendant-Respondent.

E&S SALES/KITCHEN CLASSICS L.L.C.,

Plaintiff-Respondent,

v.

EVAN FOULKE and NANCY FOULKE,

Defendants-Appellants,

and

PRESTIGE DEVELOPERS, INC.,

Defendant.

Argued November 8, 2010 - Decided March 11, 2011

Before Judges Rodríguez, Grall and LeWinn.

On appeal from Superior Court of New
Jersey, Chancery Division, Bergen County,
Docket Nos. C-473-08 and C-32-09.

Randi S. Greenberg argued the cause for appellants (Law Offices of Lawrence M. Simon, attorneys; Ms. Greenberg, on the brief).

Michael B. Blacker argued the cause for respondent.

PER CURIAM

Plaintiffs Nancy and Evan Foulke (collectively the Foulkes) filed a complaint in the Chancery Division, Bergen County, seeking to void a construction lien filed by E&S Sales/Kitchen Classics, L.L.C. (E&S). The case was consolidated with a contract action filed by E&S in Union County, in which E&S alleged that the Foulkes breached their agreement to pay E&S $40,000 to discharge its $49,893 construction lien. This lien was later discovered to be invalid for failure to comply with the technical requirements of the Construction Lien Law, N.J.S.A. 2A:44A-1 to -38.[1] Following a bench trial, Judge Koblitz invalidated the lien and enforced the alleged contract.

The Foulkes appeal. They contend that the judge erred in enforcing the agreement because there was: no valid consideration; no meeting of the minds; and no actual or apparent authority enjoyed by the attorney who extended the Foulkes' promise to pay $40,000 in return for the lien's

[1] In its complaint, E&S sought additional damages but did not pursue those claims at trial. Accordingly, they were dismissed for lack of prosecution.

discharge. They also contend that the contract is unenforceable because it was conditioned on events that had not occurred and based on a mutual mistake of fact about the validity of the lien. Finally, they argue that they are entitled to counsel fees pursuant to N.J.S.A. 2A:44A-15a. We affirm substantially for the reasons stated by Judge Koblitz in a decision filed on February 9, 2010, and those set forth in the balance of this decision.

This statement of facts is drawn from findings of fact made by Judge Koblitz after hearing the competent testimony and having the opportunity to assess the credibility of the witnesses. Her findings are adequately supported by the evidence. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). The Foulkes' arguments are based not on the judge's factual findings but on their implications.

The Foulkes contracted with Prestige Developers, Inc. to purchase property and the new residence that Prestige was building on it for $1,762,500. E&S was hired by Prestige to install the home's kitchen cabinets, vanities and countertops, and E&S filed a $49,893 construction lien when it completed the work. Unknown to the principals and representatives of E&S at all times pertinent here, there was a technical error in the lien's filing that precluded its enforcement.

After the Foulkes contracted to buy the property from Prestige, Prestige defaulted on its building loan. Consequently, the property was encumbered with liens and mortgages, including the construction liens filed by E&S and other subcontractors. Prior to closing, a title insurance company advised the Foulkes that it appeared that the liens on the property likely exceeded the price they had agreed to pay. Subsequently, foreclosure proceedings against Prestige were commenced. At that point, the Foulkes had spent in excess of $180,000 on their deposit, advances and payments to subcontractors who, unlike E&S, had not completed their work.

The Foulkes commenced litigation against Prestige but obtained no relief. Consequently, they authorized an attorney, Gerald Salerno, to negotiate payments that would satisfy the creditors and permit them to decide whether to proceed with the closing without paying more than they agreed to pay Prestige.

Salerno, also unaware of the invalidity of E&S's lien, wrote to the attorney for E&S.

> I have set forth below a list of all liens and debts which must be paid . . . to be able to convey title[.]
>
> . . . .
>
> As you can see there is a shortfall with an excess of $75,000.00. My client has approached various creditors in effort to seek a reduction of the amounts due to

> them . . . . I am presently awaiting conf[i]rmation from the realtors as to a significant reduction in their commission. We are requesting that your client consider accepting the sum of $40,000.00 . . . and provide a Release of Lien. In the event we are able to accomplish this, we intend to close the transaction within the next two weeks . . . .

Mr. Foulke was copied on the letter. Two days later, counsel for E&S responded, "E&S Sales/Kitchen Classics will accept $40,000.00 in settlement of its Construction Lien Claim on condition that, except for the balance due to Columbia Savings, it be treated equal to the other creditors listed in your letter."

After that exchange and prior to closing on April 2, 2008, the Foulkes obtained an updated title search and discovered that E&S's lien was invalid for failure to file a notice of unpaid balance in accordance with N.J.S.A. 2A:44A-21(b)(1). Because the Foulkes proceeded to closing without obtaining a release, the amount due on the E&S lien was held in escrow. One week later, Salerno wrote to the attorney for E&S requesting a discharge and advising of the Foulkes' intention to commence litigation to discharge it. E&S's lawyer responded, asserting that the parties had, through their earlier correspondence, a binding and enforceable agreement.

The Foulkes' objections to the judge's conclusions on the adequacy of consideration, the apparent authority of their attorney and a bar against enforcement of this contract attributable to the construction lien law are without sufficient merit to warrant comment beyond what is stated in Judge Koblitz's decision. R. 2:11-3(e)(1)(E). We add some brief comments to address the Foulkes' objections to the judge's determinations on the formation of an agreement and its enforcement.

Foulkes' claim that there was no meeting of the minds and their claim that the conditional nature of their offer and E&S's response precluded a finding of a binding contract are related. They argue that their offer, contingent on their ability to convince others to accept a reduced payment, was simply an offer to deal and that E&S's acceptance of $40,000 to discharge its $49,893 lien "on condition that . . . it be treated equal to the other" creditors was at most a counteroffer, not an acceptance.

There is no question that there is no enforceable agreement unless the parties agree on its essential terms. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992); Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956). It is equally clear that "parties may make contractual liability dependent upon the performance of a condition precedent." Duff v. Trenton Beverage

Co., 4 N.J. 595, 604 (1950). By its nature, a contract with a condition precedent is formulated before the condition arises, and the duty to tender performance upon occurrence of the condition is a material term. Ibid.[2] It is also clear that an expression of "assent that modifies the substance" of an offer is a counteroffer, not an acceptance, but an answer that accepts the terms consummates that contract. Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526, 538-39 (1953).

Judge Koblitz found that E&S's response was an acceptance of the material terms offered by the Foulkes and essentially reiterated the condition precedent proposed by the Foulkes — successful negotiations of reduced payments with other creditors. On this record, we see no basis for disturbing the judge's factual findings or her legal conclusion about the immateriality of the difference in terms used to express E&S's agreement on the condition precedent. The Foulkes' offer simply did not permit an implication that they intended to treat E&S differently.

We turn to consider the Foulkes' objections to the judge's ruling on mutual mistake — the mutual mistake being both parties' belief that the E&S lien was valid. In general, where

[2] In Point IV, the Foulkes seemingly argue that a contract subject to a condition precedent cannot be formed until the condition occurs, which is not the law.

both parties to a contract are mistaken about a material fact assumed by both, the contract is voidable by the party for whom performance will "be materially more onerous . . . than it would have been had the fact been as the parties believed it to be." Beachcomber Coins. Inc. v. Boskett, 166 N.J. Super. 442, 445 (App. Div. 1979) (quotations omitted).

We affirm the denial of relief on the ground of mutual mistake but focus on reasons that differ from those stated by the judge. The settlement statement at the closing on the Foulkes' home indicates that the gross amount due to seller at closing was $1,762,500. From the amount due to seller, there were reductions in an amount equivalent to the amount due. Thus, the Foulkes owed the seller $0 at closing. E&S's $49,893 lien was among the deductions from the amount due seller. Under an agreement with Prestige that the Foulkes entered subsequent to their agreement with E&S, the Foulkes were entitled to retain what they were not obligated to pay to discharge the E&S lien, whether that obligation was discharged through negotiation of the debt or proof that the lien was invalid. But for the mutual mistake, the Foulkes would have received exactly what they received despite the mistake — the difference between $40,000 and $49,893. Unless the Foulkes knew that E&S's lien was invalid when they reached an agreement with E&S, in which case

they would not be entitled to invoke the doctrine of mutual mistake, they could not have expected to receive more than the $9,893 difference between the full $49,893 and the $40,000 they agreed to pay E&S. Thus, they were not adversely impacted by the mistake.

The only remaining issue is the Foulkes' claim that the judge erred in denying them fees and costs pursuant to N.J.S.A. 2A:44-15a, which permits that relief after discharge of an invalidly filed lien. E&S's lien was discharged about one year prior to trial and entry of the final judgment on the contract claim. When the lien was discharged, the judge entered an order denying the Foulkes' request for fees and costs without prejudice. The Foulkes have not provided us with the transcript of the proceeding at which their request was denied without prejudice, and the record before us includes nothing that suggests the Foulkes renewed their request after that denial. There was no reference to statutory fees in summation at trial, and there is no motion for fees in the appendix. As it appears that the Foulkes abandoned the claim before it was addressed on the merits in the trial court, and we do not have what we need to review the initial decision, we decline to afford relief. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973);

Society Hill Condominium Ass'n, Inc. v. Society Hill Assocs., 347 N.J. Super. 163, 177-78 (App. Div. 2002).

Affirmed.