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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3575-09T1

DENNIS M. MULVIHILL,

Plaintiff-Appellant,

v.

PEPPERIDGE FARM, INCORPORATED
and DANIEL VENDITTI,

Defendants-Respondents.

Argued October 19, 2010 - Decided April 25, 2011

Before Judges Graves and Waugh.

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-54-09.

William A. Feldman argued the cause for appellant.

Richard P. McElroy (McElroy & Associates LLP) of the Pennsylvania bar, admitted pro hac vice, argued the cause for respondent Pepperidge Farm, Incorporated (Lum, Drasco & Positan LLC, and Mr. McElroy, attorneys; Dennis J. Drasco and Mr. McElroy, of counsel and on the brief).

Stevens & Berger, attorneys for respondent Daniel Venditti, join in the brief of respondent Pepperidge Farm, Incorporated.

PER CURIAM

Plaintiff Dennis M. Mulvihill appeals from a February 23, 2010 order granting summary judgment to defendants Pepperidge Farm, Incorporated (PFI), and Daniel Venditti (Venditti). The order reformed two consignment agreements between plaintiff and PFI to correct the parties' mutual mistake regarding the description of the territory in which plaintiff is permitted to distribute PFI products. For the reasons that follow, we affirm.

PFI manufactures and sells baked goods to retail stores through self-employed distributors who have entered into consignment agreements with PFI. Each distributor, or "sales development associate" (SDA), has the exclusive right to distribute PFI products to customers within the territory, or "distributorship," described in the SDA's consignment agreement. SDAs may sell or transfer their distribution rights under the agreement, but any such sale or transfer is subject to written approval by PFI.

Distributorships may be transferred either as a whole or in part. When only a portion of a distributorship is sold——a "split-route" transaction——PFI requires termination of the existing consignment agreement with the selling SDA and the subsequent creation of two new consignment agreements

delineating both the selling and purchasing SDAs' territory. In a split-route transaction, the selling SDA's territory retains the original route number, and the portion being sold is assigned a new route number.

Venditti purchased PFI distribution rights in October 1981 from SDAs James and Robert Flanagan. This distributorship now includes a Shop-Rite and Stop & Shop on Route 206 in Hillsborough, New Jersey (the disputed stores).

In 2001, plaintiff reached an agreement with SDA James Patrick Shea (Shea) to purchase a part of Shea's PFI distributorship (Route 00007) in a split-route transaction. Plaintiff signed a "Route Sale Summary" on June 26, 2001, stating that the purchase price for the territory was $136,000.[1] Because SDAs receive a commission on the products they sell, the purchase price was based on the average weekly net wholesale volume of the sales within the territory as determined by Joel Troutman, a PFI district sales manager, in a "Route Analysis Worksheet." The worksheet stated the average weekly dollar volume for each of the stores in the territory that plaintiff was purchasing, and it did not include the disputed stores. In

[1] The purchase price was subsequently reduced to $134,640.

addition, the route sale summary that plaintiff signed contained the following representation:

> I, [Dennis M. Mulvihill], represent that I have made my own independent investigation, or had the opportunity to make my own independent investigation and declined to do so, of the material facts inherent in the purchase of the named Distributorship, including, without limitation: (a) the perimeters of the described Territory, (b) the particulars (name, address, etc.) of the individual accounts and the chain accounts within the Territory, and (c) the sales volume of the Territory, as well as the sales of each independent account, and each chain account within the Territory, and I also represent that I have not relied on any representation(s) made by Pepperidge Farm, Incorporated or any of its representatives with respect thereto.

According to James Ruddy, a PFI director of retail operations, PFI approved Shea's split-route sale to plaintiff with the understanding that it included four major supermarkets: "an Acme in Princeton Junction, a Shop-Rite in Skillman, and a Pathmark and McCaffrey's in West Windsor." Ruddy certified that he communicated this information to plaintiff during a June 2001 meeting at an Applebee's restaurant and that the consideration paid by plaintiff did not contemplate "the volume of business done" at the disputed stores. Ruddy further stated that the discussions with plaintiff "did not include reference to any area or stores outside the Shea territory," and PFI would not

have approved any transaction involving greater territorial rights than Shea could convey.

John Taglieber, a business development manager with PFI, certified that PFI "carefully reviewed with Mulvihill the stores within the distribution territory he sought to acquire." He further stated that plaintiff "understood and agreed" that he was purchasing "only those portions of the Shea Territory containing the few stores that Shea sought to sell and that Mulvihill had discussed with Pepperidge Farm."

In a certification in opposition to PFI's motion for summary judgment, plaintiff described the June 2001 meeting at Applebee's as follows:

> About all that was discussed was that the territory being conveyed would include four stores which I would be expected to service, and I assured those present that I would have no difficulty in doing so. They were satisfied with that. There was absolutely no discussion of territory configuration or whether it would be the same as, more than, or less than what Shea previously was assigned. Similarly, there was no discussion as to whether there might be other stores located in the territory to be acquired, either currently or in the future. There was no representation that there would be or would not be, and the subject was simply not discussed. There could be no misunderstanding or mistake about something we never discussed or agreed on.

According to plaintiff, he was never given a map or a description of the territory he agreed to purchase prior to the

contract closing on August 6, 2001. In addition, plaintiff certified he "never paid any attention" to the language in the route sales summary that described his right to investigate "the individual accounts and the chain accounts" he would be servicing and "the perimeters of the described Territory" he was purchasing.

At the contract closing on August 6, 2001, PFI and plaintiff signed a consignment agreement (2001 Consignment Agreement), which erroneously described additional territory where the disputed stores are located. According to plaintiff, he recognized at the closing that his "new Route 00153 territory" seemed to differ somewhat from "Shea's Route 00007 description," but he assumed it was a "minor and inconsequential change." Apart from once driving to the boundary in question, plaintiff took no further action to clarify the matter.[2] He stated that when he received a copy of the 2001 Consignment Agreement three to four months later, he "gave it only a superficial review and put it away for safekeeping."

During that three-to-four-month period, plaintiff stated that he worked with "a mobile, handheld PFI computer terminal,"

[2] Joel Troutman, the PFI district sales manager, confirmed that "[f]or almost two weeks after closing," he accompanied plaintiff as he serviced the stores in his newly acquired distributorship, and during that time the disputed stores were neither serviced nor discussed.

a practice common among SDAs. These devices allow SDAs to manage their stores electronically, and plaintiff certified that his terminal listed only the four supermarkets previously serviced by Shea.

On October 24, 2005, plaintiff sold part of his distributorship to another SDA, Frank Grasso, but retained the disputed territory. The transfer to Grasso resulted in a new agreement between plaintiff and PFI (the 2005 Consignment Agreement). The 2005 Consignment Agreement was "substantially identical" to its 2001 counterpart, and the only alteration was the removal of the portion sold to Grasso.

In April 2007, plaintiff purchased an additional distributorship (Route 343) from his brother, Robert Mulvihill. PFI included in the transfer some "unassigned" territory adjacent to the area previously serviced by Robert. According to David Cavicchia, a PFI district sales manager, this unassigned territory "did not contain any retail stores selling Pepperidge Farm products and was not claimed or serviced by any Pepperidge Farm bakery SDA."[3] Cavicchia indicated that plaintiff "knew and accepted the additional territory."

[3] Cavicchia stated that prior to assigning an unassigned area, PFI researches whether it "was included in any predecessor's Consignment Agreement."

Plaintiff certified that around April or May 2008, he reviewed the 2001 and 2005 Consignment Agreements and "first became aware of the possibility that the area of [his] territory had actually been increased in 2001 . . . raising the possibility that additional stores might be located in such extended territory." When plaintiff contacted PFI, a manager there confirmed that the disputed stores were within the territory described in the 2001 and 2005 Consignment Agreements. Plaintiff subsequently contacted PFI through an attorney, claiming an exclusive right to service the disputed stores. In a letter dated July 10, 2008, PFI noted that the two stores had always been serviced by Venditti and stated that it would not "deny Mr. Venditti the right to continue servicing the stores" because "[n]o consideration was paid by Mr. Mulvihill to his predecessor for the two stores in question."

On February 13, 2009, plaintiff initiated a breach of contract action against PFI and Venditti, alleging that PFI intentionally breached the 2005 Consignment Agreement and enabled Venditti to misappropriate plaintiff's business opportunities.[4] In addition to compensatory damages, plaintiff sought a declaration that the disputed stores were within his

[4] The complaint also included a count of civil conspiracy that was subsequently withdrawn.

distributorship and an injunction prohibiting PFI and Venditti from servicing them.

PFI's answer denied plaintiff's allegations and asserted various defenses. It did not initially raise a defense of mutual mistake. Venditti subsequently filed a counterclaim against plaintiff and a cross-claim against PFI seeking declaratory judgment that the disputed stores were within his territory. Thereafter, PFI amended its answer to include the defense of mutual mistake.

All three parties moved for summary judgment, and the court heard oral arguments on February 11, 2010. On February 23, 2010, summary judgment was granted to PFI and Venditti, and plaintiff's motion was denied. The order was accompanied by a fifteen-page written decision in which the court found that there were "no genuine issues of material fact," as evidenced by the fact that all parties sought summary judgment. The court further found that both the 2001 and 2005 Consignment Agreements should be reformed because "neither PFI nor plaintiff intended for the disputed territory and the two stores within it to be included in the 2001 and 2005 Consignment Agreements." The court's findings and conclusions included the following:

> In stark contrast to the situation in [St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, N.J., 88 N.J. 571 (1982)], it was not plaintiff's

understanding that the disputed area was to be included in the 2001 or 2005 Consignment Agreements. In fact, the evidence overwhelmingly leads to the conclusion that neither plaintiff nor defendant PFI intended to include the disputed area.

Significantly, plaintiff admitted it was not until 2008 that he first became aware of the possibility that his territory had been increased in 2001. Thus, plaintiff never provided distribution services to the stores in the disputed area, even though he was aware of their existence. Indeed, plaintiff concedes inclusion of the disputed area and the two stores in the 2001 Consignment Agreement was not a factor in his decision to enter into the agreement.

Furthermore, in an August 2001 Route Analysis worksheet, Shea made known to plaintiff that the retail stores in his territory did not include the two stores at issue. Moreover, the consideration paid by plaintiff . . . did not include payment for the volume of business done at the [disputed stores]. Finally, plaintiff admits PFI made no representation to him in connection with his purchase of Shea's territory that either [of the disputed stores was] to be included in the 2001 Consignment Agreement or, later, in the 2005 Consignment Agreement.

Thus, the 2001 Consignment Agreement erroneously covered an additional territory not previously discussed by the parties, and the 2005 Consignment Agreement simply continued the same mistake. . . . Clearly, plaintiff admits the absence of any agreement to acquire territory beyond the area previously serviced by Shea, while . . . Venditti has throughout continuously serviced the disputed area and stores.

. . . .

> Accepting plaintiff's factual allegations as true, they do not raise a genuine issue with regard to mutual mistake. None of the allegations support a claim that plaintiff understood he was to get rights to the disputed territory in this case. . . . The fact that PFI reviewers found the metes and bounds description of the territory to be correct is merely consistent with the mistake that was made. . . . Finally, the transaction in 2007 is entirely irrelevant to the transactions at issue here . . . .
>
> For all of the above reasons, this court concludes neither PFI nor plaintiff intended for the disputed territory and the two stores within it to be included in the 2001 and 2005 Consignment Agreements. [Their] inclusion in those agreements was simply a mutual mistake. Therefore, the motions of PFI and . . . Venditti are granted, and plaintiff's motion is denied.

On appeal, plaintiff raises the following issues:

> POINT ONE
>
> SUMMARY JUDGMENT WAS IMPROVIDENTLY GRANTED IN FAVOR OF PFI AND VENDITTI AND AGAINST PLAINTIFF AS NUMEROUS GENUINE ISSUES OF MATERIAL FACT WERE OVERLOOKED BELOW.
>
> A. STANDARD OF REVIEW.
>
> B-F. DISPUTED QUESTIONS OF FACT.
>
> POINT TWO
>
> SUMMARY JUDGMENT IN FAVOR OF MULVIHILL WAS IMPROVIDENTLY DENIED.
>
> POINT THREE
>
> THE TRIAL COURT MISAPPLIED THE LAW OF REFORMATION AND ERRONEOUSLY FAILED TO ENFORCE THE 2001 AND 2005 MULVIHILL-PFI

CONSIGNMENT AGREEMENTS ACCORDING TO THEIR UNAMBIGUOUS TERMS.

A. NO CONTRARY MEETING OF THE MINDS.

B. THE DOCTRINE OF MUTUAL MISTAKE AS GROUNDS FOR REFORMATION WAS IMPROPERLY APPLIED BELOW.

C. THE EVIDENCE DOES NOT SUPPORT "SCRIVENER'S ERROR" OR REJECTION OF THE LACHES AND ESTOPPEL DEFENSES TO REFORMATION.

After reviewing these contentions in light of the record and applicable law, we are satisfied that plaintiff's arguments are without sufficient merit to warrant extended discussion. R. 2:11-3(e)(1)(E). We add only the following comments.

Summary judgment is appropriate where the pleadings and evidence "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). As the Court has stated:

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to 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. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to

> determine whether there is a genuine issue for trial."
>
> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)).]

When reviewing summary judgment orders, we utilize the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We must first determine "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, supra, 142 N.J. at 536 (quoting Liberty Lobby, supra, 477 U.S. at 251-52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). If there is no genuine issue of material fact, we must then decide whether the trial court's application of the law was correct. Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 258 (App. Div. 1987).

"[T]he rule that contracts may be reformed where there has been a mutual mistake is 'well settled in our jurisprudence.'" Cent. State Bank v. Hudnik-Ross Co., 164 N.J. Super. 317, 323-24 (App. Div. 1978) (quoting Sav. Inv. & Trust Co. v. Conn. Mut. Life Ins. Co., 17 N.J. Super. 50, 55 (Ch. Div. 1951)). "Reformation predicated upon mutual mistake requires that both parties are in agreement at the time they attempt to reduce

their understanding to writing, and that the writing fails to express that understanding correctly." St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, N.J., supra, 88 N.J. at 579; see also Cent. State Bank, supra, 164 N.J. Super. at 323 (stating that reformation is appropriate where "'by reason of mistake or inadvertence of the draftsman or scrivener as to a matter of fact, [a contract] does not fulfill the intention of the parties'") (quoting 76 C.J.S. Reformation of Instruments § 26). "For a court to grant reformation there must be 'clear and convincing proof' that the contract in its reformed, and not original, form is the one that the contracting parties understood and meant it to be." Cent. State Bank, supra, 164 N.J. Super. at 323 (quoting Brodzinsky v. Pulek, 75 N.J. Super. 40, 48 (App. Div.), certif. denied, 38 N.J. 304 (1962)).

In this case, the court found no issue of material fact and determined as a matter of law that the parties did not intend to include the disputed stores in either the 2001 or 2005 Consignment Agreement. Those findings are well supported by the record, and the court properly concluded that reformation was appropriate because the territory description in plaintiff's consignment agreements was the result of a mutual mistake. We

therefore affirm substantially for the reasons stated by Judge Levy in his comprehensive written decision on February 23, 2010.

Affirmed.