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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4008-09T3

66 VMD ASSOCIATES, LLC and
ATLANTIC DELTA CORPORATION
AT MONTGOMERY, INC.,

Plaintiffs-Appellants,

v.

MELICK-TULLY AND ASSOCIATES,
P.C.; RICHARD D. LEV, C.P.G.,
EUGENE M. GALLAGHER, JR., P.E.,
and RICHARD PAGANO,

Defendants-Respondents.

Argued November 1, 2010 – Decided August 11, 2011

Before Judges Rodríguez, Grall and Miniman.

On appeal from the Superior Court of New
Jersey, Law Division, Middlesex County,
Docket No. L-6584-07.

Evan L. Goldman argued the cause for
appellants (Schiffman, Abraham, Kaufman &
Ritter, attorneys; Mr. Goldman and Kristen
M. Welsh, on the brief).

Gary C. Chiumento argued the cause for
respondents (Chiumento McNally, LLC,
attorneys; Mr. Chiumento and Ashley H.
Buono, on the brief).

PER CURIAM

66 VMD Associates, LLC (VMD) and Atlantic Delta Corporation at Montgomery, Inc. (Atlantic), appeal from the summary judgment limiting their recovery against Melick-Tully and Associates, P.C. (MTA), Richard D. Lev, C.P.G., Eugene M. Gallagher, Jr., P.E. and Richard Pagano (collectively "Consultants") for breach of a contract for environmental consultation to $25,000. We affirm.

Atlantic entered a contract to purchase a lot in Somerville (the Property) for $155,000 on March 11, 1998. Because the Property was environmentally contaminated, Atlantic contracted with MTA to provide a remediation plan. Between March 17 and September 9, 1998, MTA sent Robert Weiss, VMD's president, five contracts. Each contract limited MTA's liability for professional negligence to $25,000. Although Weiss is an experienced developer and a member in several real estate holding companies and a construction company, the Property was to be his first commercial development project.

On June 19, 1998, MTA issued a report estimating that remediation would cost between $13,000 and $17,000. Following receipt of this report, Atlantic closed on the Property and assigned its rights to VMD on September 14, 1998.

By 2003, VMD had not performed any remediation. Instead, VMD had contracted to sell the Property. Before closing,

however, the buyer cancelled the sale because tests revealed that remediation costs could exceed $100,000. After the sale collapsed, VMD sued MTA for $2,000,000 alleging professional negligence.

MTA moved for summary judgment on the issue of damages arguing that, pursuant to their contract, their liability was limited to $25,000. Judge Diane Pincus agreed and granted summary judgment limiting VMD's recovery to $25,000.

After the judge denied a motion for reconsideration, VMD entered a consent judgment and appealed. On appeal, VMD argues that the limitation of liability clause is invalid because it was unsigned, inequitable, provided inadequate economic compulsion for MTA to perform diligently and violates public policy.

Each MTA proposal included a "GENERAL TERMS AND CONDITIONS" page with separate signature lines. This page contained a section entitled "RISK ALLOCATION":

> 14.1 Many risks potentially affect MTA by virtue of entering into this agreement for Consulting Services on behalf of Client. The principal risk is the potential for human error by MTA. For Client to obtain the benefit of a fee which includes a nominal allowance for dealing with MTA's liability, Client agrees to limit MTA's liability to Client and to all other parties for claims arising out of MTA's performance of the services described in this Agreement. The aggregate liability of MTA will not

> exceed $25,000 for negligent professional acts, errors, or omissions . . . .

Despite not signing several proposals or the "TERMS AND CONDITIONS" pages, VMD's representatives returned the documents to MTA each time without objection and paid MTA according to the proposals.

MTA issued a June 19, 1998 report estimating remediation costs between $13,000 and $17,000. After VMD received the Property from Atlantic, NJDEP conditionally approved the MTA remediation plan on March 30, 1999. Despite paying MTA $19,826.35 for the report, VMD never performed the planned remediation.

Intending to develop the property, VMD sought site approvals that delayed the project for several years. VMD eventually abandoned their development plans and entered a July 24, 2003 contract to sell the Property to Gordon Somerville MAB Associates (Gordon). In 2004, NJDEP reassigned the Property file to another case manager. The new case manager rescinded the 1998 conditional approval because the MTA plan did not meet the "Technical Requirements for Site Remediation."

In response, MTA issued a 2005 report which projected remediation costs near $109,000. Wary of the increase, Gordon hired The Whitman Companies, Inc., (Whitman) for a second opinion.

Whitman estimated in August 2005 that remediation would cost $94,000. Consequently, Gordon cancelled the contract of sale with VMD on September 20, 2006. VMD hired Whitman to issue another report for submission to the NJDEP in 2006. In that submission, Whitman estimated remediation costs exceeding three million dollars.

VMD sued MTA and Consultants, alleging professional negligence. Citing the limitation of liability provision in their contracts, MTA and Consultants moved for summary judgment on the issue of damages. VMD argued that "the limitation on liability clause is unenforceable because it contravenes public policy, is impermissible in professional services contracts, and was not signed."

Judge Pincus found that the limitation of liability clause was enforceable because the contracts "were negotiated and executed by two experienced and knowledgeable parties" who were represented by counsel and were "well-versed in business transactions." She also found that public policy does not disfavor limitations of liability in professional service contracts. Moreover, the $25,000 limitation of liability provided ample motivation for MTA to perform diligent work because it "exposed [MTA] to damages . . . $5,000 in excess of its entire fee." Lastly, the judge found that although New

Jersey public policy favors remediation, MTA could not be held responsible on this theory because they had not caused the contamination and VMD had failed to perform any remediation.

The judge also found the absence of signatures on some of the proposals inconsequential. VMD's representatives reviewed and sent back each proposal without objection and did not prevent MTA from working pursuant to the contracts. Thus, the judge granted partial summary judgment on August 24, 2009 limiting damages to $25,000.

After Judge Pincus denied VMD's subsequent motion for reconsideration, we denied VMD's motion for leave to appeal. No. M-2050-09 (App. Div. January 14, 2010). Consequently, the parties then entered into a consent judgment for $25,000, and VMD appealed.

VMD relies on Lucier v. Williams, 366 N.J. Super. 485 (App. Div. 2004), contending that limitation of liability clauses are unenforceable where the potential loss resulting from negligent performance greatly exceeds the limitation on damages. According to VMD, such a contract would provide no incentive to perform diligent work. VMD argues, therefore, that MTA's limitation of liability clause is unenforceable because it limited recovery to $25,000 despite potential damages "in excess of $3 million dollars." We disagree.

Comparing the limitation of liability against the expected compensation under the contract, Judge Pincus determined that MTA had ample incentive to perform diligently because the limit of $25,000 was twenty-five percent higher than their total fee, which was $19,826. Moreover, the judge explained that were she to apply the test VMD endorsed, the 2006 Whitman remediation estimate was irrelevant to determining the parties understanding of the potential losses at the time the parties entered the contract in 1998.

We review a grant of summary judgment de novo, applying 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). The reviewing court must determine whether any genuine issues of fact exist, and whether the trial judge correctly applied the law. Walker v. Atl. Chrysler Plymouth Inc., 216 N.J. Super. 255, 258 (App. Div. 1987); R. 4:46-2(c).

Courts enforce contracts negotiated at arm's-length between parties of balanced bargaining power pursuant to the doctrine of freedom of contract. Marcinczyk v. N.J. Police Training Comm'n., 203 N.J. 586, 592-93 (2010); Vasquez v. Glassboro Serv. Ass'n., Inc., 83 N.J. 86, 101 (1980) ("[C]ourts should enforce contracts as made by the parties."). Consequently, we "have

traditionally upheld contractual limitations of liability." Marbro, Inc. v. Borough of Tinton Falls, 297 N.J. Super. 411, 417 (Law Div. 1996). This tenet, however, is limited.

A limitation of liability is unenforceable where it is unconscionable or violates public policy. See Marcinczyk, supra, 203 N.J. at 593-94; Lucier, supra, 366 N.J. Super. at 491. Although unconscionability escapes precise definition, it is generally described as the antithesis to appropriate "business ethic," or a lack of "good faith, honesty in fact, and . . . fair dealing." Kugler v. Romain, 58 N.J. 522, 543-44 (1971). To judge the validity of an allegedly unconscionable contract, the court should consider "the subject matter of the contract, the parties' relative bargaining positions, the degree of economic compulsion motivating the 'adhering' party, and the public interests affected by the contract." Rudbart v. N. Jersey Dist. Water Supply Comm'n., 127 N.J. 344, 356, cert. denied, 506 U.S. 871, 113 S. Ct. 203, 121 L. Ed. 2d. 145 (1992).

There is inadequate economic compulsion to perform diligently when a party's potential liability, pursuant to a limitation of damages clause, is far less than the expected compensation pursuant to the contract. Lucier, supra, 366 N.J. Super. at 494. For example, in Marbro the plaintiff sued FRA, an engineering company, for damages relating to FRA's consulting

services. 297 N.J. Super. at 414-15. Touting a contract provision similar to MTA's, FRA argued their liability could not exceed $32,500. Id. at 415. The trial judge agreed, finding adequate economic compulsion because FRA stood "to lose its total fee for services." Id. at 418.

The court in Marbro relied heavily on a Third Circuit case, Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195, reh'g, en banc, denied, 48 F.3d 760 (3d Cir. 1995), in applying this compensation test because there was "no reported New Jersey decision on [the] issue." Marbro, supra, 297 N.J. Super. at 415. Although the Valhal decision is not binding on us, it warrants discussion because of the frequency with which our courts have cited it.

In Valhal, the plaintiff sued an architecture firm for $2,000,000 resulting from negligently prepared architecture plans. 44 F. 3d at 198-200. Applying Pennsylvania law, the Third Circuit validated the defendant's limitation of liability clause, finding that the firm was not "immunize[d] . . . from the consequences of its own actions," because they were "exposed to liability which is seven times the amount of the remuneration under [the] contract." Id. at 204.

Similarly, in Lucier, the plaintiff home-buyers sued the defendant home inspector for professional negligence for failing

to identify roof damage which required $8,000 to $10,000 in repairs. 366 N.J. Super. at 488-90. The defendant had charged plaintiffs $385 for the inspection pursuant to a contract that limited defendant's potential liability to the greater of $500 or fifty percent of the contract price. Ibid. We invalidated the clause because although the liability cap was "one-half of the fee paid for [the] job," it was "'so minimal compared with the expected compensation, that the concern for the consequences of a breach [were] drastically minimized.'" Id. at 495 (quoting Valhal, supra, 44 F.3d at 204).

Here, MTA limited their liability to twenty-five percent more than the total contract price. Contrary to Lucier, MTA's limitation of liability provided sufficient economic compulsion to complete the work diligently.

VMD next contends that limitation of liability clauses in professional service contracts violate public policy. We disagree.

Judge Pincus rejected VMD's arguments that a limitation of liability clause in a professional service contract is contrary to public policy. Rather, the judge quoted Lucier: "With professional services, exculpation clauses are particularly disfavored." 366 N.J. Super. at 496. The judge explained that the limitation of liability provision in the Lucier contract

violated public policy only because the cap on damages was so low that it was "tantamount to an exculpation clause." Id. at 495. This was distinguishable from MTA's limitation of liability clause, which was not low enough to be considered an exculpatory clause.

A limitation of liability clause is unenforceable if it violates public policy. Rudbart, supra, 127 N.J. at 356. For example, in Lucier the court noted that exculpatory provisions in professional service contracts were contrary to public policy because such clauses "are antithetical to [a professional service] relationship." 366 N.J. Super. at 496. An exculpation clause is "[a] contractual provision relieving a party from any liability resulting from a negligent or wrongful act." Black's Law Dictionary 588 (7th ed. 1999) (emphasis added). A limitation of liability clause is a "contractual provision by which the parties agree on a maximum amount of damages recoverable for a future breach of the agreement." Id. at 939.

While explaining that "exculpation clauses are particularly disfavored," the court in Lucier offered the following hypothetical:

> It would indeed be a hollow arrangement if a physician could charge $100 for an office visit and then, if, due to negligence [the patient is injured], the patient's only recourse would be a refund of $50 of the original $100 fee.

[366 N.J. Super. at 496.]

This example is not an exculpatory clause. Rather, this example demonstrates a public policy against professional service contracts containing limitation of liability provisions which cap damages at such a level so as to be "tantamount to an exculpation clause." Id. at 495.

The Lucier court's reliance on Erlich v. First Nat’l Bank of Princeton, 208 N.J. Super. 264, 286-88 (App. Div. 1984), supports this result. The defendant in Erlich, an investment manager, cited in his defense an exculpatory provision that provided that the manager would "'not be liable in any way for recommendations made in good faith.'" Id. at 287 (emphasis added). The court found the provision contrary to public policy, noting that "[a]s a general rule, the courts will not enforce an exculpatory clause if the party benefiting from exculpation is subject to a positive duty imposed by law." Ibid.

Here, the judge found that MTA's limitation of liability was not so low as to be the practical equivalent of a exculpation clause. Consequently, the MTA contract does not violate public policy.

VMD also argues the contract provisions at issue violate the public policy of New Jersey favoring remediation of contaminated sites. We disagree.

The judge found that the public policy in favor of environmental remediation was inapplicable because MTA did not cause the contamination, "nor [were] they financial[ly] responsible for its clean-up." Further, the judge noted that VMD had failed to complete the remediation plans that the NJDEP approved in 1998.

Here, it is clear that VMD's position is logically untenable. Because MTA did not cause the contamination, nor own the property, they are not responsible for the cost of remediation. Therefore, enforcement of the MTA contract will not advance or hinder New Jersey's public policy of remediation.

VMD next argues that there is an issue of fact as to whether the parties were in positions of equal bargaining power. VMD alleges that this disparity is attributable to the fact that this "was the first time Mr. Weiss purchased land with suspected contamination," and Weiss did not review or sign the contract provisions at issue. We disagree.

Judge Pincus found that the parties had equal bargaining power because Weiss is "well versed in business transactions" and he had the assistance of counsel. The judge also found

that although VMD's representative did not remember reviewing the contested portions of the MTA contracts, he could not say that he definitely did not review them. Further, on five distinct occasions, VMD received and returned the contracts to MTA without contesting the liability portion of the contracts. That VMD did not sign each page was inconsequential given this conduct.

Parties of equal bargaining power may contract as they wish. Marcinczyk, 203 N.J. at 592-93. Commercial entities with legal representation typically have equal bargaining power. See, e.g., Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 246 (2008) (no disparity between "sophisticated commercial entities"); Mayfair Fabrics v. Henley, 48 N.J. 483, 488 (1967) (upholding exculpatory provision in lease between commercial tenant and commercial lessee); Synnex Corp. v. ADT Sec. Servs., Inc., 394 N.J. Super. 577, 591 (App. Div. 2007) ("Synnex is a large corporation that could have negotiated for a contract without an exculpatory clause . . . ."); Papergraphics Int'l, Inc. v. Correa, 389 N.J. Super. 8, 14 (App. Div. 2006) ("[T]he parties were experienced commercial entities of relatively equal bargaining power which engaged in negotiated contracts.").

It is beyond cavil that a party accepting an offer has an absolute duty to read and understand the terms of an offer, and failure to do so will not diminish the force and effect of the resulting contract. Peter W. Kero, Inc. v. Terminal Const. Corp., 6 N.J. 361, 368 (1951) ("[W]here a party affixes his signature to a written instrument . . . a conclusive presumption arises that he read, understood and assented to its terms . . . ."); Christie v. Lalor, 116 N.J.L. 23, 26 (Sup. Ct. 1935); Young v. Prudential Ins. Co. of Am., Inc., 297 N.J. Super. 605, 619 (App. Div.), certif. denied, 149 N.J. 408 (1997). A party accepts an offer by signing it or "manifest[ing] an intention to be bound by those terms." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992); accord Synnex, supra 394 N.J. Super. at 586-87 ("[P]erformance of the contract . . . constituted acceptance . . . thus binding both parties to the terms of that contract, including the exculpatory clause."); 4 Williston on Contracts § 6:1 (Lord ed. 2007) (acceptance "may be inferred from any words of the offeree indicating assent to the proposed bargain").

Here, the judge correctly determined that VMD manifested definite acceptance of MTA's offered terms. Thus, the terms of MTA's proposals and the attached general terms and conditions are valid against VMD.

Further, the judge correctly determined that there was no disparity in bargaining power. Weiss was an experienced businessman and manager of several companies dealing exclusively with real estate transactions and development. He did not need any engineering acumen to understand the liability terms of the contract. Most importantly, however, Weiss had legal counsel to assess the MTA contracts. One of these attorneys was Weiss's wife, who was a member in the aforementioned real estate companies and typically worked on their contracts. Because the parties were competent commercial entities with legal representation, they enjoyed equal bargaining power.

VMD argues that it would be inequitable for it to bear the costs of MTA's negligence because they could not adequately insure themselves against such losses. VMD contends that Synnex holds that limitation of liability clauses should only be enforced against parties who were in a better position to insure against potential losses. 394 N.J. Super. at 589-90. Accordingly, they argue that MTA was in a better position to insure against its negligence and maintains a $2,000,000 policy for this purpose. We disagree.

Judge Pincus held that Synnex was inapplicable because its holding was tailored to exculpatory clauses. We review this

interpretation of law de novo. Manalapan, supra, 140 N.J. at 378.

In Synnex, the plaintiff contracted with the defendant, ADT, to provide a warehouse alarm system. 394 N.J. Super. at 581. Plaintiff sued ADT after someone disabled the alarm and stole a large quantity of merchandise. Id. at 583. ADT asserted that a broad exculpatory provision in the contract absolved ADT of any liability resulting from a failure of its alarm system. Ibid. We validated this provision, explaining that:

> The essential rationale of cases upholding the validity of such exculpatory clauses is that a property owner generally will maintain insurance coverage on its property, especially if it is valuable, and that the property owner is in a far better position than the alarm system seller to know the property's value and to bargain with an insurance company for appropriate coverage and an appropriate premium.
>
> [Id. at 589 (internal quotations omitted).]

We also noted that the language of the exculpatory provision explained this rationale. Ibid. The holding was extremely limited as the court noted:

> [W]e emphasize that this case only involves the validity of an exculpatory clause as applied to property loss for which the buyer of an alarm system may obtain its own insurance coverage.
>
> [Id. at 594.]

As discussed, MTA's contract did not contain an exculpatory clause. Consequently, Synnex and MTA's ability to insure against potential losses arising from its breach of the contract are irrelevant.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION