NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4535-09T2

DICKMAN BUSINESS BROKERS,

Plaintiff-Respondent/
Cross-Appellant,

v.

JOHN TOMASULO and J.M.
TOMASULO, INC., t/a JOHN &
MICHELLE'S BEST LITTLE
LUNCHEONETTE,

Defendants-Appellants/
Cross-Respondents.

Argued May 17, 2011 – Decided June 9, 2011

Before Judges Carchman and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2609-06.

Jerald J. Howarth argued the cause for appellants/cross-respondents (Howarth & Associates, L.L.C., attorneys; Mr. Howarth and Purnima D. Ramlakhan, on the brief).

Walter A. Risi argued the cause for respondent/cross-appellant (Plick & Risi, attorneys; Mr. Risi and Gregory Read, on the brief).

PER CURIAM

In this action to recover a sales commission for the sale of its luncheonette, defendants, J.M. Tomasulo, Inc., t/a John & Michelle's Best Little Luncheonette, and John Tomasulo in his individual capacity (collectively referred to as defendant), appeal from an order of the Law Division granting summary judgment in favor of plaintiff, Dickman Business Brokers (DBB or plaintiff). Plaintiff alleges that defendant violated the agreement by entering into negotiations to sell the business to a third-party - Frank Spinelli[1] - during the contract period, and as a result, plaintiff was deprived of its commission. We conclude that the motion judge erred by granting summary judgment and defendant raised genuine issues of material fact that must be resolved by the trier of fact. Accordingly, we reverse and remand for trial.

The underlying facts are simply stated. On January 5, 2006, plaintiff and defendant entered into a listing agreement for the sale of defendant's business, John and Michelle's Best Little Luncheonette (the luncheonette). The agreement provided in relevant part:

> In consideration of your listing and endeavoring to sell, exchange or lease the

[1] Spinelli was named as a party-defendant, but the claim against him was dismissed.

business and/or property or any portion thereof listed hereof, the undersigned hereby grants to [DBB] the sole and exclusive right to sell, exchange and lease said business and/or property or any part thereof for a period of 6 months.

Seller further agrees to sell, exchange or lease said business and/or property or any part thereof within 20 days of an offer to purchase, lease or exchange said business and/or property at the price and upon the terms set forth hereof, or for any other price or terms which the undersigned may agree to accept or shall accept.

The undersigned agrees to pay [DBB] a commission of 10% (percent) of the purchase price or $12,000, which ever is greater, upon anyone procuring a purchaser . . . . The undersigned agrees not to convey said business and/or property unless said commission is paid to DBB at closing in full and unless said broker first receives a copy of the executed contract within five (5) days of signing the contract.

The undersigned agrees to pay DBB a commission in the event said property is sold, exchanged, leased, conveyed, or disposed of by any other person, corporation, or broker including the undersigned during the term of this Agreement, or after the expiration date set forth herein above, if said transaction is consummated with a person, firm or corporation to whom the property was submitted by DBB or anyone else including the undersigned during the term hereof.

. . .

The undersigned agrees to refer to DBB all inquiries regarding the lease, exchange, or purchase of said business and/or property whether from real estate brokers,

> prospective purchasers, or prospective tenants and all negotiations shall be through you the listing broker.

Following the execution of the listing agreement, plaintiff showed the luncheonette to potential buyers. On February 14, 2006, plaintiff advised defendant that there was an offer of $130,000, but defendant rejected the offer because it did not match the asking price of $180,000.

Another offer was forthcoming as on June 28, 2006, plaintiff informed defendant that Chris Farley had made a written offer for $162,000. Defendant rejected this offer as well. On July 7, 2006, two days after the listing agreement had expired, plaintiff informed defendant that Farley had made another offer for $175,000. Plaintiff never responded to the second Farley offer.

However, on July 10, 2006, five days after the expiration of the listing agreement, defendant entered into a contract of sale with Spinelli. The sale price was $162,000, with a deposit of $16,000.[2] The closing occurred on July 13, 2006.

Plaintiff never showed the luncheonette to Spinelli. According to defendant, Spinelli had expressed interest in purchasing the business prior to the listing with DBB, but the

[2] Plaintiff observed that this sale price is equivalent to the listing price of $180,000 minus a 10% commission.

offers were never serious enough to lead to an agreement. Defendant maintains that it was understood at the time of the listing agreement that a commission would not apply to a sale to Spinelli because he was in contact with defendant prior to the formation of the listing agreement. Defendant stated in his deposition that plaintiff's representative told him that a provision regarding Spinelli did not have to be included in the listing agreement. No writing ever confirmed this purported agreement.

Thereafter, plaintiff filed a complaint against defendant alleging a breach of the exclusive listing agreement. On September 9, 2009, defendant filed a motion for summary judgment, arguing that plaintiff was not entitled to the commission because defendant did not breach its contract with plaintiff; plaintiff did not procure the ultimate buyer for the luncheonette; and plaintiff cannot earn a commission for the sale, which occurred after the expiration of the listing agreement. Tomasulo, individually, also sought dismissal because all transactions were entered into in his representative capacity as president of the corporation.

After defendant's motion was denied, plaintiff filed a motion for summary judgment, and defendant countered with a cross-motion for summary judgment. The judge granted

plaintiff's motion, denied defendant's motion and also awarded attorney's fees, costs and prejudgment interest on both the commission and the attorney's fees to plaintiff. Defendant's motion for reconsideration and plaintiff's motion for additional fees were both denied.

In granting plaintiff's motion, the Law Division judge made the following findings:

> The defendant, John Tomasulo, was the principal operating officer of the defendant corporation. And he is the individual who negotiated with Dickman Business Brokers. The plaintiff, Dickman and the defendant, J.M. Tomasulo, Inc., entered into a listing agreement which enabled the plaintiff to list the defendant's business for sale, and gave it the sole and exclusive right to market and sell the defendant's business . . . .
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> During the course of the agreement, between January and early July, Tomasulo did not refer Frank - Frank Spinelli to the plaintiff as a potential purchaser.
>
> During the course of the listing agreement John Tomasulo agreed in May 2006, or June 1, 2006, that Tomasulo would sell the business to Frank Spinelli for $162,000. To confirm the deal Spinelli gave Tomasulo a $16,000 deposit.
>
> The deposit check was made out to Mildred Tomasulo, John Tomasulo's wife. We have a certification from Frank Spinelli that he would not enter into a written contract with [Tomasulo] until after the listing agreement with Dickman was over, which would be July 5, 2006.

On July 10, 2006, five days after the end of the listing agreement, John Tomasulo entered into a written contract with Frank Spinelli, which simply confirms the verbal deal that Tomasulo made with Spinelli on or around June 1, 2006.

Three days later the closing occurs where Tomasulo gave a bill of sale to Frank Spinelli, thus conveying the business to Frank Spinelli.

The closing statement regarding the sale and transfer of the business from Tomasulo to Spinelli reflected a deposit of 16,000 had been given by Frank Spinelli, for which he received a credit on the closing statement. Yet, the deposit was never put into the company books and records.

It did not appear in the company accounts. John Tomasulo could not account or explain why the deposit he had received was not in the company records when he was deposed. After the deposition it surfaced that the check had not been made out to the company, or to John Tomasulo personally, but rather had been made out to his wife, Mildred.

Spinelli has filed a certification that the deposit he gave to Tomasulo in the amount of $16,000 was not given on the date the contract was signed, July 10, 2006, but was given to Tomasulo on June 1, 2006. And the check was made out to Mildred Tomasulo at the request of John Tomasulo.

. . .

While it is correct that the contract is dated July 10, 2006, and while it is correct that the closing occurred three days later on July 13, <u>it is improbable that a closing on a business would take place three days after a contract is — is signed.</u>

> More significantly, based upon the certification from Frank Spinelli, the discussions on this matter were in the spring of 2006. It is improbable that they were in November or December, prior to the time that the listing agreement was signed. That's Mr. Tomasulo's testimony.
>
> But under the circumstances, there is no certification from Mr. Tomasulo. There's no certification from Ms. Tomasulo. The revealing certification in this case, which makes it a summary judgment case, comes from Frank Spinelli.
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> . . .
>
> The Court does not accept [Tomasulo's] deposition testimony that the conversations began prior to the onset of the listing agreement. How convenient to say that at his deposition. Just as it was convenient for him not to know about what happened to the deposit of $16,000, because at that point the check had not surfaced.
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> It is clear to the Court that Mr. Tomasulo attempted to defraud Dickman Business Brokers out of a commission that was rightfully due it. And as a result, even though the contract is with Mr. Tomasulo's company, of which he is the sole owner and shareholder, the Court will pierce the corporate veil and enter summary judgment against both the company and Mr. Tomasulo personally for the amount which is requested.
>
> [(Emphasis added.)]

In determining the motion, the judge considered the following evidence in concluding that there was no disputed issue of material fact in this case: 1) the listing agreement;

2) a deposit check from Spinelli for $16,000 made out to Mildred Tomasulo; 3) a certification from Frank Spinelli stating that he would not enter into the contract until the listing agreement with Dickman was over and that he gave the $16,000 check made out to Mildred Tomasulo to Tomasulo on June 1, 2006; and 4) Tomasulo's deposition testimony explaining that he had discussed the sale with Spinelli before the contract period, and denying that any transaction had been consummated with Spinelli until after July 5, 2006.[3] The trial judge also noted that defendant did not offer a certification with an explanation for the check. He further considered that defendant offered no certification as to his version of events, and defendant's wife also did not offer a certification.

This appeal followed.

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[3] The judge did not consider the certification of Lewis Handrinos, which was offered by defendant. This certification was not produced until defendant's April 12 motion for reconsideration. Defendant argues that the judge should have considered the certification, while plaintiff asserts that it was properly excluded. "A motion for reconsideration is designed to seek review of an order based on the evidence before the court on the initial motion, not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div), certif. denied, 195 N.J. 521 (2008) (citation omitted). No explanation was offered as to why it was not produced in opposition to the original motion.

On appeal, defendant asserts that the judge erred by denying defendant's cross-motion for summary judgment, erred by not dismissing as to Tomasulo, individually, improperly weighed evidence and improperly awarded counsel fees. Because we determine that there were genuine issues of material fact in dispute, we need only determine whether summary judgment was properly granted as the same issues of fact apply to defendant's cross-motion. We defer the issue of counsel fees until the ultimate resolution of the merits of this litigation.

Particularly relevant to our analysis is the standard of review that we adhere to on this appeal. We apply the same standard as the trial court in reviewing the granting of motions for summary judgment. EMC Mortg. Corp. v. Chaudhri, 400 N.J. Super. 126, 136 (App. Div. 2008) (citing Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007)).

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of 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). The inquiry is "'"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."'" Liberty Surplus Ins. Corp., supra, 189 N.J. at 445-446 (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995) (quoting Anderson v. Liberty Lobby Inc., 477 U.S. 242, 251-52 (1986))). "At this stage of the proceedings, the competent evidential materials must be viewed in the light most favorable to . . . the non-moving party, and [he] is entitled to the benefit of all favorable inferences in support of [his] claim." Bagnana v. Wolfinger, 385 N.J. Super. 1, 8 (App. Div. 2006) (citing R. 4:46-2(c); Brill, supra, 142 N.J. at 540).

We must first determine whether the moving party has demonstrated that there were no genuine disputes as to material facts. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006).

> [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, supra, 142 N.J. at 540 (second alteration in original) (quotations omitted).]

We then decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co., supra, 387 N.J. Super. at 231. The motion judge's conclusions on issues of law are not entitled to deference. Ibid. (citing Manalapan Realty L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

We recognize that Brill permits a court to grant a motion for summary judgment if the evidence is so one-sided in movant's favor that movant must prevail. See Brill, supra, 142 N.J. at 536. We reject that principle here.

The trial judge's decision not to give credence to defendant's testimony was a credibility determination. In his deposition, defendant asserts that he and Spinelli had a conversation in November or December (contrary to Spinelli's certification) regarding the sale of the business. He further indicated that consistent with the listing agreement, he referred potential buyers to plaintiff.

Though plaintiff provided a wealth of evidence addressing defendant's culpability and defendant presented little more than his deposition, defendant was still entitled to all favorable inferences. Instead, the judge made a credibility determination and concluded that defendant was not credible.

The judge made no determination as to the admissibility of defendant's purported agreement with plaintiff's representative as to an alleged prior contact with Spinelli. While we have doubts as to its admissibility as evidence, we need not decide that issue here as it was not addressed below and can be raised and disposed of by the trial judge either in a motion in limine or at trial.

In sum, we conclude that the weight or lack thereof attributed to both the proofs presented by defendant as well as plaintiff are best reserved for trial and resolution by the trier of fact not by a judge on a motion for summary judgment.

We leave to the trier of fact the issue of whether defendant breached the listing agreement and whether Tomasulo is individually liable or protected by the corporate status of J.M. Tomasulo, Inc.

Finally, the award of counsel fees will abide the ultimate result of the trial. We do note that the award of interest on the counsel fees was erroneous.

Unlike the prejudgment interest on the commission, the contract between the parties does not provide for prejudgment interest on the attorney's fees. The Court has held that "[a]bsent a controlling contractual provision, permitting prejudgment interest on attorneys' fees would be contrary to our

strong public policy disfavoring shifting of attorneys' fees." N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 576 (1999). In the event counsel fees are awarded following trial, no prejudgment interest shall be awarded on those fees.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.