NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0101-11T3

DEB ASSOCIATES AND
JOSEPH ROLANDELLI,

Plaintiffs-Respondents,

v.

FOREVER YOUNG MEDICAL
DAYCARE, LLC,

Defendant-Appellant,

and

MARIA KIPNIS, MARINA
NABUTOVSKAYA, MARIYA
TOLCHEVA, SVETLANA
KESTEL, JOSEPH RODRIGUES,
ESTATE OF DEAN RICCIARDI,
and SUSAN RICCIARDI,

Defendants.

Argued March 13, 2012 - Decided July 5, 2012

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New Jersey, Chancery Division, General Equity Part, Passaic County, Docket No. C-0112-05.

R. Scott Thompson argued the cause for appellants (Lowenstein Sandler, P.C., attorneys; Mr. Thompson, of counsel and on the brief).

Peter R. Bray argued the cause for respondents (Bray & Bray, L.L.C., attorneys; Mr. Bray, on the brief).

PER CURIAM

Defendants Forever Young Medical Daycare LLC (Forever Young), Maria Kipnis, Marina Nabutovskaya, Mariya Tolcheva, Svetlana Kestel, Joseph Rodrigues, the Estate of Dean Ricciardi and Susan Ricciardi (collectively, defendants) appeal from the Law Division's June 14, 2011 order enforcing a settlement reached with plaintiff Deb Associates (Deb) three years earlier, and ordering the immediate retroactive payment of all monies thereunder. We have considered the arguments raised in light of the record and applicable legal standards. We reverse.

I.

This is the second time the matter is before us. The relevant procedural history was set forth in our prior opinion, Deb Associates v. Forever Young Medical Daycare, LLC, No. A-3373-09 (App. Div. Feb. 8, 2011).

> On August 10, 2005, [Deb] filed its complaint alleging an interest in Forever Young pursuant to an agreement previously reached with Dean Ricciardi and the subsequent investment of significant sums of money in the senior day care centers operated by defendants. [Deb] sought declaratory relief recognizing its ownership interest in the centers, the creation of equitable and constructive trusts, injunctive relief to block any sale by an individual defendant of his or her

> interests, compensatory and punitive damages, and counsel fees based upon defendants' intentional and wrongful conduct. . . .
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> Trial commenced in February 2008 before now-retired judge Joseph J. Riva. The parties reached a settlement that was orally placed on the record on March 3.
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> [Id. at 2-3.]

The settlement provided that Deb would receive a five-percent ownership interest in Forever Young from Tolcheva's share of the business, and equivalent distributions, with the first $400,000 payable as repayment of a loan in monthly installments at an interest rate of five percent. Id. at 3. Deb would also receive a twenty percent ownership interest in a new center Tolcheva was contemplating opening in New Brunswick. Ibid.

The settlement was never reduced to writing despite an exchange of emails and correspondence between the parties' respective attorneys regarding its terms and those of a corollary operating agreement. Id. at 5-6. We are advised that releases were never exchanged. Deb subsequently "moved to enforce the settlement or vacate the dismissal of the litigation and return the matter to the trial calendar." Id. at 7. Central to Deb's argument was the claim that Tolcheva failed to exercise good faith in pursuing the prospective daycare center in New Brunswick. Ibid. Judge Riva held a hearing, took

testimony and denied the motion explaining his reasons in a comprehensive written opinion. Id. at 7-8.

In relevant part, Judge Riva determined defendants had not breached the settlement by failing to pursue the new day care facility, which never came to fruition. Id. at 8-9. Deb appealed, and we affirmed substantially for the reasons expressed by Judge Riva. Id. at 9.

Within days of our decision, Deb's counsel sought a check from defendants "for the monthly payments due" under the settlement. Defendants remitted a check in the amount of $3000, the first monthly installment of the loan repayment. Deb's counsel responded on March 16, 2011, noting that defendants were "refusing to make the monthly distribution payments . . . for the period from and after May 1, 2008, notwithstanding the fact that the settlement specifically provide[d] that Deb [wa]s entitled to the economic benefits allotted to it under the Settlement Agreement from and after May 1, 2008." Defense counsel responded on March 21 by rejecting Deb's claim for the immediate payment of all "amounts that would have been paid . . . under the settlement reached in 2008" because Deb had "engaged in lengthy, and plainly frivolous, litigation . . . ."

On March 29, Deb filed a motion in the Law Division to enforce the terms of the settlement. Citing the unexecuted 2008

draft settlement and operating agreements, Deb claimed it was entitled to begin receiving payments by, at the latest, May 1, 2008. Defendants opposed the motion.

Apparently without granting defendants' request for oral argument, the judge to whom the matter was now assigned issued a letter opinion dated June 14, 2011. We discuss that decision in detail below. In short, the judge granted Deb's motion to enforce the settlement and entered an order requiring that defendants "immediately pay . . . an amount equal to the monthly payments that were to be made under the [s]ettlement, from May 1, 2008 to date, equal to five . . . percent of distributions made by Forever Young," and documentation supporting the "calculation of [those] sums." He denied Deb's request for counsel fees.

Defendants moved for reconsideration. They noted there was no oral argument, despite having received assurances from the court that a hearing would occur. Tolcheva certified that defendant began making payments to Deb "as soon as it was clear that [Deb] would not appeal yet again from the decision of the Appellate Division."[1] She further cited the financial hardship the immediate lump sum payment would cause to Forever Young. In

[1] Defendants state in their brief that Deb "first accept[ed] monthly payments" before filing the motion.

its reply, Deb noted that defendants had continuously asserted the enforceability of the original settlement throughout the litigation and therefore should be required to now comply with its terms.

Oral argument on defendants' motion for reconsideration occurred on July 11. The judge denied the motion in an oral decision citing extensively from his original written decision. He entered an appropriate order that same day.

Defendants filed their appeal on September 2, which we subsequently treated as being filed within time. On October 31, a panel of our colleagues denied defendants' motion for a stay without prejudice, determining it was premature because the trial court had not fixed "the amount of the lump sum payment due at this time" and had not determined whether a supersedeas bond should be posted. The trial court entered an order dated November 7 fixing judgment in the amount of $210,000 based upon the parties' agreement "to the amount due for the period through September, 2011 (exclusive of distribution payments already made to Deb . . .)".[2]

Defendants contend that the judge erred in finding Deb was entitled to specific performance of the settlement agreement

[2] It is unclear whether the trial court stayed the judgment pending appeal. We have not entered any order granting such relief.

retroactive to May 2008 notwithstanding Deb's rejection of the settlement. Specifically, defendants argue the judge enforced "the [w]rong [a]greement," and misapplied an unreported decision of this court, Crowley v. Maalouf, No. A-3652-01 (App. Div. Apr. 14, 2003), certif. denied, 177 N.J. 491 (2003). Deb counters by arguing that the judge correctly compelled the retroactive specific performance of the settlement, and defendants' appeal is moot because they never sought review of the November 2011 order entering judgment.[3]

II.

The judge noted in his written opinion that "[p]ursuant to the settlement agreement, D[eb] was entitled to receive loan payments starting from May 1, 2008." Defendants argue this was error because that date was contained in a draft proposal exchanged by the parties, which, as noted, was never executed for a variety of reasons, most notably because Deb sought vacation of the oral settlement placed on the record in March 2008 and appellate review thereafter. Defendants contend that Judge Riva concluded that the execution of a written agreement was the sine qua non of their obligations to make payment. We disagree.

[3] The claim that defendants' appeal is moot lacks sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

In deciding Deb's original motion that led to the first appeal, Judge Riva set forth some of the essential terms of the settlement contained in the oral agreement and Deb's counsel's draft proposed agreement as: 1) a transfer of a five-percent ownership in Forever Young to Deb subject to necessary government approvals, that share coming solely from Tolcheva's interest; and 2) Deb would "be entitled to the economic benefit that a five-percent member would enjoy from and after the effective date of this agreement."

Judge Riva never decided that defendants did not have to perform until a written agreement was executed because he was not concerned with when defendants were required to perform. In using the term "this agreement," Judge Riva was referencing not only the terms of the oral agreement, which clearly contained no commencement date, but rather the entire agreement as reflected in the oral agreement and the proposed written document.

Additionally, defendants have always sought the timely enforcement of the settlement agreement, which, but for the original motion and subsequent appeal, would have resulted in the immediate commencement of their obligations to pay Deb. We have long recognized that "[w]here the parties agree upon the essential terms of a settlement, so that the mechanics can be 'fleshed out' in a writing to be thereafter executed, the

settlement will be enforced notwithstanding the fact the writing does not materialize because a party later reneges." Lahue v. Pio Costa, 263 N.J. Super. 575, 596 (App. Div.), certif. denied, 134 N.J. 477 (1993). Thus, defendants' argument that the judge enforced the "wrong" settlement agreement is without merit.

In his written decision, the judge characterized the issue as "whether a party challenging the enforceability of a settlement agreement may seek specific performance of payments due under the agreement that were delayed as a result of the challenge to the settlement." The judge determined that "there [wa]s nothing within [our earlier decision] suggesting that D[eb] breached the settlement agreement as a result of its challenge. D[eb] is now merely seeking to comply with the decisions of the trial court and Appellate Division, both of which have upheld the enforceability of the settlement agreement."

The judge then concluded that specific performance, i.e., the immediate retroactive payment of all sums due since May 2008, would not be "harsh or oppressive" to defendants. He reached this conclusion by finding that "Forever Young never requested that its payment obligations be extended or modified in the event the Appellate Division upheld the settlement agreement[,]" it "ha[d] been conducting business and potentially

earning profits throughout this litigation[,]" and "[r]equiring Forever Young to make payments due under the settlement agreement from May 2008 to present would most likely not cause financial hardship to Forever Young." We note that the latter two findings are entirely unsupported by the record. Tolcheva's certification specifically rebutted both assertions. Noting that Deb was "rightfully seeking to enforce the settlement agreement in accordance with the Appellate Division's decision," the judge granted Deb's motion "under principles of equity."

We believe the critical question is slightly different, i.e., whether defendants are excused from performing under these unique circumstances? We conclude they are.

Initially, the judge misconstrued the breadth of our prior decision. We were not concerned with whether Deb breached the settlement agreement. We were only asked to review Judge Riva's decision that defendants had not breached the settlement agreement, as Deb contended. More importantly, in the first instance Deb renounced the settlement agreement. It is undisputed that Deb never executed or offered to execute any releases conclusively settling the litigation. Indeed, the primary relief Deb sought was to vacate the settlement and return the matter to the trial list. This conduct, in our opinion, amounted to an anticipatory breach of the settlement.

Traditionally, a party commits an anticipatory breach when it "renounces or repudiates a contract by unequivocally indicating that it will not perform when performance is due." Cipala v. Lincoln Technical Inst., 354 N.J. Super. 247, 251 (App. Div. 2002), aff'd in part, rev'd in part, 179 N.J. 45 (2004). However, "the modern view does not 'limit anticipatory repudiation to cases of express and unequivocal repudiation of a contract. Instead, anticipatory repudiation includes cases in which reasonable grounds support the obligee's belief that the obligor will breach the contract.'" Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 179 (App. Div.) (quoting Danziq v. AEC Corp., 224 F.3d 1333, 1337 (Fed. Cir. 2000), cert. denied, 532 U.S. 995, 121 S. Ct. 1656, 149 L. Ed. 2d 638 (2001)), certif. denied, 196 N.J. 85 (2008).

"If the breach is material, i.e., goes to the essence of the contract, the non-breaching party may treat the contract as terminated and refuse to render continued performance." Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 341 (1961) (citing 6 Corbin, Contracts, § 1253 (1951))(citations omitted); see also Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) ("When there is a breach of a material term of an agreement, the non-breaching party is relieved of its obligations under the agreement.").

Here, Deb clearly and unequivocally signaled its intention to breach the settlement agreement; indeed, it sought to set the contract aside and return the matter to trial. Deb never intended to perform its limited obligation under the settlement, i.e., execute a release ending the litigation. We reject the position Deb asserted at oral argument -- defendants never asked for a release -- as having any significance. Based on the motion Deb originally filed before Judge Riva, defendants reasonably assumed the settlement was repudiated. See Spring Creek Holding Co., supra, 399 N.J. Super. at 179. They need not have expressly requested a release.

Deb's actions repudiated "the essence of the contract," Ross Sys., supra, 35 N.J. at 341, the mutual exchange of promises with defendants agreeing to pay Deb, and Deb agreeing to release defendants. That being the case, defendants were under no obligation to perform by rendering payment to Deb in May 2008. Indeed, we were advised that the parties never discussed a scenario whereby Deb would accept the payments and hold them in escrow pending resolution of its appeal.

Although not controlling precedent, see R. 1:36-3 ("No unpublished opinion shall constitute precedent or be binding upon any court."), Deb urged consideration of, and the Law Division judge relied upon, our decision in Crowley v. Maalouf,

supra, slip op. at 9-12. However, the judge misconstrued Crowley's principal holding.

In Crowley, the plaintiffs agreed to sell a collection of comic books and artwork to the defendant, but, before defendant tendered payment the plaintiffs sued seeking declaratory relief and reformation of the contract. Id. at 4-5. The defendant counterclaimed seeking specific performance. Id. at 5. The trial judge found in favor of the defendant and gave him sixty days to "tender payment." Id. at 7.

We did not specifically address whether the plaintiff's actions amounted to an anticipatory breach. We nevertheless noted:

> The judge did not conclude that the filing of the complaint constituted a breach of contract. [He] only noted that by filing the declaratory judgment action, plaintiffs clearly established an unwillingness to perform until such time as a court adjudicated the validity of the agreement and it clearly excused any actual tender of funds by defendant. The judge concluded that the filing of the action had the functional effect of extending the time for performance. That conclusion was correct; by filing the declaratory judgment action, plaintiffs could not expect performance from defendant before the issues were resolved.
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> [Id. at 12 (internal quotation marks omitted).]

Essentially, Crowley supports the position defendants have taken in this case, i.e., they were not obligated to perform because of Deb's decision to repudiate the settlement.

Seen in this light, the Law Division erred by concluding that retroactive specific performance, i.e., the immediate payment of a lump sum amount reflecting all payments that would have accrued if both sides performed the agreement in a timely fashion, was equitable. "[T]he right to specific performance turns not only on whether plaintiff has demonstrated a right to legal relief but also whether the performance of the contract represents an equitable result." Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 599 (App. Div.), certif. denied, 183 N.J. 591 (2005). As a general rule, "a party seeking specific performance must show that he or she was 'ready, desirous, prompt and eager' to perform as required by the contract on the date specified . . . ." Id. at 605 (quoting Stamato v. Agamie, 24 N.J. 309, 316 (1957)). Clearly, Deb had no intention to perform because it sought vacation of the agreement.

Reversed.