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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3844-10T1

VOLLERS EXCAVATING AND
CONSTRUCTION, INC.,

Plaintiff-Appellant,

v.

CITIZENS BANK OF PENNSYLVANIA,

Defendant-Respondent.

Argued November 1, 2011 - Decided March 5, 2012

Before Judges Reisner, Simonelli and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1707-09.

J. Charles Sheak argued the cause for appellant (Sheak & Korzun, P.C., attorneys; Mr. Sheak, Deborah I. Hollander and Eugene Y. Song, on the briefs).

Tod S. Chasin argued the cause for respondent (Buchanan Ingersoll & Rooney, PC, attorneys; Mr. Chasin and Joseph A. Carita, of counsel and on the brief).

PER CURIAM

Plaintiff Vollers Excavating and Construction, Inc. (Vollers), appeals from the March 4, 2011 Law Division order,

which granted summary judgment to defendant Citizens Bank of Pennsylvania (Citizens) and dismissed this matter with prejudice. We affirm.

The following facts are derived from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in a light most favorable to plaintiff. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Opus East LLC (Opus East) was the general contractor for the office complex development project known as the Mercer Corporate Center (the Mercer Project). Opus East was the sole shareholder of Mercer Corporate Center, LLC (MCC). MCC managed the Mercer Project and owned the property in Hamilton on which the office complex would be built (the property).

On October 9, 2007, MCC entered into a construction loan agreement (CLA) with Citizens for $23.3 million to finance the Mercer Project. The CLA contained the following "No Third Parties [Benefited]" clause:

> No part of the Loan proceeds will be at any time subject or liable to attachment or levy at the suit of any creditor of [MCC], or at the suit of Contractors, or any subcontractor or materialman, or any of their creditors. No party is intended to be a third party beneficiary of the Loan proceeds or this Agreement.

MCC executed two mortgage notes, one in the amount of $3.8 million and the other in the amount of $19.5 million. To secure payment of the Notes, MCC executed and delivered to Citizens a Purchase Money Mortgage and Security Agreement (the Mortgage) in the total amount of $23.3 million, and an Assignment of Rents, Leases, Agreements of Sale, Licenses and Permits (the Assignment). All contracts and subcontracts for the Mercer Project were assigned to Citizens pursuant to the Assignment; however, none of the loan documents obligated Citizens to pay MCC's or Opus East's debts to third parties, including subcontractors.

On October 30, 2007, Vollers entered into a subcontract with Opus East to perform excavation, grading and other services on the Mercer Project for approximately $3.3 million. The subcontract permitted Opus East "to assign certain rights, including rights under the Subcontract Documents, under a separate agreement with a bank or other commercial lending institution."

In the Fall of 2008, Citizens became aware that cost overruns were jeopardizing the Mercer Project's continuing viability. According to Opus East's then senior project manager, Matthew Schlindwein (Schlindwein), Opus East "wasn't doing well," and Citizens met with him and other Opus East

representatives in January 2009 to discuss the cost overruns. In May 2009, Schlindwein warned Vollers that Opus East and MCC might discontinue paying subcontractors, and that Vollers should "use [its] discretion" in deciding whether to continue working on the Mercer Project.

Opus East's parent corporation, Opus Corporation (Opus Corp.), was also facing serious financial difficulties, and met with Citizens in February 2009 to address the situation. At that time, Opus Corp. had approximately six divisions, including Opus East, that were engaged in various real estate development projects, most of which were experiencing financial difficulties. Opus East was involved in three of those development projects, including the Mercer Project.

Citizens hoped to keep Opus Corp. "out of bankruptcy," and intended to complete Opus East's development projects so that these assets could be liquidated in order to repay the Notes. Citizens required that Opus East's three development projects be cross-collateralized, cross-defaulted, and not included in Opus East's pool of assets for other lenders. Contrary to Vollers's claim, Citizens continued providing funds pursuant to the CLA, and advanced over $1 million to Opus East and over $250,000 to MCC. Vollers claimed, however, that this money was not used for the Mercer Project, but rather, to fund Opus East's other

development projects that already had "tenants ready to move in," and thus, were better suited to fulfill Citizens' goal of liquidating Opus Corp.'s assets as quickly as possible.

Vollers claimed that MCC, Opus East and Citizens executed a modified loan agreement, with an effective date of June 1, 2009,[1] which provided that Opus East would file a bankruptcy petition shortly after June 1, 2009, and Citizens would complete the Mercer Project and liquidate it. Vollers also claimed that Citizens became the de facto owner and manager of the Mercer Project because it retained the firm of CB Richard Ellis (Ellis) as the construction/project manager to oversee the remaining construction, and hired Schlindwein as a Senior Project Manager. However, the record reflects that Ellis was the receiver appointed by the Pennsylvania State court in a foreclosure action that Citizens had filed against another Opus East development project in Pennsylvania. Ellis, as the court-appointed receiver, hired Schlindwein as a Senior Project Manager for that project, not the Mercer Project.

On June 18, 2009, Vollers filed a construction lien against the property for $505,754.32, the amount it claimed it was owed for work done on the Mercer Project. On July 1, 2009, Opus East

[1] The record does not contain any modified loan agreement signed by Opus East or approved by Citizens.

and MCC filed petitions for relief under Chapter 7 of Title 11 of the United States Code, 11 U.S.C.A. §§ 701 to -784, neither of which listed Vollers as a creditor.

On July 8, 2009, Vollers filed a complaint in the Law Division that gave rise to this appeal, alleging, in part, that the Assignment obligated Citizens to pay Vollers, and Citizens was unjustly enriched by Vollers's labor and materials on the Mercer Project. In a second amended complaint, Vollers added, in part, that (1) it was a third-party beneficiary of the "trust funds" Citizens had advanced for payment for labor and materials for the Mercer Project; (2) Citizens was estopped from claiming it had no obligation to pay subcontractors; and (3) Citizens tortiously interfered with Vollers's right to receive payment by cross-collateralizing Opus East's development projects.

On August 1, 2009, MCC defaulted on the Citizens loans. On September 1, 2009, the bankruptcy court entered a consent order terminating the automatic stay as to MCC. On September 15, 2009, Citizens filed a foreclosure complaint. By that point, the Mercer Project was ninety-five percent completed. Citizens added construction lien holders to the foreclosure matter in an amended complaint filed on November 6, 2009. Citizens took possession of the property and subsequently, on October 10, 2010, sold the Notes and Mortgage to 1000 Waterview, LLC.

On December 9, 2009, Vollers filed an answer in the foreclosure matter, seeking relief similar to the relief it sought in this matter. In a May 14, 2010 order, the Chancery judge struck Vollers's answer "as non-germane to the complaint for foreclosure, or as inconsistent with the lien priority established in N.J.S.A. 2A:44A-10[.]" The judge also denied Vollers's cross-motion to dismiss the foreclosure complaint, and preserved both Vollers's right to challenge the amount due to Citizens and Vollers's right to proceed against Citizens in the Law Division matter.

Citizens filed a motion for summary judgment in the Law Division matter on February 3, 2011, arguing, in part, that as a lender, it owed no legal duty to Opus East's subcontractors, it made no promise to pay Vollers, the Assignment imposed no liability on it, and Vollers was not a third-party beneficiary.

Vollers countered, in part, that Citizens was required to pay the subcontractors because it assumed MCC's role by taking over financial and physical control of the Mercer Project; Schlindwein was Citizens' agent who induced subcontractors to continue working despite knowing that MCC was unable to pay them; Citizens improperly disbursed loan funds into different bank accounts for purposes other than the Mercer Project; Vollers is a third-party beneficiary because its subcontract was

assigned to Citizens when Citizens took over the MCC Project; the Assignment required Citizens to give Vollers notice of MCC's default; and as holder of the Mortgage, Citizens became the general contractor and arbiter of the construction trust funds.

Citizens responded that Vollers cannot obtain priority over the Mortgage through this lawsuit; Vollers is not a trust beneficiary; there is no evidence that Citizens improperly disbursed loan funds into different bank accounts, and even if it did, Vollers cited no authority showing this was improper or gave Vollers lien priority over the Mortgage; and Vollers was not entitled to notice of default because it is not a third-party beneficiary.

Judge Sumners granted summary judgment and dismissed this matter with prejudice. In an oral opinion, the judge concluded as follows:

> In this case Citizens does not have to pay for the work of subcontractors. Subcontractors contract with the general contractor, not the bank that loaned payments to the general contractor. [First Nat'l State Bank v. Carlyle House Inc., 102 N.J. Super. 300, 322 (Ch. Div. 1968), aff'd o.b., 107 N.J. Super. 389 (App. Div. 1969), certif. denied, 55 N.J. 316 (1970)]. There is no evidence that Citizens knew that [MCC] was in default and going into bankruptcy, but desired the subcontractors to continue working without pay. Additionally, a mortgagee does not have to notify anyone of a default before foreclosing. [S.D. Walker, Inc. v. Brigantine Beach Hotel Corp., 44

> N.J. Super. 193, 202 (Ch. Div. 1957)]. The mortgage does not contain any explicit language that Citizens was to notify anyone of [MCC's] default. Mr. Schlindwein was not an agent of Citizens, but appointed by the [c]ourt to be project manager for the site after Citizens sought to foreclose upon [MCC]. There's also no facts to show that Citizens cross collateralized their loans or any law . . . that somehow changes Vollers'[s] order of collecting on their lien.
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> . . . .
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> Viewing this matter in the light most favorable to the non-moving party, Vollers simply fails to show that Citizens had a duty to the subcontractors to notify of the default, and also had a duty to pay them for the services that they rendered.

This appeal followed. On appeal, Vollers raises the following contentions:

> I. The Lower Court Erred in Dismissing Vollers'[s] Claims Because Citizens Acted As The Owner Of The Project Through Its Assignment With MCC, And Improperly Cross-collateralized Loans On Other Construction Projects To Minimize Citizens' Exposure And Losses.
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> A. The Lower Court Failed To Consider The Relational Framework of Opus East, MCC, Citizens and Vollers.
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> B. The Lower Court Failed To Consider Material Facts Showing That Citizens Was Not Merely A Mortgagee But As The Equitable And *De Facto* Owner

Who Directed Completion Of The Project For Future Tenancy Or Sale.

II. The Lower Court Erred In Determining That The Entire Controversy Doctrine Applied When The Chancery Division Action Struck Vollers'[s] Answer.[2]

III. The Lower Court Erred By Failing To Apply The Recent Clarifications To The New Jersey Construction Lien Law.

IV. The Lower Court Erroneously Ruled Citizens Was Neither An Owner Of The Property Nor Holding Construction Contract Trust Funds.

V. The Lower Court Erroneously Dismissed Vollers'[s] Equitable Claim, Although Citizens Retained The Benefit of Vollers'[s] Work.

VI. The Standard Review Of An Order Granting Summary Judgment Is *De Novo*.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Coyne v. New Jersey Dep't of Transp., 182 N.J. 481, 491 (2005); Twp. of Cinnaminson v. Bertino, 405 N.J. Super. 521, 531 (App. Div.), certif. denied, 199 N.J. 516 (2009). Thus, we consider, as the trial judge did, "'whether the evidence presents a sufficient

[2] This contention lacks merit because Judge Sumners did not apply the entire controversy doctrine in granting summary judgment.

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. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, supra, 142 N.J. at 536). 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 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). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009).

We have considered Vollers's contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We are satisfied that Judge Sumners properly granted summary judgment, and affirm substantially for the reasons expressed in his well-reasoned

oral opinion rendered on March 4, 2011. However, we make the following brief comments.

A lender providing a construction loan owes no duty to an unpaid subcontractor absent the lender's express promise or assurance of payment. First Nat'l State Bank, supra, 102 N.J. Super. at 311-12. Vollers has admitted it had no communication whatsoever with Citizens. It, thus, cannot prove that Citizens made an express promise or assurance to pay it. Also, there is no evidence that Citizens' agents promised or assured payment, or directed Vollers to continue working on the Mercer Project. There also is no evidence of what work, if any, Vollers performed in reliance on any express promise or assurance of payment from Citizens or its agents. To the contrary, the evidence establishes that Schlindwein warned Vollers in May 2009 that it may not be paid and should use its discretion in continuing to work on the Mercer Project.

Vollers is not a party to any of the loan documents, and thus, has no rights thereunder, including a right to notice of default. In particular, Vollers has no rights under the Assignment because it is not a party thereto, and the Assignment did not cover Vollers's subcontract with Opus East -- it only covered contracts by and between Citizens and MCC.

There is no privity of contract between Vollers and Citizens under any of the loan documents, and there is no evidence that Vollers was an intended third-party beneficiary thereunder, including the alleged modified loan agreement. See Werrmann v. Artusa, Ltd., 266 N.J. Super. 471, 476 (App. Div. 1993).

There is no evidence that Vollers reasonably expected Citizens to pay it, or that Citizens objectively expected to pay Vollers. See Insulation Contractor & Supply v. Kravco, Inc., 209 N.J. Super. 367, 377-78 (App. Div. 1986). In fact, Vollers did not even know that Citizens had taken control of the Mercer Project until after Citizens filed its foreclosure action, which occurred after Vollers had filed its construction lien.

The Construction Trust Fund Act (CTFA), N.J.S.A. 2A:44-148, on which Vollers relies, does not apply to private construction projects, such as the Mercer Project. Hiller and Skoglund, Inc. v. Atlantic Creosoting Co., 40 N.J. 6, 20-21 (1963); Reliance Ins. Co. v. Lott Group, Inc., 370 N.J. Super. 563, 573 (App. Div.), certif. denied, 182 N.J. 149 (2004). Even if the CTFA applied, it only applies to general contractors or other parties who receive funds for the construction project, not to lenders who supply the funds, such as Citizens. See N.J.S.A. 2A:44-148 (the CTFA creates a trust only when the funds are "in the hands

of such person as such contractor"); see also Am. Lumberman's Mut. Cas. Co. of Ill. v. Bradley Constr. Co., 127 N.J. Eq. 500, 508 (Ch. 1940), aff'd, 129 N.J. Eq. 278 (E. & A. 1941) (noting that the statute's purpose "was to charge payments on account of contracts for public works with a trust in favor of laborers and materialmen only so long as such payments remained in the contractor's hands").

There is no evidence that Citizens maliciously interfered with Vollers's subcontract or harmed Vollers's economic interests, and the alleged modified loan agreement does not establish malice. See Dello Russo v. Nagel, 358 N.J. Super. 254, 268 (App. Div. 2003) (holding that "the fact that a breaching party acted 'to advance [its] own interest and financial position' does not establish the necessary malice or wrongful conduct" (quoting Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 451-52 (App. Div.), certif. denied, 71 N.J. 503 (1976))).

Finally, this is not a lien priority action; it is a money damages action based on Citizens' alleged duty to pay Vollers. Accordingly, the New Jersey Construction Lien Law, N.J.S.A. 2A:44A-1 to -38, does not apply.

Affirmed.