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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

« Citation
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DOCKET NO. A-o

PONEMAH RIVERBANK, L.L.C., ONEKEY,
L.L.C., PAULA O'NEILL, and FINBAR
O'NEILL,

Plaintiffs-Appellants/
Cross-Respondents,

v.

THE PROVIDENT BANK,

Defendant-Respondent/
Cross-Appellant.

September 18, 2014

Argued September 9, 2014 – Decided

Before Judges Yannotti, Fasciale and Hoffman.

On appeal from Superior Court of New Jersey, Law
Division, Bergen County, Docket No. L-10250-11.

Craig B. Johnson argued the cause for
appellants/cross-respondents.

Arthur L. Raynes argued the cause for
respondent/cross-appellant (Wiley Malehorn Sirota &
Raynes, attorneys; Mr. Raynes, of counsel and on the
brief; Carolyn C. Duff, on the brief).

PER CURIAM

Ponemah Riverbank, L.L.C. ("Ponemah"), Onekey, L.L.C. ("Onekey"), and Paula and Finbar O'Neill ("the O'Neills") (collectively referred to as "plaintiffs") appeal from orders granting defendant's Rule 4:6-2(e) motions to dismiss the O'Neills' complaint and amended complaint, and an order granting summary judgment to defendant dismissing the remaining claims of Ponemah and Onekey. Defendant cross-appeals from an order denying its motion for counsel fees. We affirm on the appeal and cross-appeal.

Plaintiffs are sophisticated parties in the business of real estate development. Ponemah is a real estate developer, and Onekey is a general contractor for Ponemah's development projects. Paula O'Neill is the sole member of Ponemah and Onekey. Finbar O'Neill is heavily involved with Onekey and Ponemah's operations. In April 2008, defendant issued a line of credit (LOC) to Onekey (the "Onekey LOC") in the amount of \$1 million, which defendant renewed in June 2009. Onekey never drew on this LOC. In March 2010, Ponemah obtained from defendant a LOC (the "Ponemah LOC") in the amount of \$2 million, which provided that "[r]equests for borrowing under the [Ponemah LOC would] be subject to [defendant's] approval, in [defendant's] sole discretion." The O'Neills personally guaranteed both LOCs.

In June 2010, defendant permitted Ponemah to draw \$220,000 from the Ponemah LOC. On June 22, 2010, however, an article appeared in the newspaper reporting that Finbar O'Neill had pled guilty to unrelated federal bribery charges and forfeited \$325,000.¹ Defendant then refused to permit Ponemah to make a second

draw of \$1.3 million from the Ponemah LOC. Thereafter, the Onekey LOC expired, and in early 2011, defendant terminated the Ponemah LOC.

Plaintiffs filed a complaint against defendant seeking compensatory and punitive damages, alleging violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -195; common law fraud; and breach of contract. Defendant filed its first Rule 4:6-2(e) motion contending that plaintiffs failed to state a cause of action upon which relief could be granted. Plaintiffs opposed the motion and cross-moved seeking leave to amend their complaint.

On March 16, 2012, Judge Susan J. Steele issued an order and a comprehensive fourteen-page written decision. The judge granted that part of defendant's motion seeking to dismiss the O'Neills' claims, denied defendant's motion seeking to dismiss the claims of Ponemah and Onekey, and granted plaintiffs' cross-motion allowing them to file an amended complaint. Judge Steele stated:

The complaint . . . allege[s] facts sufficient to establish a cause of action under [the] CFA solely for Ponemah and Onekey, as those entities were directly affected by the [LOCs], however, the facts do no[t] support a cause of action under [the] CFA for [the O'Neills]. The [LOCs] were taken out for the benefit of the companies and the [alleged] loss of the available funds directly affected the companies, while the [O'Neills] provided guaranties to further secure the [LOCs]. As such, the CFA claim brought by [the O'Neills] against the defendant is dismissed.

....

[T]he complaint set[s] forth sufficient claims for breach of contract and breach of covenant of good faith and fair dealing with respect to Ponemah and Onekey, but not with respect to [the O'Neills].

....

As to [the O'Neills], other than alleging the individuals were personal guarantors for the [LOCs], nothing in the complaint suggests [that] either was a direct party to the [LOCs]. While Paula [O'Neill] is the sole member of

Ponemah and Onekey, it was the entities who were parties to the contracts[,] not the individual, and it was the entities which purportedly lost the business opportunities. The complaint also fail[s] to allege which contracts, if any, [that] Finbar [O'Neill] was a party to.

....

[T]he fraud . . . concern[s] only Ponemah and Onekey . . . [because they] suffered the loss as a result of allegedly being fraudulently induced into entering the [LOCs]. As such, the defendant's request to dismiss the claims against it premised upon [the common law fraud] count for the [O'Neills] is granted, and denied as to [Ponemah and Onekey].

In March 2012, plaintiffs filed their amended complaint, in which the O'Neills alleged, in part, that defendant breached their personal guaranty agreements. Defendant filed another Rule 4:6-2(e) motion. On June 11, 2012, the judge granted the motion and dismissed the amended claims of the O'Neills. In recognizing that the O'Neills' obligations under the LOCs are triggered if Ponemah or Onekey defaulted, but not if defendant refused to extend credit to Ponemah or Onekey, the judge stated: "While the amended complaint repeatedly provide[s] [that] the defendant breached the guaranty agreements . . . thereby causing damages, the damages . . . apply only to Ponemah and Onekey, who purportedly lost business and revenue as a result of not having the relied upon cash flow from the [LOCs]." Similarly, regarding the CFA and common law fraud claims, she stated:

While [the O'Neills] may take the position [that] their business[es] affect[] them, the loss of business revenue . . . was not theirs.

....

Here, the [O'Neills] assert[] [that defendant] fraudulently induced their execution of the guaranties, however, the [O'Neills] are not seeking to void the enforcement of the guaranties on the grounds of purported fraud[,] and instead merely assert [that defendant] induced their agreement. The damages, as previously discussed, were the companies [allegedly] losing business.

Defendant then filed its motion for summary judgment, requested attorney fees, and sought to dismiss the remaining claims. On September 19, 2013, the judge granted defendant's motion for summary judgment, but denied the request for fees.² The judge stated:

Even if this court were to find that the CFA applied to the Onekey and Ponemah [LOCs], plaintiffs have failed to proffer any evidence of defendant's underlying liability. . . . The court finds nothing in the record demonstrating misrepresentations made on behalf of defendant, unconscionable practices, or [defendant's] intent to defraud. Furthermore, there is no evidence of definitive ascertainable loss on the part of plaintiffs. . . .

Similarly, plaintiffs have failed to establish [that] a genuine issue of material fact exists as to their breach of contract claims. . . . The court does not find any language in the Onekey [LOC] that obligated [defendant] to renew the [LOC]. The maturation date was clear on the face of the [Onekey LOC], and plaintiffs have not provided any evidence to support the contention that [defendant] was either obligated to renew the [LOC] past the . . . maturation date, or promised to renew the [LOC].

Furthermore, plaintiffs cannot adequately establish a claim for the breach of the covenant of good faith and fair dealing. . . . [T]he record is devoid of any indication that bad faith was demonstrated by [defendant]. Finbar [O'Neill's] federal criminal indictment provided [defendant] with sufficient grounds to forego renewal of the [Ponemah LOC]. Furthermore, the parties' submissions indicate that [defendant] offered to extend the [Onekey LOC] for six months, on terms similar to the Ponemah [LOC], but Onekey did not accept the offer. [Defendant] was not obligated to renew the Onekey [LOC] based on the express language in the agreement, and there is simply nothing in the record that establishes [defendant's] bad faith. . . .

The express language of the [Ponemah LOC] provided that loan requests were subject to [defendant's] approval. . . . Furthermore, plaintiffs did not make a proper draw request in compliance with the terms of the [Ponemah LOC]. As per the language of the contract, plaintiffs were required to submit five days' prior written notice to [defendant] of their wish to borrow under the loan. Plaintiffs were also required to state the purpose of

the advance and the amount requested, and [also] supply the bank with a written profit and loss projection. However, there is nothing to indicate that a properly submitted request for the [second draw] was made.

As to defendant's request for attorney fees, the judge stated the following:

The court finds . . . that [defendant] is not entitled to attorney fees and costs. The language of the Onekey [LOC] provides that [defendant] is entitled to costs and expenses of collection of the Note and any judicial or non-judicial enforcement of [defendant's] rights under the Note. . . .

. . . .

A plain reading of the Onekey [LOC] indicates that enforcement of [defendant's] rights relates to collection under the Note. Therefore, defendant is not entitled to attorney fees and costs pursuant to the Onekey [LOC].

On appeal, plaintiffs argue that the judge erred by granting defendant's Rule 4:6-2(e) motions dismissing the O'Neills' claims. Plaintiffs further contend that the court erred by granting defendant's motion for summary judgment. On the cross-appeal, defendant maintains that the judge erred by denying its request for attorney fees.

I.

We review a grant of a motion to dismiss a complaint for failure to state a cause of action de novo, applying the same standard under Rule 4:6-2(e) that governed the trial court. See Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010), certif. denied, 205 N.J. 317 (2011). "[I]n reviewing a complaint dismissed under Rule 4:6-2(e)[,] [the court's] inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Green v. Morgan Props., 215 N.J. 431, 451 (2013) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). "[P]laintiffs are entitled to every reasonable inference of fact," and "[t]he examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and

hospitable approach." Id. at 452 (quoting Printing Mart-Morristown, supra, 116 N.J. at 746). "[T]he test for determining the adequacy of a pleading [is] whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown, supra, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Applying these standards, we conclude that the judge correctly dismissed the O'Neills' claims.

Regarding the CFA, plaintiffs' alleged that the parties' transactions involved customized commercial LOCs, which were generally unavailable to the public. The CFA makes it unlawful to use any commercial practice, deception, or fraud in connection with the sale of any merchandise or real estate. N.J.S.A. 56:8-2. However, the LOCs are not considered merchandise, as defined in the CFA. See N.J.S.A. 56:8-1(c) (stating that merchandise includes "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale"). "[I]t is the character of the transaction, not the identity of the purchaser, which determines whether the CFA is applicable." Finderne Mgmt. Co. v. Barrett, 402 N.J. Super. 546, 570 (App. Div. 2008). Here, plaintiffs' allegations demonstrate that plaintiffs are sophisticated parties in the business of real estate development; that the Ponemah LOC was "one component of a course of banking business that had been previously established" among defendant, Ponemah, Onekey, and the O'Neills; and that defendant's due diligence before extending the Ponemah LOC was "protracted." Thus, the character of the transactions between the parties shows that the LOCs are not considered merchandise and renders the CFA inapplicable. See Princeton Healthcare Sys. v. Netsmart N.Y., Inc., 422 N.J. Super. 467, 473-74 (App. Div. 2011) (holding that a heavily negotiated contract between sophisticated parties for the installation of a customized, complex computer system was not merchandise under the CFA).

Likewise, the O'Neills' common law fraud claims do not survive defendant's Rule 4:6-2(e) motion. There are five elements to common law fraud: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). The O'Neills failed to allege sufficient knowledge or belief by defendant of the falsity of a representation. As discussed above,

the trial court also properly found the O'Neills' fraud claim failed because they suffered no damages.

Finally, the O'Neills failed to make a cognizable breach of contract claim. They alleged that defendant breached the Ponemah LOC agreement and acted in bad faith by refusing to renew the Onekey LOC agreement, but these allegations were insufficient as to the O'Neills because they were not parties to the LOC agreements. Similarly, the facts pled in the amended complaint fail to suggest a cause of action. We have previously refused to recognize a similar claim by a guarantor of debt against a creditor, and we again do so here. See DeAngelis v. Rose, 320 N.J. Super. 263, 278 (App. Div. 1999) (noting that "[u]nder our law, there is no special relationship created between a guarantor and the creditor").

II.

The judge properly granted summary judgment to defendant. In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governed the trial court. Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 564 (2012). We must "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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Against this standard, we see no error and affirm substantially for the reasons expressed by the judge. We add the following brief remarks.

The judge correctly concluded that plaintiffs' CFA and common law fraud claims were unsupported by the record. In addition to the inapplicability of the CFA, plaintiffs produced no credible evidence to show "misrepresentations made on behalf of defendant, unconscionable practices, or [defendant's] intent to defraud."

Regarding plaintiffs' breach of contract claim, the Ponemah LOC gave defendant discretion to approve or reject draw requests. It is undisputed that Finbar O'Neill was convicted of federal crimes, which served as a sound basis for defendant to reject Ponemah's draw request.

III.

Finally, we reject defendant's argument on its cross-appeal that the judge erred by denying the motion for counsel fees. The Onekey LOC agreement stated in pertinent part that "[b]orrower agrees to pay [defendant] upon demand all reasonable costs and expenses of collection of this Note (including the fees and expenses of in-house and outside counsel), and any judicial or non-judicial enforcement of [defendant's] rights under the Note" Here, defendant defended against plaintiffs' allegations of wrongdoing, rather than enforcing defendants' rights under the Note. As a result, counsel fees are unavailable to defendant.

After reviewing the record and the briefs, we conclude that plaintiffs' remaining arguments are without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), and affirm substantially for the thoughtful reasons expressed by Judge Steele.

Affirmed.

certify



1 The federal conviction also subjected Finbar O'Neill to deportation hearings.

2 Judge Steele filed an extensive amplification of reasons in further support of her decision.

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