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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

CABLEVISION OF OAKLAND, LLC,

Plaintiff-Respondent,

v.

CK BERGEN HOLDINGS, LLC,

Defendant-Appellant.

Telephonically argued February 6, 2014 – Decided March 11, 2014

Before Judges Alvarez and Ostrer.

On appeal from the Superior Court of New Jersey, Chancery

Division, Bergen County, Docket No. C-159-12.

Steven A. Lang argued the cause for appellant (Pressler and Pressler, LLP, attorneys; Mr. Lang, on the briefs).

Eric A. Inglis argued the cause for respondent (Schenck, Price, Smith & King, LLP, attorneys; Mr. Inglis, of counsel and on the brief).

PER CURIAM

CK Bergen Holdings, LLC (CKBH), a commercial landlord, appeals from two General Equity Part orders: (1) a November 26, 2012, order compelling CKBH to execute a certain amendment to its lease to plaintiff Cablevision of Oakland, LLC (Cablevision), and awarding Cablevision fees; and (2) a January 11, 2013, order establishing the fees due in the amount of $10,132.77. Having reviewed defendant's arguments in light of the facts and applicable law, we affirm.

I.

Cablevision leased a 58,294-square-foot office building in Oakland, Bergen County, from McBride Properties, a New Jersey general partnership, on April 3, 1990.[1] We presume that at some point, CKBH acquired the property and the lease, but the record does not illuminate the issue.

The lease's initial term was twenty years from the date of occupancy, which was November 11, 1992, with an option to extend for four consecutive five-year terms, denominated "Option Terms." The rent during each five-year extension was to be set at the fair market value at the time, as determined by appraisers selected by the parties, pursuant to a methodology, and based on comparables, described in the lease. If the two appraisers could not agree, then they would appoint a third one, who would determine the value. If the two appraisers could not agree on a third appraiser, then the parties would ask the court to appoint the third appraiser.

Paragraph 46 of the lease describes the area from which the appraisers were required to select comparable properties for consideration:

> (i) The Basic Rent during each Option Term shall be a fair market rental determined as set forth below.
>
> . . . .
>
> (iii) The fair market rental of the Premises for each Option Term, as the case may be shall be determined by comparing comparable parcels of land and buildings of similar age, style and use within a 20 mile radius of the Premises, including but not limited to the towns of Wayne, Fairlawn [sic], Paramus, Mahwah, Verona, Montclair, Little Falls, West Paterson and Parsippany ("Area").

The lease states that "all appraisers, in determining fair market rental shall be instructed to take into consideration in their appraisal" certain enumerated facts. They are:

> the value of the improvements to the Premises paid for by Tenant; whether as extra materials and work or as alterations; that the extensions shall be on an "as is" basis; that no vacancy and no releasing expenses will be involved (including, without limitation, no advertising, tenant fix-up, contribution towards work or rent concession and legal); and the amount of any brokerage payable by Landlord in connection with such extension, which will be on a lease extension, rather than a new lease basis.

The lease states that the third appraiser's decision "shall be final." The lease provided that all appraisers have at least seven years of experience in the "Area" as defined, and have a M.A.I. certification.[2]

In brief, the parties' respective appraisers could not agree on a fair market rental. Cablevision's appraiser, Paul W. Korch of Cushman & Wakefield of New Jersey, Inc., opined that the fair market rent was $12 a square foot as of March 16, 2012. CKBH's appraiser, Louis S. Izenberg of Izenberg Appraisal Associates, opined that the fair market rent as of the same date was $25 a square foot, assuming a ten-year lease term. Korch considered comparable leases of office buildings in Paramus, Lyndhurst,

Montvale, Ridgefield Park, and Elmwood Park. Izenberg considered comparable leases of two office buildings in Parsippany, and one in Woodcliff Lake.

In addition to disagreeing about fair market rent, the two appraisers did not agree on the selection of a third appraiser. In May 2012, Cablevision sought the court's appointment of a third appraiser.

Eventually, the parties entered into a June 2012 "consent judgment" entered by Judge Peter E. Doyne. The consent judgment included recitals referring to the lease and paragraph 46. Among other things, the judgment required the parties' appraisers to try to agree on the fair market rent "pursuant to Paragraph 46 of the Lease." Like the lease, the judgment required the two appraisers to appoint a third one; and if they failed to do so, then the court would appoint a "Court-Appointed Appraiser" who, as under the lease, had to be M.A.I. certified and have seven years of experience in the "Area," as defined in the lease. The judgment provided that within thirty days of the appraiser's written determination, the parties were required to execute an amendment to the lease incorporating the option rent that the appraiser determined.

Pursuant to that judgment, Judge Doyne ultimately appointed an appraiser, Sean Cooney of Cooney Bovasso Realty Advisors, Inc. Before doing so, both parties consented to Cooney's

appointment. They also provided Cooney with the reports of their respective appraisers.

Cooney ultimately concluded that the fair market rent was $11 a square foot. He considered comparable leases of office buildings in Fair Lawn, Montvale, Ramsey, and Oakland. Cablevision thereafter presented CKBH with a signed lease amendment embodying Cooney's conclusion. Cooney did not expressly consider the value of improvements, or a brokerage commission to be paid by CKBH. CKBH refused to execute the amendment, and instead proposed various revisions, including a rent of $23.94.

Cablevision filed a motion in aid of litigant's rights under Rule 1:10-3. CKBH responded that the court should reject the Cooney appraisal. CKBH argued that Cooney failed to comply with Paragraph 46, which, CKBH asserted, required Cooney to analyze comparable leases of office buildings in at least the nine named municipalities — Wayne, Fair Lawn, Paramus, Mahwah, Verona, Montclair, Little Falls, West Paterson and Parsippany (Named Municipalities). CKBH also argued that Cooney failed to consider tenant improvements, and CKBH's obligation — evidenced by a certification supplied to the court — to pay a commission to McBride Corporate Real Estate. Also, CKBH complained that Cooney issued his opinion one day after the court's deadline.

After oral argument, Judge Doyne rejected CKBH's arguments:

First, defendant argues that the fair market rent set forth in the Cooney Appraisal was not determined in accordance with the terms of the Lease as Cooney did not compare properties from all of the nine (9) towns listed for comparison in Paragraph 46 of the Lease.

. . . .

Defendant argues that the use of the word "shall" means that any fair market rental value must be determined by a comparison of comparable parcels in every town listed. Thus, defendant argues, because Cooney only compared parcels in four towns and did not mention the remaining five towns, his report does not comply with the Lease. Defendant's strained reading has no merit.

The structure of the paragraph and the conduct of the parties do not suggest that parcels from every listed town must be compared or mentioned in order to have an adequate appraisal. Most notably, as to the parties' conduct, defendant has relied on the Izenberg Appraisal since March 16, 2012, which determined a fair market rent value by comparing parcels from only one of the listed towns, Parsippany, and another unlisted town, Woodcliff Lake. . . . A more appropriate interpretation of the paragraph, based on defendant's own conduct, is that parcels should be compared from at least some of the listed towns to the extent possible, although others may also be considered. Overall, it would be

nonsensical, as defendant's appraiser apparently agreed, to insist each appraiser compare at a minimum nine parcels from nine separate towns merely because the word "shall" is used earlier in the paragraph at issue. Further, this presupposed, and probably incorrectly, there are comparable properties in each of the nine listed towns. Accordingly, defendant's first argument, while creative, cannot stand.

Second, defendant argues that the Cooney Appraisal is flawed because it failed to take various features of the property into consideration as directed in the Lease. These features include improvements to the Premises paid for by Tenant; that the extension shall be on an "as is" basis; that no vacancy and no releasing expenses will be involved; and the amount of any brokerage payable by landlord in connection with such extension.

Regarding the first three features mentioned, even if these were not "taken into consideration," they all would further plaintiff's interest rather than defendant. As to the final feature, brokerage fees, defendant's expert, Izenberg, specifically stated that the "appraiser is to assume that . . . no offsets for commission and other related transactional costs are to be considered." . . . Defendant now attempts to argue that there are brokerage commissions and that Cooney would have discovered this if he had contacted defendant. Cooney did, however, have the report of defendant's expert, which specifically noted there were no brokerage commissions to be considered. As defendant has

> already stated, through its expert, that there are no brokerage fees, defendant is judicially estopped from now arguing that such fees exist and that the Cooney Appraisal was somehow deficient for not including them. Further, if such a contention was to be seriously considered, there is no explanation why defendant's counsel did not provide the relevant information to Cooney prior to his appraisal being prepared. Accordingly, defendant's second argument has no merit.
>
> Finally, defendant argues that the Cooney Appraisal must be ignored entirely as it was submitted one day later than the deadline in the Order. Considering defendant's continual delays, its continual failure to negotiate or respond in a timely manner, its general uncooperative stance, and the de minimis nature of the single-day delay, there is no reason to find that the Appraisal is deficient for having been submitted on August 24, 2012 instead of August 23.
>
> [Footnotes and emphasis omitted.]

The court issued its order enforcing litigant's rights, and the order calculating the fees due. This appeal followed.

II.

In its appeal, CKBH renews the three points it presented to the trial court. In particular, citing an unpublished opinion of our court, defendant argues that an appraiser's decision may be

reviewed for an error of law. We affirm substantially for the reasons set forth in Judge Doyne's opinion. We add the following comments.

We review the trial court's interpretation of the lease de novo, as it pertains to a matter of law. Kieffer v. Best Buy, 205 N.J. 213, 222-23 & n.5 (2011) ("The interpretation of a contract is subject to de novo review by an appellate court."). However, we discern no error in the trial court's interpretation.

In interpreting a contract, we generally turn first to a contract's plain language. Id. at 223. We seek to ascertain "the reasonably certain meaning of the language used, taken as an entirety, considering the situation of the parties, the attendant circumstances, the operative usages and practices, and the objects the parties were striving to achieve." George M. Brewster & Son, Inc. v. Catalytic Constr. Co., 17 N.J. 20, 32 (1954). Thus, we look to the intention of the parties as revealed by the language used, and also extrinsic evidence, such as the parties' subsequent dealings. Michaels v. Brookchester, Inc., 26 N.J. 379, 388 (1958). See also Twp. of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 77 (App. Div. 2011) (considering course of performance in construing vague or ambiguous contract provisions). "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." Restatement (Second) of Contracts § 202(4) comment g (1981).

Applying these principles, it is plain that the Named Municipalities were only examples of municipalities within the twenty-mile radius of the property — or "Area" as defined — from which the appraiser was required to select comparable properties. It is well-settled that the phrase "including but not limited to" is used to convey an unrestricted list of examples. Cooper Distrib. Co. v. Amana Refrigeration, Inc., 63 F.3d 262, 280 (3d Cir. 1995) (interpreting New Jersey law). The "including but not limited to" phrase is used to counter the possible application of the ejusdem generis rule. Ibid. See also Bryan A. Garner, Dictionary of Modern Legal Usage, (3d ed. 2011) (stating that the phrase "including but not limited to" is "intended to defeat three canons of construction: inclusio unius est exclusio alterius ('to express one thing is to exclude the other'), noscitur a sociis ('it is known by its associates'), and ejusdem generis ('of the same class or nature')").

In Cooper, supra, the court interpreted a provision of a distributorship agreement that permitted Amana to sell its products directly or through other channels, "including but not limited to" sales through eight identified channels. The Third Circuit rejected the distributor's argument that Amana's sale through a channel not among the eight named ones was at odds with the provision. 63 F. 3d at 280. Likewise, Cooney's reference to comparables outside the Named Municipalities was not barred by the lease. The Named Municipalities were merely examples.[3] The mandate in the lease pertained to comparables within the

twenty-mile radius, not necessarily within the Named Municipalities.

Our interpretation is consistent with that of the parties' respective appraisers. Neither one interpreted the lease to require utilization of a comparable from each of the Named Municipalities. The parties' "action under" the lease is strong evidence of the provision's meaning. See Restatement (Second) of Contracts § 202(4) comment g (1981).

We are also unpersuaded by CKBH's argument that the court was empowered to review the appraiser's decision for an error of law, or a misinterpretation of the parties' lease. We held in Cap City Products Co. v. Louriero, 332 N.J. Super. 499 (App. Div. 2000), that review of a business valuation appraiser is afforded the same finality as an arbitrator's decision. Thus, it is reviewed only for fraud, corruption, or similar wrongdoing. Id. at 504 (citing Tretina Printing, Inc. v. Fitzpatrick & Assocs., 135 N.J. 349, 358 (1994)). We recognized that the Court in Elberon Bathing Co. v. Ambassador Insurance Co., 77 N.J. 1 (1978) reached a different conclusion. Cap City, supra, 332 N.J. Super. at 508. However, we deemed Elberon modified by Tretina. Ibid.[4] See generally Keith Sharfman, Contractual Valuation Mechanisms and Corporate Law, 2 Va. L. & Bus. Rev. 53 (2007) (arguing that intrusive judicial review of contractual valuation methods undermines an alternative designed to avoid valuation litigation). Moreover, in this case, the parties did not simply refer the determination of fair

market rental to an independent appraiser. They expressly agreed that the appraiser's decision "shall be final." We discern no basis in the facts before us to relieve either party from their agreement in that respect.

CKBH's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

[1] The record indicates that as of 2012, the property consisted of 60,994 square feet of rentable space.

2 The Appraisal Institute offers the designation, Member, Appraisal Institute, or M.A.I.

3 They consist of suburban municipalities and not urban industrialized cities or largely rural towns within the twenty-mile radius.

4 We are unpersuaded by the decision of the Court of Appeals for the Tenth Circuit, which, interpreting New Jersey law, found that Elberon retains vitality. Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc., 454 F.3d 1128, 1134-36 (10th Cir. 2006).

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