SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1190-15T1

JOSEPH R. TORRE,

Plaintiff-Appellant,

v.

MICHAEL J. GEARY, KEVIN HEFFERNAN, and EAST CRESCENT MANAGEMENT, CO., INC.,

Defendants-Respondents.

Submitted March 9, 2017 – Decided March 24, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. C-233-14.

Carluccio, Leone, Dimon, Doyle & Sacks, L.L.C., attorneys for appellant (Marguerite Kneisser, on the briefs).

Greenberg Dauber & Epstein, attorneys for respondents (Linda G. Harvey and Sheryl L. Reba, on the brief).

PER CURIAM

Plaintiff Joseph R. Torre, an attorney, filed a verified complaint in the Chancery Division to enforce a settlement with

defendants Michael J. Geary, Kevin T. Heffernan, and East Crescent Management Company (EMC). Defendants counterclaimed to enforce the parties' settlement, and asserted other, related claims. Defendants then filed a motion to enforce the settlement, and plaintiff filed his opposition and a motion to disqualify defense counsel. On June 26, 2015, following oral argument, the court ruled in favor of defendants and entered an order enforcing the settlement and denying plaintiff's cross-motion to disqualify defense counsel.[1] On November 9, 2015, the court denied plaintiff's motion for reconsideration.

Plaintiff filed this appeal challenging three of the trial court's rulings. First, plaintiff contends his "waiver of fees was expressly conditioned upon [defendants'] proof of his failure to collect CAM II payments," which defendants never produced, so the trial court should not have released all parties' claims against one another. Second, plaintiff argues defendants' October 22, 2014 anti-dilution agreement lacked many of the "critical" "protections" he had previously requested, so the trial court improperly included defendants' October 22, 2014 anti-dilution agreement as part of its order enforcing the parties' settlement. Third, the trial court should have disqualified defense counsel

[1] The court dismissed the case with prejudice on July 16, 2015, after all counsel agreed the court's June 26, 2015 decision resolved all issues in the case.

because plaintiff was a "former client" of defense counsel. The record does not support plaintiff's contentions. We therefore affirm.

I.

Plaintiff filed ECM's certificate of incorporation on April 23, 2003. At the time of incorporation, Geary received fifty-seven percent of ECM's voting shares, Heffernan received thirty-eight percent, and plaintiff received five percent. Geary and Heffernan formed ECM to purchase an option on a fifty-percent interest in a Ramsey office building, which ECM now leases to tenants. According to plaintiff, Geary and Heffernan owned the company that sold ECM the option, while their old company was merging with another tenant of the building. Plaintiff also certified he "was to obtain a [five-percent] interest in ECM for [his] management responsibilities." His five-percent interest "called for [seven] years of management and would vest on June 1, 2011." Plaintiff served as ECM's counsel and property manager until May 31, 2011. In January 2005, plaintiff purchased six percent of ECM's voting shares from Geary and four percent from Heffernan.

On January 8, 2004, plaintiff signed a certificate of limited partnership for ECM Realty L.P., listing ECM as its general partner, and plaintiff as ECM's president. The certificate stated

partners' contributions of "$1,000 cash," but listed no other assets. The limited partnership agreement for ECM Realty L.P. listed Geary, Heffernan, and Torre as limited partners. Defense counsel worked on the formation of ECM Realty L.P. On February 3, 2010, plaintiff emailed Heffernan, writing ECM "is not an LLC although we formed one years back, we used the Corp. format and believe it was found that the LLC and Corp both were not necessary." Plaintiff explained, "Therefore there is no active 'LLC' (at least we never had a bank account for one) and only one account. ECM Inc." Heffernan certified plaintiff "mistakenly refer[red] to Realty LP as an LLC." The record does not show ECM Realty L.P. ever had an interest in the Ramsey office building or ECM.

Sometime around 2010, Geary and Heffernan began to suspect plaintiff of mismanagement of the office building. A tenant audited ECM's charges and identified some charges as improper. The tenant withheld some of its monthly rent and terminated its lease early. After arbitrating their disagreements, ECM paid $675,000 to the tenant. According to Geary, "Together with the withheld rent, the payments to the tenant and legal costs, ECM was out of pocket more than $1,000,000 as a result of [plaintiff's] mismanagement."

Geary and Heffernan alleged plaintiff committed other misdeeds, including "fail[ing] to charge another tenant for utility usage, thereby depriving ECM of approximately $750,000 in revenue" and "fail[ing] to pay rent and common area maintenance charges for the legal office he occupied in the building." They also alleged "he paid himself legal fees that were not approved or authorized and failed to keep proper books for ECM," and also "created fraudulent stock certificates making himself the only voting shareholder." On June 1, 2011, they replaced plaintiff as ECM's counsel and property manager.

Plaintiff disputed Geary and Heffernan's allegations. He certified the tenant took ECM to arbitration because Geary and Heffernan failed to tell the tenant about their old company's option to purchase fifty-percent interest of the Ramsey office building during the merger of their old company with the tenant. According to plaintiff, the tenant "alleged that [Geary] and [Heffernan] fraudulently misrepresented financial transactions in the sale of [their old company] to [the tenant] to the extent of an approximate $1,500,000 . . . fraud." After this issue arose, the tenant found a common area maintenance (CAM) "calculation error." Plaintiff certified, "An inadvertent overcharge of CAM . . . charges is, as [d]efendants know well, . . . an 'overage in' and an overage 'backed out' and so is a wash." Plaintiff also

alleged Geary "directed ECM's accountants to book $65,347 of my legal fees as loans."

On August 20 and 27, 2014, the parties met to negotiate a settlement of their disputes. Plaintiff maintained ECM still owed him $85,374.93 in attorney's fees. Geary and Heffernan maintained plaintiff "had not collected [CAM II] charges from tenants."

Later on August 27, 2014, plaintiff's counsel sent an email to defense counsel, confirming the parties had reached a settlement. Plaintiff's counsel wrote, "It was a pleasure to work with you in resolving the disputes among our clients. I think it was the best result for all parties, even though my client feels that he gave up too much of his fees." Plaintiff's counsel then provided a "recap [of] the settlement" under seven points:

> 1. Both sides have dropped their respective claims for payment and/or reimbursement of fees, CAM II payments, and rent during JRT tenancy and management of ECM from today and prior management/occupancy and service;
>
> 2. Both sides will execute non-dilution agreement and Rider as discussed today;
>
> 3. Draws will resume when cash flow permits and loans to shareholders will be paid in a priority at the rate of [five percent] per annum from [fifty percent] of the available cash flow. The shareholders shall distribute [fifty percent] of the remaining and available funds as distributions pro rata after the Goldman Loan and ordinary monthly expenses are paid pro rata;

4. My client will receive monthly accounting and management reports in the ordinary course and annual tax returns and tax documents prepared by SXBST;

5. ECM will pay [plaintiff's counsel] $20,000 of a reduced bill in two installments of $10,000.00 in consideration [for] time spent and fees incurred on behalf of JRT in this matter ([Plaintiff's counsel] will send an Invoice reflecting same tomorrow);

6. ECM will pay for your time as attorney, kindly send us any billing and records for JRT review; and

7. Both sides will communicate and discuss issues freely, without counsel, in order to assist in the management of the operation and preservation of the asset and real estate interest held by ECM.

Defense counsel replied to the email the next day. He wrote, "I am basically OK with your recap but, as I discussed with you today, I have one correction and a few additions." First, point three "should say 'after the Goldman interest payment.'" Defense counsel stated the parties would defer paying the principal because of the "favorable interest rate. The Board of Directors will decide at a later date as to amortization or pay off of the loan. Any such decision will affect all shareholders proportionately to their shareholdings." Second, "the shares of the Company stock will be re-issued so that [Geary] will have [fifty-one] shares, [Haffernan] [thirty-four] shares and [plaintiff] [fifteen] — all

to be voting common." Defense counsel added, "The limited partnership will be officially dissolved and the by-laws presented by [plaintiff] will be officially adopted and sent to Goldman as a replacement of those originally presented to them."

On September 18, 2014, defense counsel sent plaintiff a draft anti-dilution agreement and shareholders voting agreement for his review. On October 6, 2014, plaintiff's counsel sent defense counsel a letter regarding finalizing the anti-dilution agreement and shareholders voting agreement. Plaintiff's counsel included "a definitional section and expounded explanation of responsibilities." Plaintiff's counsel also wrote plaintiff "agreed in good faith to forgive [his] $85,345.00 legal fee claim (and more) against ECM, and your clients conversely agreed to wash-out the (alleged greater) shortfall of Tenant CAM, claimed to have been paid, in actuality, by their supportive loans to ECM." He continued, "While settled, however, the condition subsequent to prove the CAM QuickBooks summary is not yet produced. Can you do so promptly?"

On October 9, 2014, defense counsel replied to the comments of plaintiff's counsel. He wrote, "I have kept what I thought was reasonable and helpful in [the] revisions, but I have eliminated items that were never agree[d] to and mostly never even discussed at our settlement meetings." Defense counsel also included a

draft shareholders voting agreement, mutual release agreement, and a unanimous consent of shareholders and directors. Defense counsel included the other items he eliminated "in the binding settlement agreement where they belong."

On October 22, 2014, defense counsel sent another letter to plaintiff's counsel. He wrote, "Pursuant to the settlement there were a few clean-up items to take care of." First, he addressed the wording of the anti-dilution agreement:

> At the meeting, [plaintiff] presented his version of the Amendment. We all reviewed the terms item by item and agreed upon changes at that time. The major anti-dilution provisions were accepted, but [plaintiff] wanted it made clear that he wanted certain relevant provisions to include three factors. Those three factors were (1) proportional treatment (pro-rata to shareholding), (2) arms-length and (3) no disproportionate or special arrangements for the benefit of a shareholder in any dealing with third parties. I revised the Amendment accordingly, using [plaintiff's] definition of "Special Arrangement" and attaching the revised Amendment as agreed upon at the settlement meeting. We categorically reject [plaintiff's] later attempt to make further changes and add additional provisions that were never agreed upon.

Defense counsel also wrote, "After much discussion at our meetings, it was concluded that the claims regarding CAM II and legal fees were dropped by all parties as stated as item 1 in your settlement recap. Therefore, we reject [plaintiff's] request for further documentation as this issue is settled and over."

Plaintiff filed his verified complaint on November 21, 2014, seeking to enforce the settlement. The complaint stated, "As a condition of the settlement, it was agreed at the August 27, 2014 meeting that the $85,374.93 owed to [plaintiff] by ECM could be offset if [defendants] showed that CAM charges had not been collected from and paid by tenants at the office building owned by ECM." "This verbal settlement was memorialized in outline form of its most basic terms in two emails from the counsels of [plaintiff and defendants] on August 27, 2014 and August 28, 2014 and in supplemental exchanges between counsel thereafter." Plaintiff further alleged:

> In addition, to date, the parties have failed to execute a non-dilution agreement and additional reasonable terms as required by the August 21[] and 27[], 2014 settlement to protect [plaintiff] from dilution of interest and squeeze-out/freeze-out tactics, who in settlement agreed to exchange 100% of voting shares for, among other things, a minority position of non-voting shares.

Defendants filed their answer and counterclaims on April 8, 2014, admitting "the parties resolved the matter at the August 27, 2014 meeting," and "[t]he material terms of the settlement were memorialized in e-mails exchanged between counsel," but defendants denied the rest of plaintiff's allegations. Later that month, defendants filed a motion to enforce the parties' settlement. On

June 3, 2015, plaintiff filed his opposition to the motion to enforce and his motion to disqualify defense counsel.

On June 26, 2015, the trial court heard oral argument on the cross-motions. Plaintiff argued he "waived some claim[s] for legal fees, and he said he would do so based upon a handshake that he had certain information that he kept requesting, but [defendants] never provided." He also argued the court should disqualify defense counsel because the firm "was involved and allow[ed] this action to continue." One of its lawyers "was the counsel of record who prepared the key documents which have come before the [c]ourt on the issue of the complaint."

Defendants argued, "[W]ith respect to the ethical issues, . . . we did disclose them in our moving papers, but that's not the point of this case. The point is . . . there was a settlement on August 27[], 2014." In sum, defendants asserted, "The deal was they both walk away from each other. No payment of money. Have a mutual release and [plaintiff] still owns [fifteen] percent of the company."

The court ruled in favor of defendants, finding

> The evidence shows that there was a meeting of the minds [at the] August 27, 2014 settlement meeting when an offer and acceptance . . . clearly occurred. . . . The attorneys then memorialized the essential terms of the agreement by exchanging emails, and the parties intended to later formalize in writing their anti-dilution agreement and

> general release which was already agreed upon at the meeting.

The judge further found the settlement precluded plaintiff from demanding proof "he failed to collect the [CAM] II payments from tenants," because his counsel's email stated, "Both sides have dropped their respective claims for payment and/or reimbursement of the fees, [CAM] II payments and rent . . . ."

The court further found, "[W]ith respect to the language of the anti-dilution agreement, . . . the agreed upon language is best reflected in the draft of the anti-dilution agreement that was attached to the October 22[], 2014 letter from defendants' counsel." The court explained defense counsel "made clear that he revised the anti-dilution agreement to include certain changes that plaintiff demanded." The court denied plaintiff's motion to disqualify defense counsel because he never represented plaintiff individually, and was not involved in the formation of ECM.

The court entered a confirming order setting forth "the terms of the Settlement" as follows:

> 1. [Plaintiff] releases and gives up any and all claims, causes of action, actions, remedies, and rights against [defendants], and [defendants] release and give up any and all claims, causes of action, actions, remedies, and rights against [plaintiff], including but not limited to any claims, for any sums of money and equitable relief, whether asserted or unasserted, alleged to be due for any reason whatsoever. This release applies to

> any and all claims resulting to anything which has happened up to August 27, 2014;
>
> 2. Draws to [plaintiff, Geary, and Heffernan] will be paid from [ECM] when cash flow permits, and loans to shareholders will be paid in a priority at the rate of [five percent] per annum from [fifty percent] of the available cash flow. The shareholders shall distribute [fifty percent] of the remaining and available funds as distributions pro rata after the "Goldman interest payment" and ordinary monthly expenses are paid pro rata;
>
> 3. Defendants will forward [plaintiff] monthly accounting and management reports in the ordinary course and annual tax returns and tax documents;
>
> 4. The Anti-Dilution Agreement attached to [defense counsel's] October 22, 2014 letter to [plaintiff's counsel], shall be filed;
>
> 5. The shares of [ECM] that were reissued shall be distributed.
>
> 6. ECM Realty L.P. shall be immediately dissolved.

The court denied plaintiff's motion for reconsideration on November 9, 2015. This appeal followed.

II.

A. Settlement

"On a disputed motion to enforce a settlement," a trial court must apply the same standards "as on a motion for summary judgment." Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 474 (App. Div. 1997). In reviewing the grant or denial of summary judgment, this court applies the same standard that governs the trial court,

which requires denial of summary judgment when "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." Townsend v. Pierre, 221 N.J. 36, 59 (2015) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). "Bald assertions are not capable of . . . defeating summary judgment." Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div. 2014) (citations omitted).

New Jersey has a "strong public policy in favor of the settlement of litigation." Gere v. Louis, 209 N.J. 486, 500 (2012) (citations omitted). "Therefore, our courts have actively encouraged litigants to settle their disputes," Puder v. Buechel, 183 N.J. 428, 438 (2005) (citation omitted), recognizing that they are most informed of their own interests, and are best positioned to resolve their disputes in a manner that is acceptable to them. Gere, supra, 209 N.J. at 500.

"A settlement agreement between parties to a lawsuit is a contract," Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citation omitted), and thus governed by principles of contract law. Brundage v. Estate of Carambio, 195 N.J. 575, 600-01 (2008). Unlike in other contract cases, however, because of the strong public policy in favor of settlements New Jersey "courts 'strain

to give effect to the terms of a settlement wherever possible.'" Id. at 601 (quoting Dep't of Pub. Advocate v. N.J. Bd. of Pub. Util., 206 N.J. Super. 523, 528 (App. Div. 1985)). Moreover, "any action which would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general, should not be countenanced." Dep't of Pub. Advocate, supra, 206 N.J. Super. at 528.

"Where 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.) (quoting Bistricer v. Bistricer, 231 N.J. Super. 143, 145 (Ch. Div. 1987)), certif. denied, 134 N.J. 477 (1993). The addition of terms to effectuate the settlement that do not alter the basic agreement will not operate to avoid enforcement of an agreement to settle a litigated matter. Bistricer, supra, 231 N.J. Super. at 148, 151. Moreover, "the failure to execute release documents does not void the original agreement, or render it deficient from the outset. Execution of a release is a mere formality, not essential to formation of the contract of settlement." Jennings v. Reed, 381 N.J. Super. 217, 229 (App.

Div. 2005) (citations omitted); see also Hagrish v. Olson, 254 N.J. Super. 133, 138 (App. Div. 1993) (holding that the "failure to execute release documents did not void the original agreement, nor did it render it deficient from the outset").

"The parties to a contract 'may make contractual liability dependent upon the performance of a condition precedent.' However, condition precedents are 'disfavored by the courts.' This is because the 'failure to comply with a condition precedent works a forfeiture.'" Liberty Mut. Ins. Co. v. President Container, Inc., 297 N.J. Super. 24, 34 (App. Div.) (internal citations omitted), certif. denied, 149 N.J. 406 (1997). A condition precedent must therefore "be expressed in clear language or it will be construed as a promise." Ibid. (citations omitted). "The adjectives 'subsequent' and 'precedent' add nothing with respect to the character of the fact or event in describing the effect of the operation of a condition." 8 Corbin on Contracts § 39.1 (Perillo ed. 1999). "'[E]very condition is precedent to an immediately performable duty' and the condition subsequent is treated as a form of discharge of obligation." Corbin, supra, § 39.1 n.2 (citation omitted). Black's Law Dictionary defines "condition subsequent" as a "condition that, if it occurs, will bring something else to an end; an event the existence of which, by

agreement of the parties, discharges a duty of performance that has arisen." 334 (9th ed. 2009).

Plaintiff argues the trial court erred twice when it enforced the parties' settlement. First, he contends the court should have found his "waiver of fees was expressly conditioned upon [defendants'] proof of his failure to collect CAM II payments." Second, he argues defendants' October 22, 2014 anti-dilution agreement lacked many of the "critical" "protections" he had previously requested, so the trial court should not have filed defendants' October 22, 2014 anti-dilution agreement as part of its order enforcing the parties' settlement.

Plaintiff was the first party to memorialize this settlement and the first party to seek its judicial enforcement. His counsel's first email stated, "Both sides have dropped their respective claims for payment and/or reimbursement of fees, CAM II payments, and rent during JRT tenancy and management of ECM from today and prior management/occupancy and service . . . ." Plaintiff only started arguing the settlement was conditioned on defendants producing "proof of his failure to collect CAM II payments" over a month later. His counsel wrote plaintiff "agreed in good faith to forgive [his] $85,345.00 legal fee claim (and more) against ECM, and your clients conversely agreed to wash-out the (alleged greater) shortfall of Tenant CAM, claimed to have

been paid, in actuality, by their supportive loans to ECM." His counsel referred to defendants' duty as a "condition subsequent." Plaintiff now refers to defendants' duty as a "condition precedent."

Because "[t]he adjectives 'subsequent' and 'precedent' add nothing with respect to the character of the fact or event in describing the effect of the operation of a condition," we seek to determine whether the parties' settlement was ever conditioned on defendants producing proof of plaintiff's "failure to collect CAM II payments." Corbin, supra, § 39.1. Given plaintiff's first recap of the settlement did not express the condition in "clear language," Liberty Mut. Ins. Co., supra, 297 N.J. Super. at 34, we conclude the settlement was not conditioned according to plaintiff's later "bald assertions." Ridge at Back Brook, LLC, supra, 437 N.J. Super. at 97-98.

The record also contradicts plaintiff's second argument. Plaintiff's last email to defendants summarized his comments on defendants' draft anti-dilution agreement. The letter stated he had added "a definitional section and expounded explanation of responsibilities." Many of plaintiff's comments were restatements of other parts of the settlement agreement. Defendant declined to include those comments in its October 22, 2014 draft of the agreement, but the trial court included them as separate parts of

its order enforcing settlement. The record shows plaintiff filed his complaint to enforce the settlement because he wanted to condition the settlement on defendant producing "proof of his failure to collect CAM II payments." Because "[e]xecution of a release is a mere formality, not essential to formation of the contract of settlement," we conclude the trial properly found the October 22, 2014 anti-dilution agreement "best reflected" the parties' settlement. Jennings, supra, 381 N.J. Super. at 229.

B. Disqualification Issue

RPC 1.9(a) provides:

> A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

This prohibition "is triggered when two factors coalesce: the matters between the present and former clients must be 'the same or . . . substantially related,' and the interests of the present and former clients must be 'materially adverse.'" City of Atlantic City v. Trupos, 201 N.J. 447, 462 (2010) (alteration in original).

> [M]atters are deemed to be "substantially related" if (1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both

> relevant and material to the subsequent representation.
>
> [Id. at 451-52.]

Even if the client has consulted the attorney without actually retaining her, the attorney is still disqualified if she acquired from the client confidential information material to the litigation. Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 222 (1988). The former client bears the burden of proving that the prohibition of RPC 1.9 applies. Trupos, supra, 201 N.J. at 462. However, if the client comes forward with prima facie proof, the burden of producing countervailing evidence shifts to the attorney. Id. at 462-63. Disqualification motions should normally be decided based on "affidavits" and other documentary evidence, unless live testimony is clearly required or witness credibility is in issue. Id. at 463. This court reviews the trial court's decision de novo. Ibid.

Plaintiff argues he was a "former client" of defense counsel. This argument lacks merit. Defense counsel represented defendants in forming ECM Realty, L.P., and throughout the disputes underlying this case. As an owner, counselor, and manager of ECM, plaintiff worked with defense counsel, but defense counsel never represented plaintiff individually. Because plaintiff was never defense counsel's client, we affirm the trial court. RPC 1.9(a).

Affirmed.