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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2844-14T3

MOON LANDSCAPING, INC.,

Plaintiff-Respondent,

v.

BURRIS CONSTRUCTION COMPANY, INC.,

Defendant-Appellant.

Submitted April 25, 2016 – Decided September 2, 2016

Before Judges Fasciale and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-2958-13.

Steven A. Berkowitz & Associates, P.C., attorneys for appellant (Mr. Berkowitz and Chris Corsi, on the brief).

Jeffrey A. DiLazzero, attorney for respondent.

PER CURIAM

Defendant Burris Construction Company, Inc. (Burris Construction) appeals from a January 9, 2015 order entering judgment against Burris Construction in favor of Moon Landscaping, Inc. (Moon) on a settlement. Burris Construction raises a single issue on appeal: the trial court erred by not declaring the parties' stipulation of settlement void because

Moon's attorney had a conflict of interest, another attorney in that firm having represented Burris Construction's principal in financial and estate planning matters. For the reasons that follow, we affirm.

These are the facts. In April 2013 Burris Construction as "Contractor" entered into a "Subcontract" with Moon as "Subcontractor," the terms of which required Burris Construction to pay Moon $24,985 for landscaping and planting, fine grade and lawn seeding, and ninety-day plant and lawn maintenance at a construction project. Moon completed the work but Burris Construction refused to pay, claiming it was not required to pay Moon until it was "in possession of all sums due [Moon] under the Subcontract." Moon filed a four-count complaint alleging breach of contract, violation of the New Jersey Prompt Payment Act, N.J.S.A. 2A:30A-1 to -2, an account stated, and unjust enrichment.

Moon filed the complaint on December 12, 2013. Burris Construction filed an answer on February 10, 2014. During the intervening sixty-two days, the parties exchanged emails in which Burris Construction alleged that Moon's attorney had a conflict of interest but nonetheless engaged in settlement negotiations. Moon's attorney was Sergio I. Scuteri of Capehart & Scatchard, P.A. (Capehart). According to Burris Construction's Chairman and CEO, William Burris (Burris),

another Capehart attorney, Thomas D. Begley, III, had, since January 2012, represented Burris "on numerous occasions on issues pertaining to financial planning and estate planning." On January 15, 2015, Burris Construction's General Counsel, Sophia P. Furris, emailed Scuteri, asserting Capehart's representation of Moon was a conflict. Her email stated: "We are in receipt of the Complaint that you have filed . . . . William Burris is represented by Tom Begley with regard to estate matters and, therefore, a conflict of interest exists regarding your representation of [Moon] in this matter."

One week later, on January 22, the parties exchanged the following sequential communications. Scuteri emailed Furris at 2:18 p.m. and sent copies to Burris and Mitchell Zbik, Burris Construction's Executive Vice President and CFO, stating:

> We do not believe that there is a conflict since Capehart & Scatchard does not represent Burris Construction and in fact has been adverse to Burris Construction on several matters in the past. Additionally, William Burris is not a party to this action.
>
> Mitchell [Zbik] left me a voice message wanting to discuss a resolution with this matter. Please advise whether I can speak to him directly or whether the resolution needs to go through you.

Burris "reached out" to Begley, advising Begley of his "conflict concerns." Begley emailed Burris at 3:21 p.m.: "Bill, [l]et me look into this for you. Will get back to you by the

end of the week." Then at 3:48 p.m., Burris Construction's in-house counsel, Furris, emailed Scuteri:

> Mitchel [Zbik] has settlement authority to discuss with you.
>
> In the event the matter is not settled, we respectfully decline to waive the conflict.

Furris copied Burris and Zbik on her email to Scuteri.

The next day, January 23, 2014, Begley sent Burris an email stating, "am working on issue with [Scuteri]. [D]on't worry about it." Burris responded: "I will pay [Moon] [$15,000] and the balance if I get it . . . [W]e are not paid and have a [$]500,000 lien . . . [H]e was last in." Begley then emailed Burris: "Will pass it along to [Scuteri]. I am sure he will ask for a due date on the $[15,000]. [G]ive me a date." Burris responded, "[N]ow."

On January 29, 2014, Burris sent Begley an email asking "What's the deal with this?" Two days later, on Friday, January 31, 2014, Scuteri emailed Zbik, stating:

> Moon is in agreement with your latest proposal, which is for Burris to pay $25,000 payable $15,000 now and $10,000 by the earlier of (a) 5 days from when Burris gets paid by the owner on the project or (b) April 15, 2014, with the understanding that if any payment is not timely made Moon can take judgments against Burris for the unpaid balance. This agreement is to be memorialized by way of a Stipulation in Lieu of Judgments to be filed with the Court. I will send you this document shortly for signatures.

The record contains no documentation of Zbik's "latest proposal," to which Scuteri was responding. Later that day, Scuteri sent Zbik the stipulation. Zbik responded on the following Monday and informed Scuteri that "[d]ue to the inclement weather today, we will get this done on Tuesday." Scuteri copied Furris on the email enclosing the stipulation. He had copied neither her nor Burris on the email accepting Zbik's offer.

On Tuesday, February 4, 2014, at 11:01 a.m., Burris emailed Scuteri, Zbik, and Begley, copying Furris. His email stated:

> I made the settlement offer directly to my attorney Thomas Begley. I did not back out on anything.
>
> We are owed approximately [$]500,000. I offered to pay [$]15,000 immediately to settle this matter and the balance if and when I get my money.
>
> Not sure why there is confusion, and if it is anyway on our part, I'm sorry.

Scuteri then sent an email to Zbik at 11:53 a.m., with a copy to Furris, stating:

> Confirming our conversation of moments ago, you advised that despite the fact that we had reached an agreement to resolve this matter, . . . Burris is now backing out of the deal. As a result, you have asked for additional time to file an [a]nswer to the [c]omplaint. I must say that I am very disappointed with ho[w] . . . Burris is handling this matter. As a good faith gesture, I will extend the deadline to file

> and serve an [a]nswer to the [c]omplaint to February 7, 2014. Please note that this is only an extension to file an [a]nswer, not an extension to file any other pleading or motion practice.

Burris Construction filed its answer within a week and the following month Moon filed a motion to enforce the settlement. Burris Construction filed a cross-motion to disqualify Moon's counsel due to a conflict of interest. The trial court granted the cross-motion. No appeal has been taken from that order. The court adjourned the motion to enforce settlement pending Moon's retention of new counsel.

On August 5, 2014, the court granted Moon's motion and ordered "that the settlement and repayment agreement entered into between the parties on January 31, 2014 and memorialized in writing by way of Stipulation in Lieu of Judgment attached to the moving papers is declared to be in full force and effect." No one has appealed from that order. In the same order, the court denied without prejudice Moon's application for entry of judgment. When Burris Construction did not pay Moon, Moon filed a motion to enforce litigant's rights. The judge granted the motion on January 9, 2015, and entered the judgment from which Burris Construction appeals.

Burris Construction raises a single issue on appeal: the trial court erred by finding the settlement agreement "was not void as a matter of law due to the conflict of interest."

According to Burris Construction, Burris passed confidential information to Begley, who in turn passed the information to Scuteri; "[t]hus, . . . Scuteri and Capehart possessed confidential information, along with other information . . . Begley had come into possession of since early 2012 when he began representing . . . Burris, which could have been used against [Burris Construction] in this litigation." Burris Construction asserts this is a "clear prejudice and a violation of the Rules of Professional Conduct (RPCs)." Relying on Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10 (1992), Burris Construction argues that because a settlement is a contract and because this contract violates the RPCs, it is unenforceable.

Moon responds there was no conflict of interest because "Capehart's representation of . . . Burris, individually, is distinctly and legally different than its representation of Burris Construction." Additionally, Moon argues Burris Construction waived any conflict by allowing Scuteri to negotiate with Zbik.

We begin our analysis by emphasizing that Burris Construction has raised a single issue on appeal: whether the trial court should have set aside the settlement agreement due to Capehart's alleged conflict of interest. Burris Construction has not appealed from the trial court's August 5, 2015 order memorializing the court's determination the parties had entered

into a settlement. We also note there has been no appeal from the order disqualifying Capehart. Consequently, the sole issue we must resolve is whether Capehart's alleged violation of the RPCs constituted a ground for setting aside the settlement. We conclude it did not.

Our Supreme Court has explained that a "strong sense of the requirements of justice demands that those rules be enforced vigorously." The Court has further explained, however, the RPCs are generally enforced "by this Court through the disciplinary mechanisms we have established; and . . . punishment for violations of those rules fall, with exceedingly rare exceptions, on the offending attorney rather than upon his or her client." Brundage v. Estate of Carambio, 195 N.J. 575, 581-82 (2008). The facts of this case do not fall within a rare exception.

Significantly, in Brundage v. Estate of Carambio, 394 N.J. Super. 292, 308 (App. Div. 2007), rev'd, 195 N.J. 575 (2008), we vitiated a settlement because of an attorney's alleged violation of an RPC. We concluded the attorney's conduct had significantly affected the adverse party's strategy, and vitiating the settlement was "the only way to restore the essential elements of good faith and fair dealing, which are implicit parts of all contracts in this State." Id. at 303 (citation omitted).

In reversing, the Supreme Court expressed its continuing disapproval of "'sharp practices,' which are tactics employed by some members of the bar that are not explicitly unethical but nonetheless tread perilously close to the line of being unacceptable." Brundage, supra, 195 N.J. at 603-04. The Court did not, however, find the attorney's conduct violated the RPCs. Id. at 605-07. More significantly, the Court stated: "Attempting to enforce the RPCs through imposition of sanctions on a client . . . is simply outside the role of the trial and appellate courts; they are not free to impose their own notions of discipline in place of our plenary authority." Id. at 610. The Court noted "[t]he circumstances in which a sanction is appropriate in place of discipline have been exceedingly rare . . . and we have never endorsed the use of a sanction to be visited on the client as a means to discipline that client's attorney." Id. at 610-11 (citations omitted).

This case does not present any rare circumstances. It is now beyond dispute that "[a]n agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of 'fraud or compelling circumstances,' should honor and enforce as it does other contracts." Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div.) (quoting Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974)), certif. denied, 94 N.J. 600 (1983)).

Moreover, "[f]undamental to our jurisprudence relating to settlements is the principle that '[t]he settlement of litigation ranks high in our public policy.'" Brundage, supra, 195 N.J. at 601 (second alteration in original) (quoting Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div.), certif. denied, 35 N.J. 61 (1961)).

Here, the trial court determined the parties had settled the lawsuit. The court's determination is amply supported by the record, which, as the trial judge noted, did not include certifications from either Burris Construction's COO or in-house counsel disputing they had negotiated a settlement as authorized. Although Burris disputed the terms of the settlement, he did not dispute that Burris Construction's Executive Vice President was authorized to enter into negotiations, notwithstanding Burris' "concern" that Capehart had a conflict of interest. In view of those considerations, the strong policy favoring settlements, and the Supreme Court's admonition that enforcing the RPCs through imposition of sanctions on a client is outside the role of the trial and appellate courts, there is no basis for overturning the trial court's order enforcing the settlement and entering judgment against Burris Construction.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION