SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5425-15T2

PROCTOR PROPERTIES, LLC,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF COMMUNITY
AFFAIRS, DIVISION OF HOUSING,

Defendant-Respondent.

Submitted November 29, 2017 – Decided December 22, 2017

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2055-12.

Stephen J. Buividas, attorney for appellant.

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Debra A. Allen, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Proctor Properties, LLC appeals from an April 29, 2016 order granting defendant State of New Jersey, Department of

Community Affairs, Division of Housing (DCA) summary judgment and a July 25, 2016 order denying reconsideration. After reviewing the contentions in light of the record and applicable principles of law, we reverse and remand.

I.

The following facts are derived from the record. Plaintiff owns four property management companies in New Jersey. One of these property management companies, Proctor Properties I, owns seven duplex units on Park Boulevard in Camden, New Jersey. In 1996, DCA approved three of these units for participation in the federal Section 8 housing program authorized by the United States Department of Housing and Urban Development (HUD). DCA then entered into a contract with plaintiff in 1996 under the Moderate Rehabilitation Program authorized by HUD.

The Moderate Rehabilitation Program provides rental assistance to low-income families on a project-specific basis. Participating families are placed into specific "Mod Rehab projects," where they pay 30% of their adjusted income towards rent. HUD then provides subsidies to the property owners in order to rehabilitate and maintain the rental units. The program was repealed in 1991, preventing any new projects from participating. However, HUD allowed public housing agencies (PHAs) to renew housing assistance payment contracts with property owners for an

additional year after the repeal. The PHAs could then renew this extension annually at their discretion.

The contract between DCA and plaintiff required plaintiff to comply with federal regulations and to maintain all the rental units in accordance with federal housing quality standards (HQS). So long as plaintiff met these requirements, defendant would pay plaintiff a fixed rental subsidy each month on behalf of each tenant participating in the Moderate Rehabilitation Program.

Around September 1998, DCA terminated its housing contract with plaintiff, contending plaintiff failed to timely correct HQS violations discovered during a mandatory inspection of the units. Plaintiff contended it was not afforded the thirty days to which it was entitled to cure the deficiencies discovered during an unnoticed, surprise inspection.

Plaintiff filed a breach of contract action against DCA in September 2004. In 2007, the parties entered into a settlement agreement which required DCA to pay plaintiff $30,000 and to provide plaintiff with six applications for participation in the Tenant-Based Housing Assistance Program (HAP). HAP grants vouchers to low-income families for use in leasing eligible rental housing. HAP allows individuals to choose their own location. The settlement agreement specified that applications would be sent "upon the determination that the HAP has availabilities for such

participation in Camden County[]" and "shall not be construed, in any way, as an indication that an applicant, who currently resides in any of the Park Boulevard properties owned by [plaintiff] would have an advantage to being chosen for participation in the HAP."

DCA paid plaintiff $30,000 in accordance with the settlement agreement. DCA also provided plaintiff with "one or more lists containing the names of some potential tenants" in 2010, but plaintiff contends the names were not provided in accordance with the settlement agreement. On May 4, 2012, plaintiff filed a breach of contract claim against DCA claiming DCA breached the settlement agreement by providing the applications in an untimely manner and by providing applications that "were worthless, in that the applicants were not qualified or eligible for participation in the program or to occupy the Units, or were not currently seeking housing in Camden County, or were otherwise not reasonably available potential tenants for the Units." It is undisputed that none of the applicants sent to plaintiff resulted in tenancies for the respective units.

Thereafter, plaintiff applied for an order to show cause, and defendant moved to dismiss the complaint for failure to state a claim upon which relief may be granted. On September 28, 2012, the trial court denied both applications without prejudice. Settlement discussions ensued, resulting in a modified settlement

agreement. This led to DCA sending plaintiff additional applications for approximately fifteen to seventeen prospective tenants on the waiting list for HAP. DCA claims to have pre-screened the prospective applicants for those likely to be eligible under HAP. DCA also had its Camden Field Office list any of plaintiff's vacant units under its landlord listings in order to increase awareness of any HAP participants. DCA contends this resulted in the acquisition of tenants for all of plaintiff's units; however, plaintiff contends that only some of the units were filled and only on a temporary basis. Plaintiff claims that due to the delay in filling the units, it has received less money than it would have if DCA had performed its duties under the settlement agreement in a timely fashion.

DCA moved for summary judgment. On September 5, 2014, the trial court denied the motion to allow completion of discovery.

On January 15, 2016, DCA renewed its motion for summary judgment after settlement negotiations proved unfruitful. On February 19, 2016, the motion judge, relying on Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461, 470 (App. Div. 2015), certif. denied, 224 N.J. 529 (2016), denied the motion as untimely because the return date was only twenty-seven days prior to the scheduled trial date.

Finally, with discovery completed and trial set for April 11, 2016, DCA once again renewed its motion for summary judgment, filing it on March 23, 2016, with a return date of April 29, 2016. Plaintiff objected to the untimely filing, and submitted opposition, which incorporated by reference the submissions it had filed in opposition to DCA's previous summary judgment motions. Notwithstanding the late filing, a different motion judge entertained the motion and requested that plaintiff's counsel deliver a copy of the documents incorporated by reference from the prior motions. Plaintiff's counsel did so, delivering a copy of the prior submissions to the court shortly before the return date. The motion judge heard oral argument on April 29, 2016, and granted summary judgment after acknowledging he had not read the opposing papers previously submitted by plaintiff that had been incorporated by reference and hand-delivered to the court at the judge's request.

Plaintiff then moved for reconsideration, which was denied on July 25, 2016. In its oral decision the judge noted plaintiff failed to identify "any new facts or any law that . . . [the court] had failed to consider" on the summary judgment motion. This appeal followed.

Plaintiff raises the following arguments for our consideration: (1) the DCA's motion was untimely and should not

have been considered by the court; (2) the DCA breached the agreement because its alleged performance occurred too late to constitute performance; (3) the DCA failed to produce evidence of compliance as to at least one of the units which was the subject of the settlement agreement; (4) the court failed to consider plaintiff's right to recover damages for the years it received reduced rents because of the DCA's delay; (5) the court erred by refusing to consider certifications and briefs which plaintiff incorporated by reference in its opposing certification; and (6) the court erred in denying plaintiff's motion for reconsideration.

II.

In considering plaintiffs' appeal, we repeat and abide by certain fundamental principles applicable to summary judgment motions. The court 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); see also R. 4:46-2(c). The court cannot resolve contested factual issues but instead must determine whether there are any genuine factual disputes. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005). If there are materially disputed facts, the motion for summary judgment should be denied.

Parks v. Rogers, 176 N.J. 491, 502 (2003); Brill, 142 N.J. at 540. To grant the motion, the court must find that the evidence in the record "is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)).

Our review of an order granting summary judgment must observe the same standards, including our obligation to view the record in a light most favorable to the non-moving party. See IE Test, LLC v. Carroll, 226 N.J. 166, 184 (2016) (citing Brill, 142 N.J. at 540). We accord no special deference to a trial judge's assessment of the documentary record, as the decision to grant or withhold summary judgment does not hinge upon a judge's determinations of the credibility of testimony rendered in court, but instead amounts to a ruling on a question of law. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (noting that no "special deference" applies to a trial court's legal determinations).

III.

Plaintiff contends DCA did not adhere to the requirements of the settlement agreement when it sent plaintiff "stale" names that were allegedly useless. Plaintiff argues the names were provided too late to constitute performance. DCA argues the names were sent as soon as there were availabilities in the program, in

accordance with the settlement agreement. DCA further argues it complied with the modified settlement agreement by sending plaintiff the names of seventeen pre-qualified HAP participants. While the judge addressed the issue of timing, he made no determination regarding the usefulness of the names, other than noting that names were, in fact, sent.

According to the settlement agreement, DCA must "mail six, separate applications to [plaintiff], for participation in the [DCA's] Tenant-Based Housing Assistance Program." The settlement agreement states that "the applicant must be otherwise eligible for participation in the HAP." The parties later agreed to modify this directive to require DCA to send plaintiff fifteen names of prospective tenants. Plaintiff contends the parties intended for the applications to be viable at least to the extent that the applicants were still in need of housing and were eligible to participate in the program.

Plaintiff does not dispute that DCA sent the seventeen names but does dispute the value of the names supplied. Viewing the facts in a light most favorable to plaintiff, the names were "stale" or useless as the individuals had already found housing when contacted or were otherwise not eligible to participate in the program. Plaintiff contends DCA's duty to provide the names was even more valuable than the payment of $30,000 because it was

meant to ensure continuing tenants in plaintiff's units, thereby generating continuous rental income. DCA asserts it satisfied its duties under the settlement agreement by paying the $30,000 and sending the applications.

The motion judge did not address whether the applications provided were of eligible individuals who had not yet found housing. Nor did he consider the financial impact of providing names of individuals who had already found other housing or were ineligible to participate in the program, causing plaintiff to suffer lost rental profits. Instead, the judge held it was not DCA's duty under the settlement agreement to ensure the names provided resulted in tenants. He further concluded DCA was not liable for any resulting lost rental profits. Rather, the judge ruled that by sending the names to plaintiff, DCA had fulfilled its settlement obligations whether or not the names were viable.

The intent of the parties with regard to the viability of the names supplied by DCA presents a genuine issue of material fact, critical in determining if DCA met its obligations under the modified settlement agreement. This, in turn, raises the additional material factual issue of whether the names provided were "useless" because the individuals identified had already found housing when contacted or were otherwise no longer eligible to participate in the program. These factual issues were not

analyzed or decided by the motion judge, nor would it have been appropriate for the judge to do so; they must be assessed by the factfinder after hearing the evidence. Brill, 142 N.J. at 540. For these reasons, summary judgment should not have been granted to DCA.

IV.

"Our Rules of Court provide explicit requirements for the timing of summary judgment motions . . . ." Cho, 443 N.J. Super. at 470. "All motions for summary judgment shall be returnable no later than [thirty] days before the scheduled trial date, unless the court otherwise orders for good cause shown." R. 4:46-1. The amendment to the summary judgment rules that imposed that requirement "was made '[i]n recognition of counsel's need to know the disposition of the summary judgment motion in sufficient time to prepare for trial if the motion is denied or only partially granted." Cho, 443 N.J. Super. at 473 (alteration in original) (quoting Pressler & Verniero, Current N.J. Court Rules, History and Analysis of Amendments to R. 4:46-1, www.Gannlaw.com (2018)).

Here, the motion judge did not grant a relaxation of the motion filing deadline, let alone find good cause for doing so. Cho held that "absent extraordinary circumstances or the opposing party's consent, the consideration of an untimely summary judgment motion at trial and resulting dismissal of a complaint deprives a

plaintiff of due process of law." Id. at 475. Defendants have not demonstrated extraordinary circumstances warranting relaxation of the filing deadline. Accordingly, the motion judge should have neither disregarded the filing deadline nor considered defendant's motion.

We further note the motion judge candidly admitted that he had not read certain aspects of plaintiff's opposing papers. Rule 1:6-7 requires judges to read motion papers in advance of the hearing. This requirement "is designed to ensure that trial judges be familiar with the moving papers in advance of motion arguments." Pressler & Verneiro, cmt. on R. 1:6-7.

Plaintiff moved for reconsideration on the basis that the court had not considered opposing papers submitted in opposition to defendant's prior summary judgment motions, which were incorporated by reference and also hand-delivered to the court before the return date. Those submissions outlined disputed issues of material fact as to whether defendant ever provided viable lists of available tenants for all six properties involved. Despite not reading them in the first instance, on reconsideration the judge stated he did not feel that plaintiff had identified any new facts that he had failed to consider when granting the summary judgment motion.

For these additional procedural reasons, we are constrained to vacate the orders granting summary judgment and denying reconsideration.

Reversed and remanded for trial. We do not retain jurisdiction.