**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5578-15T3

STRAUS ASSOCIATES II and 11 HISTORY LANE OPERATING COMPANY, LLC d/b/a CAREONE AT JACKSON,

Plaintiffs-Respondents,

v.

MURRAY BERMAN,

Defendant-Appellant,

and

JACKSON HEALTH CARE ASSOCIATES,

Defendant.

---

Submitted October 3, 2017 - Decided October 24, 2017

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-000102-15.

McCusker, Anselmi, Rosen & Carvelli, PC, attorneys for appellant (William P. Munday and Louis C. Formisano, on the briefs).

Cole Shotz, PC, attorneys for respondents (Michael D. Sirota, Joseph Barbiere, and Michael R. Yellin, of counsel and on the brief).

PER CURIAM

Plaintiffs Straus Associates II (Straus) and 11 History Lane Operating Company, LLC d/b/a CareOne at Jackson (CareOne) filed suit against defendants Murray Berman (Berman) and Jackson Health Care Associates (JHCA) for specific performance of a partnership agreement between Straus and Berman. Defendant Berman now appeals from orders of the Chancery Division granting plaintiffs' motion to enforce the settlement, denying defendant's cross-motion to enforce the settlement, and denying defendant's motion for reconsideration. We affirm.

The facts giving rise to this action are undisputed. Straus and Berman each own a fifty percent partnership interest in JHCA. JHCA owns and manages property in Jackson, New Jersey (the Property). CareOne was a long-term tenant on the Property. Prior to the expiration of CareOne's lease, Straus and Berman disagreed on the lease renewal terms. Plaintiffs filed suit against Berman and JHCA for specific performance seeking to compel renewal of the lease or, in the alternative, to compel Berman to purchase Straus's interest in JHCA.

The parties requested mediation in an effort to resolve their dispute. The trial judge agreed and referred the matter to a retired federal district court judge to serve as mediator. With the assistance of the mediator, the parties reached a settlement and drafted a mediation settlement agreement (Agreement). The Agreement stated:

> [I]t is agreed among the parties that Plaintiff, or its assigns, will pay Defendant Murray Berman ("Berman"), $7,500,000.00 in exchange for Berman's assignment to 11 History Lane Operating Company, LLC, or its assigns, of any and all interests in Jackson HealthCare Associates. Closing to occur within six months or sooner, but not before January 2, 2016, upon not less than 30 days' notice. Rents pursuant to the Lease, shall continue to be timely paid and distributed until Closing. Formal general releases and final settlement agreement to be exchanged in due course.

The Agreement was signed by the mediator and counsel for the parties.

Three weeks after signing the Agreement, Berman's attorney sent a draft final settlement agreement to Plaintiffs' attorney. Section 8.15 of the draft final settlement agreement read as follows:

> Like-Kind Exchange. Berman may elect to structure the sale of the Partnership Interest within the meaning of Section 1031 of the Internal Revenue Code by assigning its rights, but not its obligations, hereunder to a qualified intermediary as provided in Income Tax Regulations Section 1.103(k)-1(g)(4) on or

> before the Closing Date, and Straus hereby agrees to cooperate therewith, provided that (a) they will not be required to incur any costs as a result of such like-kind exchange, (b) the Closing Date shall not be adjourned by reason thereof and such like kind exchange shall not delay consummation of this transaction, (c) Straus will incur no expense, liability obligation, in connection with said structuring, other than acknowledging and consenting to exchanging party's assignment in connection with such exchange, (d) Straus shall have no obligation to take title to any real property in connection with such exchange, and (e) Straus shall make no representation or warranty in connection with, and shall have no responsibility for, compliance by such exchange with the Internal Revenue Code or any regulations thereunder.

This term was acceptable to Straus, and the parties subsequently exchanged revised drafts of the final settlement agreement. The language of section 8.15 remained unchanged throughout the revision process.

Two months later, plaintiffs' attorney sent a copy of a final settlement agreement which set the closing date for January 29, 2016. The next day, Berman's attorney replied: "[T]he change from 30 days' notice to January 29, 2016 closing is not acceptable. Client is setting up a 1031 exchange." The parties then agreed to a closing date of February 25, 2016, and plaintiffs' counsel circulated a final settlement agreement for execution. Only one ancillary document, an assignment of partnership interest

conveying Berman's interest in JHCA to Straus, entitled Exhibit "A," was annexed to the final settlement agreement.

Three weeks prior to the February 2016 closing date, Berman's attorney revised the final settlement agreement. The revision changed section 8.15 as follows: "(d) Plaintiffs shall have no obligation to take title to any real property in connection with such exchange, other than the Property . . . ." This change would have allowed Berman to use a "drop and swap" mechanism to effectuate a 1031 exchange, whereby JHCA would deed a one-half tenancy-in-common interest in the Property to Berman, who would then convey the Property interest to a new entity owned by Straus, in exchange for the $7,500,000 purchase price. Plaintiffs objected to the change. Berman refused to move forward without the "drop and swap" provision. Plaintiffs served Berman a notice of default based upon Berman's refusal to proceed with the closing.

One month after the closing date, plaintiffs filed a motion to enforce and compel performance of the Agreement. Plaintiffs argued that the Agreement established a contract for the sale of Berman's partnership interest in JHCA to Straus, and that Berman's addition of the drop and swap language was an improper attempt to materially change the parties' Agreement.

Berman cross-moved to enforce and compel performance of the Agreement or, in the alternative, to restore the matter to the

trial calendar. Berman asserted the parties agreed during the mediation to conduct the sale as a 1031 exchange, but decided it need not be included in the signed agreement as it would be fleshed out in the formal written agreement to follow. Berman argued that the 1031 exchange was a material term of the Agreement because it allowed Berman to defer approximately $2,500,000 in taxes. Berman claimed that plaintiffs agreed to a 1031 exchange, and a drop and swap was the only way to effectuate such an exchange.

During oral argument on the enforcement motions, plaintiffs argued that the Agreement set forth the essential terms requiring Straus to buy out Berman's interest in JHCA. Plaintiffs denied that a 1031 exchange was part of the mediation discussions. Plaintiffs maintained that Berman's draft final settlement agreement never included documents necessary to effectuate a drop and swap as the method for transferring the Property. According to plaintiffs, the drop and swap was a new and unacceptable term.

Berman argued that the thirty days' notice provision in the Agreement was included to allow for the completion of a 1031 exchange, and evidenced the parties' intent that the transaction occur as a 1031 exchange. Berman argued that the 1031 exchange was an essential term of the settlement. Berman asked the court to compel plaintiffs to consent to the drop and swap, or declare

the Agreement null due to a failure of mutual assent on a material term.

Examining the undisputed evidence, the judge determined that the Agreement drafted by the mediator and signed by the parties contained the material terms of the settlement: (1) sale of Berman's interest in JHCA to CareOne or its assigns; (2) sale price of $7,500,000; (3) closing in under six months, but not before January 2016; (4) 30 days' notice; and (5) continued distribution of rent until closing. The judge found no evidence of a 1031 exchange as a requirement or essential term of the Agreement.

Accordingly, the judge granted plaintiffs' motion to enforce the Agreement, struck the addition to Section 8.15, and ordered closing within thirty days. The judge denied Berman's cross-motion. The judge also denied plaintiffs' fee application, finding that such a provision was not contained in the Agreement.

Berman moved for reconsideration seeking to compel performance of the draft final settlement agreement, including a 1031 drop and swap exchange, or restore the matter to the trial calendar. Plaintiffs opposed Berman's reconsideration motion. While his reconsideration motion was pending, Berman declined to close by the deadline established in the court's May 13, 2016 order. The judge denied the reconsideration motion.

On appeal, Berman argues that the judge erred by: (1) failing to view the competent evidence in the light most favorable to him; (2) failing to find that structuring the sale as a "like-kind" exchange under 26 U.S.C.A. § 1031 was an essential term of the settlement; (3) enforcing a contract wherein the parties failed to agree on an essential term; and (4) declining to hold a plenary hearing to resolve disputed issues of fact.

"A settlement agreement between parties to a lawsuit is a contract." Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). "Interpretation and construction of a contract is a matter of law for the court subject to de novo review." Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). "Accordingly, we pay no special deference to the trial court's interpretation and look at the contract with fresh eyes." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011).

A motion for reconsideration is reviewed for abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). Reconsideration is appropriate only in those cases "in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

In support of his argument that the judge failed to view the competent evidence in the light most favorable to him, Berman relies on Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 474-75 (App. Div. 1997), and contends that the judge should have conducted an evidentiary hearing related to the parties' agreement of the 1031 exchange. According to Berman, the evidence that should have been considered in the light most favorable to him included: (1) the 30 days' notice provision in the Agreement; (2) the inclusion of section 8.15 in the draft final settlement agreement to which plaintiffs did not object; and (3) the certification of Berman's attorney stating the parties agreed to a 1031 exchange during the mediation.

The Amatazzo case turned on whether a settlement existed. In that case, the parties negotiated and exchanged drafts of a settlement agreement, but the defendant never executed an agreement. Id. at 471–73. When the plaintiff in Amatazzo moved to enforce the agreement, the defendant claimed his attorney lacked authority to settle. Id. at 473. Based on those facts, we found that the trial judge erred in enforcing the settlement and remanded for an evidentiary hearing. Id. at 476.

Berman's reliance on Amatazzo is misplaced, as the parties here agreed upon a settlement that was reduced to writing and signed. Moreover, because both parties filed motions to enforce

the Agreement, neither party disputed the existence of a written settlement.

The question in this case is whether a 1031 exchange was contemplated as part of the settlement, not whether there was a settlement. Accordingly, an evidentiary hearing was not required. Moreover, because mediation communications are privileged, and plaintiffs have not expressly waived such privilege, Berman's argument that information could be provided through an evidentiary hearing is unavailing. See N.J.S.A. 2A:23C-4; N.J.R.E. 519(a). See also Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 263 (2013).

Further, the parties' exchange of post-mediation documents does not support Berman's contention that the parties agreed to the drop and swap provision at mediation. Berman's attorney did not include the supposedly agreed-on term — "other than the Property" - in the final settlement agreement when he drafted it and sent it to plaintiffs' counsel three weeks after the Agreement was signed. Instead, he added it many drafts later, shortly before the February 2016 closing date.

Berman also argues that the judge erred in failing to find the 1031 exchange was an essential term of the Agreement. Berman cites Lahue v. Pio Costa for the proposition that "[w]here 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." 263 N.J. Super. 575, 596 (App. Div.), certif. denied, 134 N.J. 477 (1993). Berman claims that the parties agreed to a 1031 exchange during the mediation, but declined to write the provision into the Agreement. Berman contends that the 1031 exchange was an agreed-upon essential term, and the use of a drop and swap to accomplish the exchange was merely "mechanics" to be implemented in the final agreement.

Berman misconstrues the legal meaning of "essential" terms to a contract. A contract's terms are essential when they are necessary to produce a complete transaction. See, e.g. Berg Agency v. Sleepworld-Willingboro, Inc., 136 N.J. Super. 369, 375 (App. Div. 1975). In Berg, the judge held that a signed letter of intent was a binding contract, notwithstanding the parties' intent to produce a subsequent formal lease agreement, where the letter contained the basic terms essential to creating a lease. Id. at 375–76.

The Agreement in this case, like the agreement in Berg, contains all of the essential terms for a settlement. Berman agreed to relinquish his interest in the joint partnership, which both parties agree was the essence of the settlement. The

Agreement contained terms identifying the interest to be transferred, the parties to the transfer, the price, the timeline, and the financial obligations of the parties pending closing. Thus, there are no missing terms essential to complete the transfer. Berman's argument misperceives terms essential to form a contract with terms that he subjectively deemed essential in order to settle. Berman signed the Agreement which contained clear terms, manifesting his intent to be bound by that Agreement. See Comerata v. Chaumont, Inc., 52 N.J. Super. 299, 305 (App. Div. 1958) ("[T]he fact that parties who are in agreement upon all necessary terms may contemplate that a formal agreement yet to be prepared will contain such additional terms as are later agreed upon will not affect the subsistence of the contract as to those terms already unqualifiedly agreed to and intended to be binding.").

Berman's brief does not address denial of his motion for reconsideration. There is no argument explaining how the judge abused his discretion in denying Berman's reconsideration motion. Nor do we find any such abuse from the record. Berman failed to raise any new facts or controlling decisions not previously considered by the judge. See R. 4:49-2. Berman's dissatisfaction with the judge's ruling is not a basis for reconsideration. D'Atria v. D'Atria, supra, 242 N.J. Super. at 401.

Plaintiffs request costs and attorney's fees in accordance with Section 7.2 of the final settlement agreement. However, plaintiffs did not file an appeal or a cross-appeal. Therefore, the issue is not properly before us and we decline to consider it.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION