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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-0661-16T1

ANNETTE SMITH and
LORRAINE JOHNSON,

Plaintiffs-Respondents,

v.

SHAREEF A. SALAAM,

Defendant-Appellant.

Argued February 6, 2018 – Decided February 26, 2018

Before Judges Fasciale, Sumners and Moynihan.

On appeal from Superior Court of New Jersey,
Chancery Division, Hudson County, Docket No.
C-000140-15.

George Tenreiro argued the cause for appellant
(Baldassare & Mara, LLC, attorneys; Jennifer
Mara and George Tenreiro, on the briefs).

Donald D. Campbell argued the cause for
respondents (Campbell & Campbell, attorneys;
Donald D. Campbell, on the brief).

PER CURIAM

Shareef Salaam (defendant) appeals from a July 22, 2016 order
denying defendant's motion for summary judgment; a September 8,

2016 order denying defendant's evidentiary motions in limine; and a September 14, 2016 final judgment, entered after a bench trial, compelling defendant to sell real property (the Property). We affirm.

Lorraine Johnson (Johnson) and Annette Smith (Smith) (collectively plaintiffs) filed a three-count complaint seeking specific performance of a contract compelling defendant to sell Smith the Property, located at 23 Madison Avenue, Jersey City, for \$250,000. At the completion of discovery, defendant moved for summary judgment, which the judge denied. Before the bench trial began, defendant filed two in limine motions seeking to exclude extrinsic evidence that went beyond the four corners of the purchase agreement between Johnson and defendant. The judge then entered the final judgment.

Johnson owned the Property, and in June 2014, struggled to make the mortgage payments, which resulted in a sheriff's sale of the Property scheduled for July 2015. Johnson wanted her goddaughter, Smith, to own the property, and Smith began the mortgage application process with her daughter Aiesha. Smith obtained an adjournment of the sheriff's sale until early August 2015, however, she failed to obtain the necessary financing to purchase the Property in time.

Defendant noticed the Property on the foreclosure list and approached Smith about purchasing the Property, who he mistakenly thought owned the Property. The parties met in mid-July 2015 at the office of Johnson's closing attorney, Stephen C. Gilbert (Gilbert), and discussed how defendant would first purchase the Property from Johnson and then resell to Smith, but prices were not set at the meeting. There is a partial audio recording of this meeting. After the meeting, the parties, without Gilbert, had lunch together wherein, plaintiffs contend, the purchase price of \$225,000 for the sale from Johnson to defendant and the purchase price of \$250,000 for the sale from defendant to Smith were agreed upon.

On July 26, 2015, defendant and Johnson entered into a purchase agreement for the Property (Johnson Purchase Agreement). Both Johnson and defendant signed the contract for a purchase price of \$225,000, and the closing took place at Gilbert's office, without either party being present.

Smith alleges that she obtained a mortgage pre-approval certificate in preparation of purchasing the Property from defendant with a purchase price of \$250,000. However, the bank asserted that the certificate was "not an official approved Provident form." On or about August 18, 2015, defendant and Smith met at the Jersey City courthouse to discuss the Property resale.

The parties disputed the purchase price discussed at the meeting. Smith contended that the parties had an oral agreement with a purchase price of \$250,000.

Defendant sent Smith a purchase agreement (Smith Purchase Agreement) that he signed and dated August 21, 2015, with a purchase price of \$335,000. The Smith Purchase Agreement also included a lease for \$1200 rent for Smith and other rents. Additionally, defendant sent a letter addendum to the Smith Purchase Agreement seeking \$11,852.44 for expenses incurred and anticipated to incur. Smith did not sign the contract.

On appeal, defendant focuses on the denial of the summary judgment, and the judge's findings of fact and conclusions of law supporting the final judgment. Fact issues precluded the entry of summary judgment. The judge correctly applied the law, and there exists sufficient evidence in the record to support the judge's findings of fact.

We begin by addressing the denial of summary judgment. When reviewing an order granting or denying summary judgment, we apply "the same standard governing the trial court." Oyola v. Liu, 431 N.J. Super. 493, 497 (App. Div. 2013). We owe no deference to the motion judge's conclusions on issues of law. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Defendant argues that the Johnson Purchase Agreement is unambiguous and exclusively controls the parties' dispute and thus no material issues of fact existed to require the judge to deny defendant's summary judgment motion. To grant summary judgment regarding the terms of the agreements, the judge had to conclude that the agreements permitted only one plausible interpretation and that that single plausible interpretation one-sidedly favored defendant's position. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Here, however, the parties presented two plausible explanations of the agreements and the judge properly denied summary judgment. We will address defendant's related contentions seriatim.

Defendant asserts that when denying summary judgment, the judge improperly allowed plaintiffs to rely on extrinsic evidence, specifically the parol evidence rule.¹ Plaintiffs disagree, and further contend that the Johnson Purchase Agreement is defective and not controlling, explaining that at issue is the oral agreement between the parties, not the Johnson Purchase Agreement. The parties disputed whether the Johnson Purchase Agreement or Smith Purchase Agreement controls, whether an oral agreement exists

¹ In a footnote, defendant relies on this same argument to appeal the judge's denial of defendant's evidentiary motions in limine. This contention is without merit. R. 2:11-3(e)(1)(E).

between the parties for defendant to sell the Property to Smith, and if so, what terms and conditions exist in that oral agreement.

Defendant asserts that because the alleged oral agreement occurred before the signing of the Johnson Purchase Agreement, the judge could not consider parol evidence unless there existed an ambiguity in the contract, and no ambiguity existed in the Johnson Purchase Agreement. "In general, the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document." Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 268 (2006) (citing Restatement (Second) of Contracts § 213 (Am. Law Inst. 1981)).

Here, the resolution of defendant's summary judgment motion depended on the judge's interpretation of the parties' agreements – usually a matter of law, suitable for decision on a motion for summary judgment. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 190 (App. Div. 2008). However, when a contract is ambiguous in a material respect, summary judgment is unavailable and the parties must be given the opportunity to illuminate the contract's meaning through the submission of extrinsic evidence. Conway, 187 N.J. at 268-70. A contract is ambiguous if its terms "are susceptible to at least two reasonable alternative interpretations." Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (quoting Kaufman v. Provident

Life & Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993)). Although extrinsic evidence should never be permitted to modify or curtail the terms of an agreement, a court may "consider all of the relevant evidence that will assist in determining the intent and meaning of the contract." Conway, 187 N.J. at 269. The Court has "permit[ted] a broad use of extrinsic evidence to achieve the ultimate goal of discovering the intent of the parties." Id. at 270.

We reject defendant's argument that the judge improperly admitted parol evidence when interpreting the Johnson Purchase Agreement. The Johnson Purchase Agreement validly sold the property to defendant, and plaintiffs do not dispute this sale. The judge considered the conversations between the parties as evidence of the oral agreement for defendant to sell the Property to Smith in preparation of the Smith Purchase Agreement. Defendant relies on the Johnson Purchase Agreement's clause, "[t]his Agreement contains the entire agreement of the parties," and section, "Additional Contractual Provisions (if any)" marked as "N/A" to assert this Agreement unambiguous and controlling, and barring parol evidence. The parties' oral agreement concerned a different agreement, the sale from defendant to Smith, not Johnson to Smith, and this is the agreement at issue here. The judge did not improperly rely on parol evidence to alter the terms of the

Johnson Purchase Agreement, but instead considered the conversations between the parties as evidence of an oral agreement for defendant to sell to Smith.

At summary judgment, the parties sharply disputed the oral agreement for defendant to sell the property to Smith. They disputed the existence of the oral agreement, with defendant at times denying its existence and other times acknowledging an oral agreement but with different terms than plaintiffs; when and where the alleged oral agreement occurred; and the purchase price, terms, and conditions for the alleged oral agreement.

Defendant asserts that the judge should have granted summary judgment because plaintiffs' opposition violated court rules by not containing a counterstatement of undisputed material facts as required by Rule 4:46-2(b) and instead submitting Smith's affidavit; and the opposition failed to address defendant's legal arguments in any meaningful way.

To oppose a summary judgment motion, the non-movant is required to file a responding statement either admitting or disputing each of the facts in the movant's statement. R. 4:46-2(b). Rule 4:46-2(b) provides that "[s]ubject to [Rule] 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming

to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact." "[B]are conclusory assertions in an answering affidavit are insufficient to defeat a meritorious application for summary judgment." Brae Asset Fund, LP v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999).

Here, in opposition to defendant's summary judgment motion, plaintiffs submitted Smith's affidavit and undisputed facts in lieu of a responding statement of facts. Plaintiffs also submitted a separate counterstatement of facts in their reply brief to the summary judgment motion. Defendant asserts these submissions did not comply with Rule 4:46-2 because plaintiffs did not admit or deny each of defendant's facts, and the facts set forth by plaintiffs were without citation to the record. As such, defendant contends that his facts that were supported with citation to the record should have been "deemed admitted."

Rule 4:46-2(b) is subject to Rule 4:46-5(a), which provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of [Rule] 1:6-6 or as otherwise provided in this rule and by [Rule] 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial.

Thus, the rule allows affidavits to set forth specific facts. Rule 1:6-6, governing affidavits, explains that "[i]f a motion is based

on facts not appearing of record or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify."

Smith submitted the affidavit which contained, amongst other facts, facts regarding the mortgage application which had not been previously produced. Her statements were made on personal knowledge. Further, Smith's affidavit and undisputed facts specifically stated that it was made "to refute the absolute false factual representations made in the Motion for Summary Judgment." She refuted the events that took place according to defendant, the parties' conversations, the negotiated resale price, and defendant's assertions regarding the mortgage application. There were no citations to the record, except to exhibits that Smith attached to her affidavit regarding newly discovered documents regarding the mortgage application.

Although defendant simplifies the matter, the evidence presented a clear dispute. Specifically, the parties' depositions were at odds regarding the events between them and, importantly, the resale price; and plaintiffs' production of mortgage application documents in opposition to defendant's summary judgment motion furthered the dispute regarding the existence of an oral agreement. Notably, at the summary judgment motion

hearing, defendant's counsel abandoned the Rule 4:46-2 argument, stating "it's procedural. We wanna do this on the merits. So I'll move on."

The judge properly found that genuine issues of material fact existed. "A judge may not merely accept as true all the allegations of a party's statement with no consideration of 'the competent evidential materials.'" Leang v. Jersey City Bd. of Educ., 399 N.J. Super. 329, 357 (2008) (quoting Brill, 142 N.J. at 540), aff'd in part and rev'd in part on other grounds, 198 N.J. 557 (2009). Defendant's statement of facts were not "sufficiently supported" to be "deemed admitted" under Rule 4:46-2(b). Although plaintiffs failed to strictly comply with the rule, defendant was not entitled summary judgment based on the assumption that his statement of material facts was true "when the record as a whole clearly show[ed] a material dispute." Pressler & Verniero, Current N.J. Court Rules, cmt. 1.2 on R. 4:46-2 (2018).

Defendant further contends that plaintiffs' opposition failed to address defendant's legal arguments in any meaningful way. The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts," Triffin v. Am. Int'l Grp., Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (quoting Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992)), as "[c]ompetent opposition

requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments,'" Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (quoting Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div.) certif. granted, 183 N.J. 592 (2005), appeal dismissed, 217 N.J. 591 (2006)). Defendant provides no basis to assert that plaintiffs failed to abide by this standard. Plaintiffs responded to defendant's summary judgment motion by submitting a thirteen-page brief along with exhibits and Smith's affidavit.

Defendant asserts that the judge should have granted summary judgment because the doctrines of impossibility and/or mutual mistake provide defendant with defenses to non-performance. "A successful defense of impossibility . . . of performance excuses a party from having to perform its contract obligations, where performance has become literally impossible, or at least inordinately more difficult, because of the occurrence of a supervening event that was not within the original contemplation of the contracting parties." JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass'n, Inc., 431 N.J. Super. 233, 246 (App. Div. 2013).

At the summary judgment hearing, the judge asked plaintiffs if Smith would qualify for a mortgage to purchase the Property. Plaintiffs' counsel answered in the affirmative, and explained

that Smith does not have debt, she is employed, her daughter is employed – who would be a co-applicant for the mortgage – and they have a combined income of over \$120,000. The parties stipulated that Smith did not have time to obtain financing to purchase the Property before the August 2015 sheriff's sale.

Defendant relies on Smith's mortgage pre-approval certificate, which the bank explained was "not an official approved Provident form," to assert that it was impossible for Smith to purchase the Property during the relevant time period. Defendant provides no other explanation or reason to assert that Smith could not have possibly purchased the Property from defendant. The parties disputed the procedures Smith and her daughter followed in either obtaining a mortgage pre-approval or completing a mortgage application. Smith and her daughter received letters from Provident Bank in July 2015 regarding their mortgage application, which included their credits scores. The credit scores and combined income do not suggest that it was impossible for Smith and her daughter to purchase the Property. Further, Provident Bank's Mortgage Instruction Letter provides a checklist for obtaining a mortgage and explicitly requires the applicant to provide the sales contract for the purchasing property. Smith could not furnish such a contract to the bank because she did not

execute the Smith Purchase Agreement. The doctrine of impossibility is inapplicable and has no bearing on this case.

"The doctrine of mutual mistake applies when a 'mistake was mutual in that both parties were laboring under the same misapprehension as to [a] particular, essential fact.'" Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 608 (1989) (alteration in original) (quoting Beachcomber Coins, Inc. v. Boskett, 166 N.J. Super. 442, 446 (App. Div. 1979)). Here, neither party asserted that they shared an erroneous assumption of fact, but instead, the parties shared conflicting views of their agreement. See id. at 609. The facts do not support the application of mutual mistake.

Defendant asserts that in their opposition to the summary judgment motion plaintiffs failed to demonstrate by clear and convincing evidence that an exception to the statute of frauds applied. Specifically, defendant argues that the judge applied the wrong standard by explaining that plaintiffs "could meet the burden of clear and convincing evidence," and he should have required plaintiffs to provide clear and convincing evidence because of the statute of frauds.

"The motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried." Globe Motor Co. v. Igdaley, 225 N.J. 469, 480 (2016). The statute

of frauds permits the enforcement of an oral agreement to sell interest in real estate in limited scenarios.

An agreement to transfer an interest in real estate or to hold an interest in real estate for the benefit of another shall not be enforceable unless:

. . . .

b. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement and the identity of the transferor and the transferee are proved by clear and convincing evidence.

[N.J.S.A. 25:1-13 (emphasis added).]

Evidence is clear and convincing when it "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960); see also In re Purrazzella, 134 N.J. 228, 240 (1993). This standard does not imply absolute certainty or that the evidence is uncontested. See In re Jobes, 108 N.J. 394, 408 (1987).

"It is ordinarily improper to grant summary judgment when a party's state of mind, intent, motive or credibility is in issue." In re Estate of DeFrank, 433 N.J. Super. 258, 266 (App. Div. 2013); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3.4 on R. 4:46-2 (2018). Here, the showing of clear and convincing

evidence for defendant to resell the Property to Smith for \$250,000 hinged on the credibility of witness testimony. The judge properly determined that the facts viewed most favorably to plaintiffs could provide clear and convincing evidence that an agreement was reached between the parties. Many material issues of fact continued to exist and the judge could not properly grant summary judgment. The judge, in his letter opinion post-trial, explained that in denying defendant's summary judgment motion he reviewed the statute of frauds. Even considering the statute of frauds, the judge could not have granted summary judgment because material issues of fact existed and credibility findings were required.

We now turn to the trial. Our review of the factual findings made by a trial court in a non-jury trial is quite limited. Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 400 (App. Div. 2007). "We do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." State v. Barone, 147 N.J. 599, 615 (1997).

Findings of the trial judge are binding on appeal if they are "supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Inv'rs. Ins. Co., 65 N.J. 474, 484 (1974). We have determined that there exists sufficient evidence in the record to support the judge's findings of fact. The judge found plaintiffs credible. The judge considered the parties testimony,

which "significantly differ[ed]," regarding the terms of the resale; and the documents entered into evidence. He noted that defendant did not dispute discussions about the resale, citing a recording of defendant offering to purchase the Property and then resell it to Smith. The judge found that

[o]nce having secured title to the property at the end of July, when confronted by . . . Smith on her pressing for the underlying contract of sale for the agreed upon resale price of \$250,000 in August, [d]efendant reneged on his promise citing "other issues" and demanded an additional \$85,000 and presented . . . Smith with a take [it] or leave it contract of \$335,000.

In considering defendant's numerous arguments against the existence of an oral agreement, the court explained that "[d]efendant's citation to the 'entire agreement' boiler plate paragraph in the [Johnson Purchase Agreement] does not abrogate the right of the [p]laintiffs to prove an enforceable oral agreement, which they have."

Plaintiff contends that the judge failed to apply a two-tiered legal standard for granting specific performance. "That [standard] is, after determining that the purchaser has a legal right to recovery, a court of equity must make a further determination that has been said to be discretionary." Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 599 (App. Div. 2005).

"[T]he right to specific performance turns not only on whether plaintiff has demonstrated a right to legal relief but also whether the performance of the contract represents an equitable result." Ibid. Defendant contends that the judge improperly found that a valid contract existed and, additionally, failed to balance the equities, which would have been decided in defendant's favor.

Although specific performance is a discretionary remedy, "[t]here is a virtual presumption, because of the uniqueness of land and the consequent inadequacy of monetary damages, that specific performance is the buyer's appropriate remedy for the vendor's breach of the contract to convey." Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 113 (App. Div. 1990).

Even though the judge did not clearly explain how he applied the standard when he found for specific performance, his letter opinion provides his thorough analysis for finding an oral agreement between the parties and how the balance of equities favored plaintiffs. The judge specifically considered the events that led to the parties entering into the Johnson Purchase Agreement – Johnson's impending sheriff's sale for which defendant expressed an interest to help; the meetings and conversations between the parties; their testimony; and the documents entered into evidence.

The judge made equitable considerations, including the parties' respective conduct and situation of the parties, in making his discretionary decision in favor of plaintiffs for specific performance. See *ibid.* Specifically, the judge requested written summations post-trial from the parties regarding their positions, and "pursuant to the equitable powers in terms of trying to reach . . . a just resolution of this complaint," considered the possibility of allowing Smith to purchase the Property for \$335,000. Further, the judge considered that the parties only entered into the agreements in order to save the Property from foreclosure – defendant was supposed to assist plaintiffs.

Defendant contends that the judge erred by considering fraud in his final judgment decision because plaintiffs did not plead fraud. Defendant correctly states that plaintiffs never pled fraud, however, mischaracterizes the judge's use of fraud. Defendant focuses on the judge's following language as the lynchpin for his argument: "the [c]ourt will not permit the statute of frauds to perpetuate frauds" and "it would be fraud not to enforce the agreement." Defendant removes this language from its context and reads it as if it stands alone. This language concludes the judge's discussion of the statute of frauds, where the judge unequivocally cites a statute of frauds exception. The judge further cites two cases in which the statute of frauds is

discussed, not an allegation of fraud. The judge did not consider fraud.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION