SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3588-15T1

INVESTORS BANK F/K/A INVESTORS SAVINGS BANK,

Plaintiff-Respondent,

v.

VISIONS DEVELOPMENT GROUP, LLC; AIR JOY HEATING & COOLING; AIR JOY MECHANICAL INC.; JEFF KLEIN REALTY, LLC; LOMURRO DAVISON EASTMAN & MUNOZ, PA; and 600 MADISON AVENUE CONDOMINIUM ASSOCIATION, INC.,

Defendants,

and

ERIC W. WEISS,

Defendant-Appellant.

Argued December 6, 2017 – Decided March 9, 2018

Before Judges Fuentes, Koblitz and Manahan.

On appeal from Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. F-002167-11.

Eric W. Weiss, appellant, argued the cause pro se.

Thomas W. Halm, Jr. argued the cause for respondent (Hill Wallack, LLP, attorneys; Thomas W. Halm, Jr. and Mark A. Roney, of counsel and on the brief).

PER CURIAM

Defendant Eric W. Weiss appeals from an order granting summary judgment in favor of plaintiff Investors Bank f/k/a Investors Savings Bank (Investors). Specifically, Weiss argues there are genuine issues of material fact as to the existence of an equitable lien with priority over a prior recorded mortgage of Investors in certain property located in Manalapan, New Jersey. We disagree, and affirm.

We briefly recite the facts relevant to our decision. Defendant Visions Development Group, LLC (Visions) executed and delivered to Investors, a note in the original principal balance amount of $3,400,000 (loan), with interest and costs to accrue to Investors, and a construction loan mortgage and security agreement (mortgage) in the same amount against the property located at 610-680 Madison Avenue, Manalapan, New Jersey (property). The costs associated with this transaction were to be used for the development of two commercial buildings located on the property.

Visions also executed and delivered to Investors an absolute assignment of rents and leases (ALR) to all present and future leases. The ALR also granted Investors a revocable license to

collect and use rents and profits from the leases to operate the property until the event of default. The mortgage and ALR were both recorded in the Monmouth County Clerk's Office on November 3, 2006.

On April 11, 2006, Visions retained Weiss, a real estate broker, to procure a commercial tenant for the property. Visions agreed to pay Weiss a commission. The broker's agreement was not recorded or filed so as to provide constructive notice of its existence to creditors of Visions. The broker's agreement also did not disclose the source of funds for Weiss's commission.

During the course of the loan, Investors and Visions agreed to three loan modifications of the note and mortgage. The first two modifications were recorded in the Monmouth County Clerk's Office on April 4, and July 11, 2008, respectively.

After the second modification agreement, Investors executed and delivered two releases of part of the mortgaged property, dated December 12, 2008, in connection with Visions' sale of one of the two buildings on the property. These were recorded in the Monmouth County Clerk's Office in December of 2008.

Weiss filed a notice of lis pendens against the property pursuant to an action filed by Visions against Weiss. The lis pendens was recorded in the Monmouth County Clerk's Office on October 21, 2008. On November 24, 2008, the lis pendens was

discharged by order of the court and recorded on December 11, 2008.

The third modification decreased the principal balance of the loan to $2,000,000 and was recorded in the Monmouth County Clerk's Office on August 26, 2009. Investors was unaware of the earlier, discharged lis pendens prior to the execution of the third modification.

Weiss filed a second notice of lis pendens against the property, which was recorded on April 16, 2010, pursuant to Weiss's claim for a commission against Vision. Weiss obtained two judgment liens against the property on January 7, 2011, docketed March 1, and April 13, 2011.

Visions defaulted on its obligations to Investors and; on March 30, 2011, Investors filed a foreclosure complaint against Visions. Investors filed an amended complaint adding a claim against Weiss for the two lien judgments against the property. Investors also filed an action against Visions in Hunterdon County, where they obtained an order providing that Abbie Rose Realty, LLC, a tenant at the property, make rent payments directly to Investors.

In the foreclosure action, a sheriff's sale of the property was scheduled to occur on July 16, 2012. It was adjourned as a result of an order to show cause (OTSC) filed by Weiss pro se

seeking to stay the sale. After an initial hearing, and further briefs submitted by the parties, a subsequent hearing was held on the OTSC before Judge Thomas W. Cavanagh, Jr. Judge Cavanagh entered an order which denied with prejudice the relief Weiss sought in the OTSC, and allowed Investors to proceed with the sheriff's sale of the property. Despite the dismissal of the OTSC, Judge Cavanagh ordered Investors to deposit $100,000 into its counsel's trust account as security in the event that Weiss was successful in securing an equitable lien; Judge Cavanagh also directed Weiss and Investors to engage in discovery limited to the equitable lien. Weiss did not appeal this order.

After two depositions by Weiss of Investors's senior vice president of real estate and former vice president, Investors filed a motion for summary judgment. Judge Joseph P. Quinn heard oral argument and entered summary judgment in favor of Investors.

Weiss raises the following points on appeal:

> POINT I
>
> THERE WAS NO JURISDICTION ON DEFENDANT AS PLAINTIFF FAILED TO SERVE HIM WITH A COPY OF THE COMPLAINT DESPITE HAVING ACTUAL KNOWLEDGE OF THE FAILURE TO SERVE HIM.
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> POINT II
>
> THE TRIAL COURT ABUSED ITS DISCRETION BY ENTERING SUMMARY JUDGMENT AGAINST DEFENDANT AS THERE WERE GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT.

POINT III

AS A MATTER OF LAW AND AS A MATTER OF EQUITY THE PLAINTIFF'S MORTGAGE DOES NOT HAVE PRIORITY TO DEFENDANT'[S] LIEN AND IT WAS AN ABUSE OF DISCRETION TO GRANT SUMMARY JUDGMENT.

POINT IV

THE PLAINTIFF IS UNJUSTLY ENRICHED AT DEFENDANT'S EXPENSE IF THE RULING IS NOT REVERSED AN[D] AVOIDS PAYMENT OF THE ESCROW.

POINT V

IT WAS AN ABUSE OF DISCRETION FOR THE COURT NOT TO FOLLOW THE DOCTRINE OF "LAW OF THE CASE" AS ESTABLISHED BY JUDGE CAVANAGH.

POINT VI

DIRECT BREACH OF CONTRACT.

Appellate review of a summary judgment motion is de novo, requiring application of the same standard as the motion court. Templo Fuente De Vida Corp. v. National Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012). Under that standard, summary judgment should be granted "if the pleadings, depositions, answers to interrogatories on file, together with affidavits, if any, show that there is no genuine issue as to any material fact." R. 4:46-2(c). In determining whether a genuine issue of material fact exists, the court considers "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). The court is obligated to defer to a motion court's factual findings when supported by the record, but need not accord any special deference to its interpretation of the law. Manalapan Realty, LP v. Twp. Comm., 140 N.J. 366, 378 (1995) (citing State v. Brown, 118 N.J. 595, 604 (1990)).

Initially, Weiss argues triable issues of fact exist as to the existence of an equitable lien on the property. Specifically, Weiss argues that the agreement between he and Visions, executed prior to the ALR between Visions and Investors, created an equitable lien on the property, as the rental payments received pursuant to the ALR were the source of Weiss's commissions. We reject this argument.

Our Supreme Court has summarized New Jersey law concerning the existence and creation of equitable liens:

> An equitable lien is "a right of special nature in a fund and constitutes a charge or encumbrance upon the fund." Generally, "[t]he theory of equitable liens has its ultimate foundation . . . in contracts, express or implied, which either deal with or in some manner relate to specific property, such as a tract of land, particular chattels or securities, a certain fund, and the like."
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> . . . .

> . . . [W]here a contract creates the basis for a lien, a court may impose an equitable lien if the contract is assigned with notice of that lien.
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> . . . However, . . . when property is sold subject to a lease, there is no obligation on the purchaser's part to pay the broker, unless the purchaser affirmatively assumes that obligation.
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> [VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 546-47, 556 (1994) (internal citations omitted).]

Here, Weiss's commissions were based on the aggregate rental value for the lease term. The agreement provided that Weiss's commission would be "earned, due, and payable in full upon the execution and delivery of the lease by and between the landlord and the tenant." There was no provision in the agreement that pledged the property as security for an obligation, or required the commissions be paid directly out of the rental income received by Visions. Further, the agreement was never recorded as a lien on the property, a fact that Weiss admits in his brief. The agreement, by its express terms, provided for a contractual obligation to Weiss which was attributable to Visions. It did not provide for an equitable lien on the leased property. As such, the argument that the agreement formed the basis for an equitable lien fails.

Weiss further argues that the April 16, 2010 notice of lis pendens gave the judicial liens priority over Investors's mortgage. Pursuant to the chronology of events, we disagree.

It is well-settled that New Jersey is a "race-notice" state. N.J.S.A. 46:26A-1 to -12 (Recording Act). The Recording Act provides in pertinent part:

> a. Any recorded document affecting the title to real property is, from the time of recording, notice to all subsequent purchasers, mortgagees and judgment creditors of the execution of the document recorded and its contents.
>
> b. A claim under a recorded document affecting the title to real property shall not be subject to the effect of a document that was later recorded or was not recorded unless the claimant was on notice of the later recorded or unrecorded document.
>
> [N.J.S.A. 46:26A-12(a), (b).]

The October 21, 2008 lis pendens filed by Weiss was discharged on December 11, 2008, removing his claim from the chain of title. The third modification to the loan was subsequently recorded on July 29, 2009. The second lis pendens that Weiss filed was recorded on April 16, 2010, and the judgment liens docketed on March 1, 2011, and April 13, 2011. The chronology of relevant filings shows that the judgment liens were filed well after the third modification agreement. Weiss has failed to produce any documentation indicating Investors had any actual

knowledge of the 2008 filing, which was recorded and discharged more than six months prior to the recording of the third modification to the loan. As such, on the issue of priority, the judge properly granted summary judgment in favor of Investors.

We next address those arguments raised by Weiss relating to the September 2012 order of Judge Cavanagh. The sole issue in contest after the entry of that order was whether an equitable lien existed on the property that was superior to Investors's lien. Nonetheless, on appeal, Weiss argues: (a) the issue of service of the foreclosure complaint; (b) that Investors's lien was void because it did not meet the definition of a "construction mortgage"; and (c) unjust enrichment. These issues were part of the matter Judge Cavanagh dismissed with prejudice.

Appeals as of right to our court are limited to final judgments of the trial courts with limited exceptions. R. 2:2-3(a)(1). As the Supreme Court recently reaffirmed:

> Generally, an order is considered final if it disposes of all issues as to all parties. Thus, in a multi-party, multi-issue case, an order granting summary judgment, dismissing all claims against one of several defendants, is not a final order subject to appeal as of right until all claims against the remaining defendants have been resolved by motion or entry of a judgment following a trial.
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> [Silviera-Francisco v. Board. of Educ. of City of Elizabeth, 224 N.J. 126, 136 (2016) (citations omitted)]

A notice of appeal from a final order must be filed within forty-five days. R. 2:4-1(a).

Judge Cavanagh's order is final not interlocutory because it dismissed with prejudice all of Weiss's claims in his OTSC. Weiss did not file a notice of appeal within forty-five days of this final order. Even were we to conclude that the order was not final, Weiss did not identify Judge Cavanagh's order in his notice of appeal. An appeal is limited to those judgments or orders, or parts thereof, designated in the notice of appeal. Pressler & Verniero, Current N.J. Court Rules, cmt. 6.1 on R. 2:5-1(f)(1)(2018); see also Campagna ex rel. Greco v. Am. Cyanamid Co., 337 N.J. Super. 530, 550 (App. Div. 2001) (refusing to consider a challenge to an order not listed in the notice of appeal).

Affirmed.