SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4604-15T2

EVARISTO CRUZ,

Plaintiff-Appellant/
Cross-Respondent,

v.

QUALITY CONSTRUCTION & RENOVATION, INC. and MARIO ESPADA,

Defendants/Third-Party Plaintiffs-
Respondents/Cross-Appellants,

v.

EDWARD CRUZ and E.E. CRUZ & COMPANY, INC.,

Third-Party Defendants-Respondents.

Argued May 1, 2018 – Decided May 10, 2018

Before Judges Carroll and DeAlmeida.

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-000073-15.

Marilyn K. Barbosa argued the cause for appellant/cross-respondent (Law Office of Barbosa Donovan, LLP, attorneys; Maurice J. Donovan and Marilyn K. Barbosa, of counsel and on the briefs).

Gary Potters argued the cause for respondents/cross-appellants (Potters & Della Pietra LLP, attorneys; Gary Potters and Michele L. DeLuca, on the brief).

Mitchell W. Taraschi argued the cause for respondent E.E. Cruz & Company, Inc. (Connell Foley LLP, attorneys; Mitchell W. Taraschi, of counsel and on the brief).

Roger B. Kaplan argued the cause for respondent Edward Cruz (Greenberg Traurig, LLP, attorneys; Roger B. Kaplan, of counsel and on the brief).

PER CURIAM

On November 30, 2000, plaintiff Evaristo Cruz and his cousin, third-party defendant Edward Cruz ("Edward"), loaned defendant Quality Construction and Renovation, Inc. ("Quality") $520,000. The loan was secured by a mortgage on property located on Prospect Street in Newark that Quality was developing into residential and commercial condominiums. By its terms, the loan was to be repaid incrementally upon the sale of the individual condominium units or in full by November 30, 2002.

The note and mortgage listed plaintiff and Edward as the "Lender." The note provided "[a]ll payments will be made to the Lender at the address shown above or at a different place if required by the Lender." The Lender's address was specified as

"Cruz Plaza, 943 Holmdel Road,[1] Holmdel, New Jersey." The record reflects that this was also the address for third-party defendant E.E. Cruz & Company, Inc. ("E.E. Cruz").[2]

A dispute developed in November 2014, as Quality prepared to sell a commercial condominium unit but the 2000 mortgage still appeared open of record. Quality took the position that it had previously repaid the loan in full by virtue of a $349,547.40 check in 2001, and a $237,493.50 check in 2003. Plaintiff disputed this contention, and on March 27, 2015, filed a verified complaint and order to show cause seeking to escrow the proceeds from Quality's sale of the condominium until proof of payment could be established. On April 6, 2015, Quality filed an answer, counterclaim and third-party complaint against Edward and E.E. Cruz. Quality also filed a cross-order to show cause seeking to discharge the mortgage.

A period of discovery ensued during which various documentary evidence was produced. Included was a copy of the front of Quality's check dated July 29, 2001, in the amount of $349,547.40, payable to plaintiff and Edward, which contained a notation

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[1] The mortgage identified the address of Cruz Plaza as 953 Holmdel Road, Holmdel.

[2] E.E. Cruz is a construction company originally founded by plaintiff and Edward. According to plaintiff, he sold his interest in E.E. Cruz to Edward in 2002.

"320,000 plus interest 1st Installment." The check was accompanied by a July 30, 2001 letter from Quality's attorney, Richard C. Sherman, to plaintiff and Edward at the Cruz Plaza address, and an Airborne Express mail receipt. Sherman's letter stated:

> I am enclosing herewith Check No. 1566 of Quality Construction & Renovation, Inc. payable to your order in the sum of $349,547.40. The within check represents the following in connection with Note and Mortgage from Quality to you bearing date of November 30, 2000 covering property in the City of Newark, County of Essex as follows:
>
> 1. Principal payment in the sum of $320,000;
>
> 2. Interest on the original principal balance of $520,000 at 8-1/2% per annum from November 30, 2000 through and including August 1, 2001 in the amount of $29,547.40.
>
> The within check is in full satisfaction of mandatory principal payment which was otherwise due on November 30th next pursuant to Paragraph 1 of Rider to Note and Rider to Mortgage. Accordingly, there remains a principal balance of $200,000 to you from my client.
>
> My client is not, at this time, asking for release of any units from the lien of mortgage notwithstanding it is entitled to same under aforesaid Paragraph 1 of Rider to Mortgage. However, Quality reserves its right to request said release, should the need arise in the future.

Records obtained from Quality's bank confirmed that funds in the amount of $349,547.50 were debited from Quality's account.

With respect to the second and final payment, Quality's documentary proofs included an October 8, 2003 letter from Sherman addressed to plaintiff and Edward at the Cruz Plaza address. The letter reflects it was sent via facsimile, and stated:

> According to my records, there remains outstanding to you from my client [Quality], the sum of $200,000 with interest thereon from August 1, 2001.
>
> My client is about to close title to [an unrelated property] . . . on Friday, October 10th next. Although your Mortgage does not cover the subject property but instead covers adjoining property . . . my client wants to satisfy your obligation in full at this time.
>
> Would you kindly fax to me on or before October 10th next your calculation as to the amount due assuming that you would be in receipt of check on October 13th next via overnight mail.

The next day, Sherman received a written response from E.E. Cruz's Chief Financial Officer, Bennet Klausner, advising the loan payoff amount was $237,446.92, comprised of $200,000 in principal plus $37,446.92 in interest.

Copies of the front and back sides of an October 10, 2003 check drawn on the Giantomasi and Oliveira attorney trust account, payable to plaintiff and Edward in the amount of $237,493.50, were produced in discovery. The check was thereafter endorsed and

deposited by E.E. Cruz. E.E. Cruz also produced ledgers of checks, and its checking account records were obtained from Wells Fargo Bank. These records showed E.E. Cruz deposited $237,521.50 on October 14, 2003, and shortly thereafter issued two checks to plaintiff and Edward, each in the amount of $118,746.75.

Edward was satisfied the loan had been fully repaid and accordingly he signed a discharge of the mortgage. Plaintiff was still not satisfied, however, and refused to discharge the mortgage absent an agreement to escrow the sale proceeds. Consequently, prior to the close of discovery, E.E. Cruz filed a motion for summary judgment seeking dismissal of Quality's third-party complaint. Quality filed a cross-motion for summary judgment seeking to dismiss plaintiff's complaint, which relief Edward also supported.

Following oral argument on the motions, Judge Thomas M. Moore concluded there was

> undisputed evidence that [Quality's first check in 2001] was properly made out. That it was properly delivered to the correct address. It was properly presented, negotiated and paid by Quality's bank two days later. What I would consider . . . in the ordinary course of business.

The judge further determined it did not matter whether the first check was deposited by E.E. Cruz because in 2001, plaintiff and Edward jointly owned and had equal interests in E.E. Cruz. Thus,

as to this first check, the judge found there was "clear and convincing proof that it was paid. And [plaintiff] got the benefit."

As to the second payment in October 2003, Judge Moore similarly concluded there was

> [a]mple evidence that Mr. Sherman had requested and received the [mortgage] payoff amount, as required under the loan documents. The check was issued . . . [i]t was paid. The entry of the [E.E. Cruz] ledger indicates the check for the identical amount was issued and payment made to [plaintiff].
>
> So it's clear, it's beyond any doubt in my mind, . . . that Quality Construction satisfied, paid off the mortgage in full, with checks paid out to the mortgagees, to the lenders as required by the loan documents, undisputed.
>
> I don't think it could be much clearer that [plaintiff's] claims are . . . without merit at this time and should be dismissed.

Judge Moore further determined:

> I don't believe further discovery on this matter would make any difference. The parties have acted extraordinarily diligent[ly] in trying to fl[e]sh out all of these issues from [thirteen, fourteen, fifteen] years ago.

Accordingly, the court granted Quality's motion for summary judgment and dismissed plaintiff's complaint. Since this relief effectively rendered Quality's third-party complaint moot, the court also granted E.E. Cruz's motion to dismiss. The August 20,

2015 memorializing order provided for discharge of the subject mortgage by the Essex County Registrar and its cancellation of record pursuant to N.J.S.A. 2A:51-1.

Quality then moved for an award of attorneys' fees and costs against plaintiff pursuant to N.J.S.A. 46:18-11.4.[3] Quality also sought frivolous litigation sanctions against plaintiff and plaintiff's counsel pursuant to N.J.S.A. 2A:15-59.1 and Rule 1:4-8.

The court heard oral argument on the motion on December 4, 2015, and reserved decision pending a full review of the record. On February 29, 2016, the court granted Quality's motion for attorneys' fees and costs pursuant to N.J.S.A. 46:18-11.4, but denied its request for frivolous litigation sanctions "by the slimmest of margins." Quality's counsel was directed to submit a supplemental certification of services addressing the fees and costs that Quality sought to recover.

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[3] The version of N.J.S.A. 46:18-11.4 in effect when this suit was filed provides in relevant part:

> Any mortgagee . . . who fail[s] to comply with [N.J.S.A. 46:18-11.2] shall be liable to the mortgagor . . . for the cost of any legal action to have the mortgage canceled of record, including reasonable attorneys' fees, but no attorneys' fees shall be allowed unless 20 days written notice is given to the mortgagee prior to institution of the suit.

On March 14, 2016, plaintiff filed a motion for reconsideration of the court's decision to award counsel fees. Plaintiff argued the court's dismissal of its complaint on August 20, 2015, did not address cancellation of the subject mortgage pursuant to N.J.S.A. 46:18-11.2, thus extinguishing Quality's right to seek fees under the mortgage discharge statute, N.J.S.A. 46:18-11.4. Judge Moore disagreed, noting the court's August 20, 2015 order did not amount to a final adjudication of all issues related to the litigation under Rule 4:42-9(d), since Quality's counterclaim for attorneys' fees remained outstanding. The judge recognized that Quality specifically sought attorneys' fees pursuant to N.J.S.A. 46:18-11.4 in count one of its counterclaim, and again at oral argument on December 4, 2015.

Judge Moore also noted plaintiff failed to raise this argument in its original opposition. The judge elaborated:

> [P]laintiff failed to make these particular arguments at the time of the motion for attorney[s'] fees. . . . [P]laintiff, in the [c]ourt's view, was well aware of claims under [N.J.S.A.] 48:18-11.4 prior to the entry of the [c]ourt's February [29, 2016] order. Failure to raise any issue as to this claim prior to the motion is evident in the record. And the failure to raise it . . . precludes reconsideration.

Citing Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996), the judge noted a motion for reconsideration cannot be based upon

facts that were known to the moving party when the judgment being challenged was entered.

Turning next to the issue of the quantum of fees to which Quality was entitled, Judge Moore began with a determination of the lodestar. He evaluated the fees charged by defendant's counsel in light of the factors enumerated in RPC 1.5 and concluded "that the fees sought satisfy the baseline hurdle of reasonableness under the [New Jersey Rules of Professional Conduct].

Judge Moore additionally determined post-judgment fees, including the reasonable cost of preparing Quality's fee application, should be included in the award. However, the judge rejected an award for time spent on defendant's unsuccessful frivolous litigation argument. The judge also concluded Edward, while equally situated to plaintiff as a mortgage lender, should not be "saddled with fees" because he executed a discharge of the mortgage before July 24, 2015, the date of oral argument on the motions for summary judgment, while plaintiff contested his duty to discharge the mortgage throughout the entire litigation. Ultimately, the judge made certain reductions to the calculations submitted by Quality's counsel, and entered a fee award of $116,110.07.

Plaintiff now appeals from the August 20, 2015 order entering summary judgment for Quality, the February 29, 2016 order awarding

attorneys' fees, and the companion orders entered on June 14, 2016, denying reconsideration and fixing the amount of the fee award. Quality has filed what it terms a "contingent cross appeal" of the August 20, 2015 order dismissing its third-party complaint against Edward and E.E. Cruz, for the purpose of preserving those claims in the event plaintiff's appeal is successful.

Before us, plaintiff raises the following arguments in support of his position that summary judgment was improperly granted: (1) genuine issues of material fact exist; (2) an open mortgage of record raises a presumption of non-payment; (2) the court erroneously accepted E.E. Cruz's financial ledgers without properly authenticating them as business records; and (4) summary judgment was premature because the discovery period had not ended.

Additionally, plaintiff contends the trial court's award of attorneys' fees pursuant to the mortgage discharge statute, N.J.S.A. 46:18-11.4, was an abuse of discretion because (1) the mortgage was not "redeemed, paid and satisfied;" and (2) Quality was granted summary judgment on the basis of N.J.S.A. 2A:51-1, not N.J.S.A. 46:18-11.2, so that a fee award under N.J.S.A. 46:18-11.4 was not implicated. Plaintiff also challenges the quantum of attorneys' fees and costs awarded by the court as excessive and palpably unreasonable.

Having considered plaintiff's arguments in light of the record and applicable legal standards, we affirm on the appeal and the cross-appeal substantially for the reasons stated in Judge Moore's comprehensive oral opinions. Plaintiff's arguments lack sufficient merit to warrant extended discussion. R. 2:11-3(e)(1)(E). We add only the following limited comments.

We review a grant of summary judgment de novo, observing the same standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). Summary judgment should be granted only if the record demonstrates there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). If the evidence submitted on the motion "'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). If no genuine issue of material fact exists, the inquiry then turns to "whether the trial court

correctly interpreted the law." DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citations omitted).

Applying these standards, we conclude Quality was entitled to summary judgment as a matter of law. It is true, as plaintiff contends, that an open mortgage of record creates a presumption of non-payment. Kushinsky v. Samuelson, 142 N.J. Eq. 729, 731 (E. & A. 1948) (citing Ocean Cty. Nat'l Bank v. Stillwell, 123 N.J. Eq. 337 (E. & A. 1938)). Nonetheless, we conclude, as did Judge Moore, that this presumption was overcome by the abundant evidence presented that Quality's obligation under the note and mortgage was fully paid.

Next, we note "[t]he general rule as to the admission or exclusion of evidence is that '[c]onsiderable latitude is afforded [to] a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion.'" State v. Kuropchak, 221 N.J. 368, 385 (2015) (alterations in original) (citation omitted). "Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted."'" Ibid. (citation omitted).

Here, we discern no abuse of discretion in Judge Moore's decision to accept as a business record E.E. Cruz's ledger sheet showing receipt of Quality's second mortgage payment and subsequent disbursements in equal amounts to plaintiff and Edward. We note the entries in the ledger are supported by the records obtained from Wells Fargo Bank, which show E.E. Cruz deposited $237,521.50 on October 14, 2003, and shortly thereafter issued two checks, each in the amount of $118,746.75. Even if the ledger was improperly admitted, we view any such error as harmless, in view of the substantial other evidence in the record as to the second payment. This evidence includes the payoff correspondence between Sherman and Klausner; the front and back sides of the October 10, 2003 check drawn on the Giantomasi and Oliveira attorney trust account, payable to plaintiff and Edward in the amount of $237,493.50, which was thereafter endorsed and deposited by E.E. Cruz; and the Wells Fargo records of the E.E. Cruz account.

Nor do we find that summary judgment was prematurely granted. While summary judgment is often inappropriate when discovery has not been completed and "critical facts are peculiarly within the moving party's knowledge," Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988) (quoting Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981)), plaintiff has not shown that further discovery would have changed the relevant facts. See

Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977). Further, we note that actions to cancel or discharge a mortgage pursuant to N.J.S.A. 2A:51-1 may be brought summarily in accordance with Rules 4:67-1(a) and 4:67-2(a).

We also agree with Judge Moore that attorneys' fees were properly awarded to Quality pursuant to N.J.S.A. 46:18-11.4, and that Quality gave plaintiff timely notice of its request to discharge the mortgage prior to filing its counterclaim, which specifically sought such fees on this statutory basis.

With respect to the quantum of the fee award, in calculating the amount of reasonable attorneys' fees, "an affidavit of services addressing the factors enumerated by RPC 1.5(a)" is required. R. 4:42-9(b). Courts then determine the "lodestar," defined as the "number of hours reasonably expended" by the attorney, "multiplied by a reasonable hourly rate." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)). "The court must not include excessive and unnecessary hours spent on the case in calculating the lodestar." Furst, 182 N.J. at 22 (citing Rendine v. Pantzer, 141 N.J. 292, 335-36 (1995)). The court is required to make findings on each element of the lodestar fee. Id. at 12. The fee awarded must be "reasonable," RPC 1.5(a), and reasonableness is a

"calculation" to be made in "every case." Furst, 182 N.J. at 21-22.

We afford trial courts "considerable latitude in resolving fee applications . . . ." Grow Co., Inc. v. Chokshi, 424 N.J. Super. 357, 367 (App. Div. 2012). We will not disturb the trial court's award of counsel fees "except 'on the rarest occasions, and then only because of a clear abuse of discretion.'" Ibid. (quoting Rendine, 141 N.J. at 317). Here, Judge Moore engaged in a thorough analysis of the applicable factors when calculating the fee award. We discern no abuse of discretion.

Affirmed.