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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-0911-20

BELLMAWR PARK MUTUAL
HOUSING CORPORATION,

Plaintiff-Appellant,

v.

JESSICA MARINO, individually
and as Executrix of the Estate
of JEAN KEYS-CHEVERIE
and CURTIS MARINO,

Defendants-Respondents.

Submitted¹ February 7, 2022 – Decided April 26, 2022

Before Judges Rothstadt and Natali.

On appeal from the Superior Court of New Jersey,
Chancery Division, Camden County, Docket No.
C-000050-19.

Paul Leodori, attorney for appellant.

¹ We note that although the matter had been listed for oral argument, none of the parties appeared. For that reason, the matter was transferred to our waiver calendar.

Respondents have not filed a brief.

PER CURIAM

After a bench trial, a Chancery judge determined that plaintiff Bellmawr Park Mutual Housing Corporation, a cooperative-type housing corporation, could not bar the transfer of defendant Jessica Marino's late mother Jean-Keys Cheverie's interest in her unit in plaintiff's building to Jessica,² so she could live there with her husband, defendant Curtis Marino, and their children. On appeal from the Chancery judge's October 20, 2020 judgment, plaintiff contends that Jessica's "failure to report income to state and federal authorities . . . justifi[ed]" plaintiff's decision to bar defendants from living in the unit. It also asserts that allowing the Marinos to reside in the unit would violate N.J.A.C. 5:28-1.11. In addition, plaintiff argues that Curtis's "gambling habits" warranted the Marinos' exclusion from the building. It also contends it was "entitled to recover . . . all operating payments under the Membership Contract" and "late charges and attorneys' fees and costs" from the Marinos.

² We refer to the Marinos individually by their first names to avoid any confusion caused by their common surname.

We have considered plaintiff's contentions in light of the record and applicable principles of law. We affirm substantially for the reasons expressed by the Chancery judge that were placed on the record on October 20, 2020.

The facts developed at trial are summarized as follows. The late Jean Keys-Cheverie was a "member" of plaintiff³ and she lived in the unit assigned to her membership interest that was located in plaintiff's building at 2 Pine Terrace in Bellmawr. She acquired her interest in April 2009 and lived in the unit until she died in July 2018. Thereafter, her daughter, Jessica became her executrix and the beneficiary of her estate.

Keys-Cheverie's use and occupancy of her unit was subject to a "Membership Contract." Under that contract, members acknowledged that plaintiff was formed to "promote the mutual housing principles." And, under plaintiff's rules and regulations, unit members were advised that plaintiff "was formed to provide members and their families with affordable housing wherein all residents can live in a place devoted to promoting a safe, healthy, and enjoyable environment."

³ Plaintiff's governing documents designate its residents as members, rather than shareholders, and are designated as sharing in the ownership of the corporation under terms set forth in a Membership Contract and related documents.

The Membership Contract also contained a provision for "operating payments," and plaintiff's rules and regulations contained a provision for attorney's fees and costs should plaintiff incur them in any effort to remove a member or occupant. Specifically, the agreement provided that "so long as this [c]ontract is in effect," "the [m]ember" would be obligated "to make operating payments." The Membership Contract explained that these payments were "to cover the estimated cost of the [o]perating [s]ervice, and [r]eserves," otherwise set forth within the agreement. Those payments were due monthly "so long as this [c]ontract is in effect." Under the agreement, these payments were to go towards administrative expenses; plaintiff's taxes, assessments, insurance expenses; and to establish reserves for losses, "repairs, maintenance, and replacements."

The Membership Contract also reserved onto plaintiff the right to terminate the contract if, among other events, the unit assigned to the member was being occupied "by persons not permitted to do so." In that event, plaintiff was entitled to terminate the agreement "upon [ten] days written notice to the [m]ember." Among other terminating events, the agreement provided that if two thirds vote of all members determined that a "member is for any reason

undesirable as a resident," plaintiff could terminate the agreement. Upon termination, under the agreement, the member was required to vacate the unit.

Also under the Membership Contract, a member was entitled to transfer his or her rights to a family member, but the agreement specifically required that "permission of the Board of Trustees shall, . . . be required for such transfer." If approved, any transfer would permit the transferee to "enjoy all the privileges of and be subject to all the obligations of the [m]ember under this [c]ontract."

After her mother's death, Jessica planned to move into the unit with her husband and her four children. In accordance with the Membership Contract, in 2018, she applied for a transfer of her mother's "Membership Certificates" and their corresponding right to occupy the unit, by initially submitting her income information and other documents. In her application, Jessica disclosed income she received from a home and office cleaning business she operated on her own. Also, although he was not listed as an applicant, Jessica disclosed unemployment compensation Curtis was receiving and their joint tax returns for the past two years.

According to plaintiff's amended complaint, Jessica's "application was denied by [plaintiff] based upon her lack of income." Plaintiff sent a letter to Jessica individually and in her capacity as executrix of her mother's estate that

the application was denied "due to [Jessica's] unstable and inconsistent income source as well as [her] credit score"⁴ and that she had thirty days to leave the unit. Notably, Jessica never took possession of the unit.

Jessica responded to plaintiff's denial with a request for an informal review and provided additional information, clarifying that Curtis returned to work and could provide pay stubs and that they would live together in the unit. Plaintiff responded stating that it would not change its decision and reiterated that she had to vacate the premises by October 30, 2018.

In order to address plaintiff's concern, in January 2019, Jessica sought to resubmit an application, this time including Curtis as an applicant. The new application was submitted with plaintiff's permission on behalf of defendants as well as only two of their four children because one child was going to live in a home that addressed the child's needs, and another child was enlisting in the service. Neither would be residing in the unit.

Plaintiff acknowledged receipt of the new application and advised Jessica that it would be considered at a meeting on February 5, 2019, but that she had to supply missing financial information, which she did.

⁴ Plaintiff's appendix does not include a copy of a credit report as to Jessica or Curtis.

The 2019 application included federal and state tax returns for four years beginning in 2016. As it turned out, Jessica under reported her income on those tax returns for the three most recent years because she did not include income she received from the home and office cleaning service that she conducted. Jessica confirmed that the amount consisted of "just pocket money," although it totaled approximately \$375 per week.

Plaintiff rejected the 2019 application. It withheld its approval for the transfer based upon its "concern[] about the financial circumstances and background of Jessica and Curtis."

Also, prior to rejecting the application, plaintiff obtained documentation from local authorities about "incidents of verbal disputes between Jessica and Curtis" occurring in April and May 2017 and January 2019. Notably, the documents revealed that Jessica and Curtis stated to have been "in the middle of a divorce."

Based on those documents, plaintiff requested from Jessica confirmation about this "status of their divorce proceedings in order to move forward with Jessica's application." According to plaintiff's amended complaint, "Jessica failed to supply this information."

In sum, plaintiff rejected the 2019 application because of Jessica's under reporting of her income from her house and office cleaning business and because of the potential for a divorce where Jessica relied upon her husband's income.

Afterward, on May 24, 2019, plaintiff filed its complaint in this action. Jessica filed a timely answer and counterclaim. Thereafter, plaintiff amended its complaint to add Curtis as a party and he and Jessica filed a timely answer and counterclaim in response.

The amended complaint set forth allegations based upon information that had been disclosed during discovery since the filing of the original complaint. During discovery, the Marinos were deposed by plaintiff, and they also produced various documents. Among them were bank statements provided by Curtis, which revealed that he paid in 2018 a retainer to a law firm in connection with his divorce from Jessica. Moreover, according to plaintiff, the documents indicated Curtis had a "sporadic" work schedule and according to his deposition testimony "he work[ed] on a day to day basis." Curtis also confirmed that he "regularly participate[d] in online gambling" and that he was not sure whether he would be moving into the unit with Jessica or whether the children would be living with her.

According to Jessica's testimony at her deposition, she confirmed that she did not work in 2019 and that she relied solely upon Curtis's income. However, Jessica's testimony about not working did not relate to her cleaning service, which she confirmed was not disclosed on her tax returns.

The amended complaint added as a reason for rejecting Jessica's application, Curtis's propensity for gambling and set forth claims for the following: Count 1 - Declaratory Judgment; Count 2 - Unlawful Possession under N.J.S.A. 2A:35-1; Count 3 - Unlawful Entry under N.J.S.A. 2A:39-1; Count 4 - Ejectment; Count 5 - Quantum Meruit; Count 6 - Trespass; Count 7 - Specific Performance; Count 8 - Holdover Tenant; Count 9 - Breach of Contract; and Count 10 - Bad Faith. In their answers and counterclaims, the Marinos asserted a cause of action for "frivolous claim," under N.J.S.A. 2A:15-59.1.

The matter came before the Chancery judge for trial on September 23, 2020, and October 15, 2020. A representative for plaintiff and the Marinos testified.

At trial, plaintiff's representative confirmed that the Marinos' income as indicated on their tax returns, which ranged from \$92,000 a year to over \$97,000 a year, was sufficient to qualify for membership. She also testified plaintiff never reached out to the Marinos to verify their marital status. The

representative also stated she was not aware that one of the Marinos' children resided in a residential treatment center or that their oldest child was going to be getting his own place to live. She conceded the Marinos had not occupied the unit as plaintiff had not approved them to do so. The representative ultimately confirmed that other than defendants maintaining their current home as their primary residence, if that was their plan, there was no other reason why their application should not have been approved.

For the first time, at trial plaintiff raised an issue with the number of people that the Marinos planned to have occupy the unit. According to plaintiff, the Marinos intended to live in the unit with their four children and such occupancy would have violated N.J.A.C. 5:28-1.11.⁵ Plaintiff contended that under that regulation only three people could have occupied the unit.

⁵ The regulation is part of New Jersey's Housing Code and states in relevant part the following:

(a) Every dwelling unit shall contain at least 150 square feet of floor space for the first occupant thereof and at least 100 additional square feet of floor space for every additional occupant thereof, the floor space to be calculated on the base of total habitable room area.

(b) Every room occupied for sleeping purposes by one occupant shall contain at least [seventy] square feet of floor space, and every room occupied for sleeping

Jessica testified as to her two applications, including her financial and familial circumstances. She confirmed her she earned about \$375 per week of unreported income by cleaning houses and offices. She also testified her bills were all current, including the mortgage at her current residence, in addition to paying the rent on her mother's unit. Jessica stated that, although she and Curtis had some marital difficulties, they never separated and planned on living together with their children in her mother's unit. She clarified that her child that was living at a treatment center had returned home and would continue to live with her and that her other child would live with them for a few months until he graduated high school and enlisted in the service. Jessica also stated her intention was to add an addition to the unit to provide more bedrooms.

Curtis testified he worked regularly as a carpenter in a union for sixteen years and, when he was not assigned a job, he collected unemployment compensation. He stated he gambled for fun and did not have an addiction or any financial problems because of it. Curtis testified he had not filed for divorce and was refunded the retainer he paid to an attorney as he was no longer

purposes by more than one occupant shall contain at least [fifty] square feet of floor space for each occupant thereof.

[N.J.A.C. 5:28-1.11(a) to (b).]

contemplating filing for divorce. He confirmed he could and intended to build an addition to the unit, and until the addition was completed the children would share the bedrooms and he and Jessica would sleep in the living room. Finally, he clarified his intention was to move into the unit and sell or rent his current residence to save money and live more efficiently considering his children were moving out as they grew up.

After considering the testimony and documents submitted into evidence, on October 20, 2020, the Chancery judge placed her findings of fact and conclusions of law on the record. In her decision, the judge noted that when Jessica submitted her original application, she left out Curtis because a representative of plaintiff advised her that "since the will devised the property to her . . . she didn't need to put Curtis'[s] name on it." Because her income was insufficient without Curtis being on the application, plaintiff did not approve of the transfer to Jessica. The judge noted that at the time the application was submitted defendants and their children were not living in the subject unit but in their current home.

The judge found that plaintiff's rejection of the 2018 application "was made as a result of the lack of income and poor credit rating of" Jessica. However, the judge also found that plaintiff told Jessica that she could submit

the joint application with Curtis and would be reconsidered, which the Marinos did on January 21, 2019. However, the judge also found that Jessica's reliance on Curtis's income became an issue because of their contemplated divorce and for that reason Jessica's reliance on Curtis's "income may have been inappropriate." But, the judge found at trial it was clear that defendants did not file for a divorce, and although Curtis consulted with an attorney in December 2018, he received a refund of the retainer that he had paid at that time.

Turning to the issue with Jessica, Curtis, and their children's proposed occupancy, the judge found from the testimony that their oldest son was scheduled to graduate in June and join the Air Force. The other three children "would be able to have the two boys sharing the larger of the two bedrooms, the girl in the smaller of the two and then [the Marinos] would use a fold out couch in the living room until such time as they make application to expand their home by adding an extra living space." The judge noted Curtis was a carpenter for the past seventeen years and he "would be able to design and build this extra living space."

The judge was satisfied that defendants had demonstrated "their good faith by maintaining the property and paying monthly rent, even though [plaintiff] ha[d] not accepted the rent." Relying on Jessica's undisputed testimony, the

judge found that the Marinos assumed responsibility for shoveling the snow, raking leaves, cutting grass, painting the property, and making "other small maintenance chores." Moreover, as to the monthly charge, they continued to tender checks that plaintiff refused to deposit even when the charge was increased. The judge was also satisfied the Marinos demonstrated that they were able to afford the required payments under the Membership Contract because they made them while maintaining the property "as though it was their own," and still making the payments on their then current residence.

The judge also found that, although Jessica had initially "improperly submitted information and also failed to submit information that would have been imperative for [plaintiff] to make the right decision for her[,] [s]he did clear that up." The judge noted that the plaintiff relied upon two specific reasons for rejecting the application. One was income, which was resolved with the second application and based on the judge's review of the financial information, she concluded that "there [was] sufficient income to support the financial obligation." The other reason, the alleged divorce "never came to fruition and may or may not have been misunderstood by" plaintiff. At the time of trial the judge noted that the Marinos were "still together and intend[] to stay together and intends to reside in the property together with their children."

The judge concluded any issue regarding the inadequacy of the space will be resolved by the parties altering the living area which "would enable there to be a resolution of any occupancy requirements." On the issue of payments that had allegedly not been made by the Marinos to plaintiff, the judge acknowledged that plaintiff "had a legitimate reason to deny the application . . . initially and through no fault of" plaintiff. Again, the judge noted that Jessica misstated in the initial application that there would be "only her and her two children living there, when in fact it would be her, her husband and four children living there." And again, Jessica failed in the initial application to provide proof of "income that [plaintiff] could rely on in granting the application."

In an effort "to alleviate or relieve some of the legal fee burden that has been placed on" plaintiff, the judge required defendants to pay one half of the rent that was due beginning the month after Jessica's mother died. According to the judge it was "equitable" to only require one half since the Marinos "were denied access and use of the property during that entire time and also because she [was] diligent in maintaining the outside of the property."

In the judge's October 20, 2020 order, she dismissed the complaint; entered judgment in favor of the Marinos, requiring plaintiff's approval of its transfer of Jessica's mother's interest in the unit to Jessica; and required Jessica

to pay one half the rent from August 2018 through September 2020 within forty five days. This appeal followed.

The scope of our view of a judgment entered in a nonjury case is limited. When "supported by adequate, substantial and credible evidence," a trial courts finding "are considered binding on appeal" and "should not be disturbed unless . . . they are so wholly insupportable as to result in a denial of justice." Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 483-84 (1974). The final determinations made by the trial court, "premised on the testimony of witnesses and written evidence at a bench trial" are viewed in accordance with this differential standard. D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013). "[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interest of justice." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Trust Created by Agreement Dated Dec. 20, 1961, 194 N.J. 276, 284 (2008)). However, a trial court's legal determinations are not entitled to any special deference in our reviewed de novo. D'Agostino, 216 N.J. at 182 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

With these guiding principles in mind, we begin with plaintiff's first contention that Jessica's alleged underreporting of her income warranted plaintiff's rejection of her application. At the outset, we observe that in Jessica's initial application, she disclosed her additional income to plaintiff setting forth that she earned on average approximately \$375 per week through her business. Moreover, plaintiff never rejected Jessica's application based on her not reporting this income on her tax returns.

Nevertheless, on appeal, plaintiff relies upon state and federal tax laws and Jessica's alleged failure to report her income allegedly in violation of those laws, as a basis for denying her application even though it was undisputed Jessica disclosed the additional income on her application. Specifically, plaintiff cites to N.J.S.A. 54:52-6 that makes it a disorderly persons offense if someone fails to file or report income on a state income tax return; N.J.S.A. 54:52-9 that makes it a third-degree crime for failure to pay taxes with intent to avoid payment of taxes; and similar requirements under N.J.S.A. 54:52-8 and N.J.S.A. 54:52-10 that makes it a third-degree crime if a person files a fraudulent return with the intention to avoid timely payment of taxes.

However, plaintiff does not cite any authority to support its contention that the violation of such laws, if proven, under these circumstances supports its

decision to reject Jessica's application. Moreover, it does not cite to any language in plaintiff's governing documents that would support such a contention.

Under these circumstances, we conclude that plaintiff's argument in this regard is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Suffice it to say that there was never a determination in this case that Jessica had any intention to avoid paying taxes. Even if there had been, according to plaintiff's representative who testified at trial, pleadings, and denial letters, Jessica's alleged failure to report was not a determining factor. As the witness testified, there was no reason to reject the 2019 application as long as Jessica intends that the unit would be her primary residence.

Next, we consider plaintiff's contention that, because the number of people who sought to occupy the unit violated N.J.A.C. 5:28-1.11, plaintiff's refusal to transfer the right to occupy the unit to Jessica was justified. As already noted, the judge found that any issue about occupancy would be relieved by the sleeping arrangements initially contemplated by the Marinos and by the plans to create an additional bedroom.

In any event, we are not persuaded by plaintiff's reliance on construction regulations addressed in N.J.A.C. 5:28-1.11(b). This regulation is contained in

a subchapter of the state housing code that sets forth the "standards of habitability" for homes. Specifically, the regulation states, "The provisions of this subchapter shall constitute the standards to guide the public officer or his agents in determining the fitness of a building for human habitation, use, or occupancy." N.J.A.C. 5:28-1.1.

At trial, there was no testimony that the anticipated use of the unit by defendants violated that regulation. The only related testimony came from plaintiff's representative who stated that the large bedroom in the unit was approximately one hundred and twenty-two square feet, while the smaller bedroom was approximately ninety-nine square feet. No expert or construction official ever testified about how those dimensions would not legally accommodate the number of people the Marinos planned on moving into the unit.

What was clear was that the Marinos had never occupied the unit, and if they were approved, they were obligated to comply with any laws, rules and regulations. The Chancery judge was satisfied that the Marinos had the intention to make alterations necessary to complying with legal requirements. If they do not, plaintiff is not without a recourse under its governing documents and the law.

We turn our attention next to plaintiff's contention that Curtis's gambling losses justified the denial of the application. Here, again, there was no evidence at trial that supported plaintiff's conclusion that the reported losses justified the rejection of defendants' application. As already noted, plaintiff's representative testified that considering the parties current income as depicted in their tax returns, which reflected gambling losses, and other than the Marinos possible continued occupancy of their current home, thereby making the subject unit not their primary residence, there was no other reason to deny their application. Moreover, the representative confirmed that the income shown on the tax returns was more than sufficient to meet plaintiff's criteria.

As already noted, the Chancery judge found that the Marinos proved that not only could they afford the payments and upkeep costs associated with the unit in plaintiff's building, but they could do so while still maintaining the expenses of their current residence. That finding was supported by plaintiff's representative testimony about defendants' income and the proof of their continued payment of the monthly charges to plaintiff while this action was pending.

In its next argument, plaintiff contends that they were entitled to full reimbursement of the operating payments from the time of Jessica's mother's

passing through the date of trial. As noted, there is no dispute that the Marinos tendered payments to plaintiff each month, which did not cash their checks. It was also undisputed that the Marinos never occupied the unit at any time because of plaintiff's refusal to approve their application for the transfer of Jessica's mother's rights.

On appeal, plaintiff relies upon N.J.S.A. 2A:35-1 to -3, an act governing ejectment proceedings, to support its claim for full reimbursement of the operating payments. According to plaintiff, it is entitled to those payments because "in part" its "action [was] for unlawful detainer against [Jessica] pursuant to" that act.

We conclude that plaintiff's reliance on this act is inapposite. Specifically, the act applies to tenants who hold over without permission. Under N.J.S.A. 2A:35-2, a successful plaintiff in an action to determine rights to real property "shall be entitled to recover from the defendant any and all incidental damages including mesne profits, and the full value of the use and occupation of the premises for the time, . . . before the commencement of the action, during which the defendant was in possession thereof."

Here, the Marinos never took possession of the premises because it was undisputed that plaintiff refused to approve their application. Despite that, the

Marinos maintained the premises and tendered the monthly rent. Moreover, plaintiffs did not prevail in its action to determine its right to possession of the property and there was no use and occupancy that would support an award of damages from defendants.

Finally, we address plaintiff's claim for attorney's fees under the unlawful detainer statute, N.J.S.A. 2A:39-4.⁶ Here, again, we conclude plaintiff's contentions are without sufficient merit to warrant discussion in any written opinion. R. 2:11-3(e)(1)(E). Suffice it to say the statute deals with a hold over tenant in possession of the subject premises, and by its own actions plaintiff interfered with the Marinos' rightful use and occupancy of the premises. Defendants never became tenants, and therefore they did not hold over.

⁶ The statute states the following:

If any tenant or other person in possession of any real property under a tenant, shall willfully and without force, hold over any such real property after demand and notice in writing given for the delivery of the possession thereof by a lessor or the person to whom the remainder or reversion of such real estate shall belong, such tenant or other person, so holding over, shall be guilty of an unlawful detainer.

[N.J.S.A. 2A:39-4.]

Under N.J.S.A. 2A:39-8, damages and attorney's fees are recoverable by a plaintiff who succeeds in an action for unlawful detainer.

Affirmed.

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

A handwritten signature in black ink, appearing to be the initials 'AW' with a stylized flourish.

CLERK OF THE APPELLATE DIVISION