SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3909-19

RIGGINS, INC.,

Plaintiff-Appellant,

v.

JOHN PICERNO, CARMELA CIFELLI and GIOVANNI CIFELLI,

Defendants,

and

JOSEPH PICERNO, RICHARD PICERNO, GCP REAL ESTATE, LLC, a New Jersey limited liability company successor by merger to G & J Real Estate, LLC,

Defendants-Respondents.

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Submitted January 11, 2022 – Decided December 29, 2022

Before Judges Messano and Accurso.

On appeal from the Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. F-011283-19.

Gruccio Pepper De Santo & Ruth, PA, attorneys for appellant (Lee J. Hughes, on the brief).

Pellettieri, Rabstein & Altman, attorneys for respondents Joseph Picerno and Richard Picerno (W. Barry Rank, on the brief).

The opinion of the court was delivered by

ACCURSO, J.A.D.

Plaintiff Riggins, Inc. appeals from orders denying its motion for summary judgment in this commercial mortgage foreclosure action against defendants Joseph Picerno, Richard Picerno and GCP Real Estate, LLC and granting their cross-motions dismissing the complaint.[1] Plaintiff contends the trial court failed to account for the effect of N.J.S.A. 42:2B-20(g), the statute governing mergers of limited liability companies under the former New Jersey

[1] G & J Real Estate, LLC, John Picerno, Carmela Cifelli and Giovanni Cifelli were also made defendants in the action as prior owners of the property and/or subsequent mortgagees. None of them appeared in the trial court, and they are not participants on appeal. GCP's brief was suppressed on the court's own motion.

Limited Liability Company Act, N.J.S.A. 42:2B-1 to -70, on the parties' rights and obligations under the loan documents.[2] We agree and reverse.

The essential facts are undisputed. In 2005, brothers John, Joseph and Richard Picerno, owners of the property at 1543 Parkway Avenue in Ewing, on which they operated a gas station, Picerno's Quality Fuels, LLC, entered into a $900,000 credit facility agreement and credit facility note with Riggins to secure the advances of credit necessary for Riggins to make regular deliveries of fuel to the station. Those agreements were secured by a mortgage against the gas station property and the personal guaranty of the Picerno brothers.

In 2007, the brothers conveyed the property to an LLC owned by John Picerno and his wife Gilda, G & J Real Estate, LLC, subject to Riggins' mortgage, and John Picerno became the sole member of Picerno Fuels. G & J gave a second $500,000 mortgage to Joseph and Richard Picerno and a third $350,000 mortgage to Carmela and Giovanni Cifelli.

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[2] That statute was repealed and replaced in 2013 by N.J.S.A. 42:2C-77 when the Legislature adopted The Revised Uniform Limited Liability Company Act, N.J.S.A. 42:2C-1 to -94 (2013). Although we refer to the former statute throughout this opinion, as it was in effect at the time of the relevant mergers, we note the result would not change were we to apply the current statute as there was no substantive change effected by the Revised Act as to the issue here. See generally Assembly Regul. Oversight & Gaming Comm. Statement to A. 1543 (Jan. 30, 2012).

In late 2010, Gilda and John Picerno divorced. Gilda thereafter formed two LLCs, GCP Real Estate LLC and Cifelli's Quality Fuels, LLC. GCP became the successor by merger of G & J, and Riggins released John from his guaranty. On March 31, 2011, Cifelli Fuels, by its sole member Gilda Cifelli-Picerno, filed a certificate of merger of Cifelli Fuels and Picerno Fuels with the State Treasurer. The certificate provided that an agreement of merger had been approved and executed by both parties, and that the surviving LLC would be Cifelli Fuels, effective April 1, 2011.

Riggins was advised of the change at the time it occurred. On March 31, 2011, Cifelli Fuels advised Riggins by email "that as of tomorrow, April 1, 2011" the business would have a new name, Cifelli Fuels, and a new federal tax I.D. number, which it provided, but assured Riggins "[e]verything else is the same and will be business as usual." On April 1, Riggins sent to Cifelli Fuels' new email address a statement of "current balances 4/1" listing delivery dates, invoice numbers and the date each was due. The total due was $273,426.70, with payment on the last invoice for a delivery on March 30 due April 9, 2011.

Thereafter, business continued as usual between Riggins and Cifelli Fuels, with Riggins making fuel deliveries on April 1, 2011, through April

2019 on the same ten-day terms. During that time, Cifelli Fuels purchased nearly $70,000,000 worth of fuel from Riggins. As counsel for the Picernos advised the trial court at oral argument, however, the gas station's business began to decline after a Wawa with fuel pumps opened down the street. The station closed abruptly at the end of April 2019, with Cifelli Fuels owing Riggins $433,224.57.

Following discovery, Riggins filed a motion for summary judgment, arguing it was entitled on default of Cifelli Fuels, successor by merger to Picerno Fuels, to foreclose the mortgage on the property given by the Picerno brothers in 2005, now owned by GCP. The Picernos filed a cross-motion for summary judgment, arguing the credit facility note had been paid in full in April 2011, and the mortgage satisfied. The Picernos supported their cross-motion with a certification by Gilda Cifelli-Picerno. Referencing the "current balances 4/1" statement sent by Riggins to Cifelli Fuels, showing a total balance of $273,426.70 for fuel deliveries through March 30, 2011, she certified "I paid this outstanding balance in April 2011," with Cifelli Fuels thereafter ordering "more than $69,000,000 worth of fuel."

Relying on Riggins' accounts receivable records supplied in discovery, the Picernos argued all of the invoice numbers listed on Riggins' "current

balances 4/1" statement had been paid by April 11, 2011, reducing Picerno Fuels' balance with Riggins to zero. Because the mortgage provided that "[w]hen all amounts due to the Lender under the Note and this Mortgage are paid, the Lender's rights under this Mortgage will end" and the lender would then cancel the mortgage at the borrowers' expense, the Picernos argued both the mortgage and N.J.S.A. 46:18-11.2[3] required the mortgage to have been marked satisfied and returned to the Picernos in April 2011. The Picernos reasoned that the credit facility note was made by Picerno Fuels; Picerno Fuels stopped purchasing fuel from Riggins on March 30, owing a balance of $273,426.70, which was paid in full by April 11, 2011, and that the fuel deliveries Riggins made on or after April 1, 2011, to Cifelli Fuels were made to the new entity on an unsecured basis.

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[3] The statute provides in pertinent part that when any properly recorded mortgage

> shall be redeemed, paid and satisfied, a mortgagee, other than a bank, savings bank, savings and loan association, credit union or other corporation engaged in the business of making or purchasing mortgage loans, or his agents or assigns shall within 10 days notify the mortgagor that he has the right to demand the mortgagee to cancel the mortgage of record upon payment by the mortgagor of the fee required by the county to effect the cancellation.

The trial court heard argument and entered summary judgment for the Picernos. The court noted it was undisputed that Riggins knew Picerno Fuels was no longer operating the business as of April 1, 2011, and Riggins' own records demonstrated Picerno Fuels' outstanding invoices were all paid in full by April 11, 2011. The court also noted Riggins did not dispute Gilda's certification "that from April 2011 to 2019, [Cifelli Fuels] purchased and paid for almost $70 million of fuel," with all payments by wire transfer from a Cifelli Fuels account to Riggins' account.

The court found "[Picerno Fuels] paid its debts and obligations; any debts incurred after March 31, 2011, belonged to another entity, not [Picerno Fuels]. Plaintiff knew this, from the very first day, yet proceeded to deliver fuel (and until 2019, receive prompt payment) to Cifelli Fuels, a reliable, but totally unsecured, customer." The court found once the credit facility note was satisfied, Riggins had an obligation to notify defendants "that they had the right to demand Plaintiff to cancel the mortgage" under the statute, with "[n]either party assert[ing] that such notice was given" as well as the right to cancellation under the terms of the Note itself. The court concluded Riggins' "rights under the mortgage ended on April 11, 2011. To the extent that

Plaintiff continued to extend credit to Cifelli's Quality Fuels, it did so on an unsecured line."

Riggins moved for reconsideration, arguing defendants misled the court in claiming payment of the invoices listed on Riggins' "current balances 4/1" reduced the balance owed on the credit line to zero, and the court "overlooked the impact of the statutory merger of Picernos into Cifelli's." Paul Riggins submitted a certification averring that "[a]t no time from January 1, 2011 to April 30, 2011 did the Operating Entity of 1543 Parkway Avenue, Ewing, NJ pay the balance of purchases of petroleum to zero." Employing the same Riggins accounts receivable documents relied on by the Picernos, Riggins explained that on April 11, 2011, the day the Picernos contended the balance was zero, those records reflected a balance due of $298,891.80 based on uninterrupted fuel deliveries to the station through April 10.

Counsel for Riggins argued that as a result of the statutory merger of Picerno Fuels and Cifelli Fuels, they "were not two distinct customers" of Riggins. "They were one and the same. Cifelli's had the right to continued supply of fuel by [Riggins] pursuant to the then-existing supply agreements, and [Riggins'] rights under those same documents, including the Mortgage, remained fully intact." Counsel also argued the statute the Picernos relied on,

N.J.S.A. 46:18-11.2, applies only to residential mortgages, and the court erred in entering summary judgment for GCP as it had never even moved for summary judgment.

The court denied the motion as to the Picernos. The court found

> [d]efendants' moving papers established — with no real efforts by Plaintiff to discredit Defendants' analysis of the billing and payment history — that the Picernos' debts to Plaintiff were paid within 10 days of fuel delivery, just as they always were. Further, Picerno Quality Fuels ceased to exist as an entity after the Certificate of Merger. Although Cifelli then became responsible for paying due obligations of the Picerno entity, the statute cited by Plaintiff [N.J.S.A. 42:2B-20(g)] does not provide that Defendants' non-existent LLC can later be liable for debts incurred by [Cifelli Fuels].

The court did, however, vacate the summary judgment to GCP. GCP subsequently filed a properly supported motion for summary judgment, which the court granted based on the same reasons for granting judgment to the Picernos. In the statement of reasons accompanying that order, the court acknowledged its reliance on N.J.S.A. 46:18-11.2 had been misplaced, but noted it had not relied on the statute alone but also on the terms of the agreement dictating "when the lender's rights under the mortgage will end."

We, of course, review summary judgment de novo, applying the same standard as the trial court, Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582

(2021), without deference to interpretive conclusions of statutes or the common law we believe mistaken, Nicholas v. Mynster, 213 N.J. 463, 478 (2013). As the parties agreed on the material facts for purposes of the motion, our task is limited to determining whether the trial court's ruling on the law here was correct. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We agree with Riggins, the judge was wrong on the effect of the merger statute.

Limited liability companies, hybrid entities designed to combine the limited liability of corporations and the favorable tax treatment of partnerships, have been permitted in New Jersey since 1994. See Kuhn v. Tumminelli, 366 N.J. Super. 431, 439 (App. Div. 2004). The former New Jersey Limited Liability Company Act, "a comprehensive statutory scheme that governed all New Jersey LLCs for two decades," IE Test, LLC v. Carroll, 226 N.J. 166, 177 (2016), specifically permitted the merger of LLCs, N.J.S.A. 42:2B-20(b)(1), on the filing of a certificate of merger, N.J.S.A. 42:2B-20(c), as the parties agree Cifelli Fuels did on March 31, 2011, effective April 1, 2011.

Pursuant to N.J.S.A. 42:2B-20(g), the statute controlling mergers between domestic LLCs when Picerno Fuels merged with Cifelli Fuels:

When any merger or consolidation becomes effective under this section, for all purposes of the laws of this State, all of the rights, privileges and powers of each of the domestic limited liability companies . . . that have merged or consolidated, and all property, real, personal and mixed, and all debts due to any of those domestic limited liability companies . . . , as well as all other things and causes of action belonging to each of those domestic limited liability companies . . . , shall be vested in the surviving or resulting domestic limited liability company . . . , and shall thereafter be the property of the surviving or resulting domestic limited liability company . . . as they were of each of the domestic limited liability companies . . . that have merged or consolidated, and the title to any real property vested by deed or otherwise, under the laws of this State, in any of those domestic limited liability companies . . . , shall not revert or be in any way impaired by reason of this act; but all rights of creditors and all liens upon any property of any of those domestic limited liability companies . . . shall be preserved unimpaired, and all debts, liabilities and duties of each of those domestic limited liability companies . . . that have merged or consolidated shall attach to the surviving or resulting domestic limited liability company . . . , and may be enforced against it to the same extent as if the debts, liabilities and duties had been incurred or contracted by it. Unless otherwise agreed, a merger or consolidation of a domestic limited liability company, including a domestic limited liability company which is not the surviving or resulting entity in the merger or consolidation, shall not require the domestic limited liability company to wind up its affairs under [N.J.S.A. 42:2B-50] or pay its liabilities and distribute its assets under [N.J.S.A. 42:2B-51].

[emphasis supplied.]

As the surviving entity, Cifelli Fuels acquired all of the rights of Picerno Fuels under the loan documents and supply agreements with Riggins and the power to enforce them, but Riggins' rights under those same documents were likewise "preserved unimpaired," with "all debts, liabilities and duties" of Picerno Fuels attaching to Cifelli Fuels and capable of being "enforced against it to the same extent as if the debts, liabilities and duties had been incurred or contracted by it." A plain reading of N.J.S.A. 42:2B-20(g) permits no other conclusion here than the one offered by Riggins, namely that "Cifelli's had the right to continued supply of fuel by [Riggins] pursuant to the then-existing supply agreements, and [Riggins'] rights under those same documents, including the Mortgage, remained fully intact." Cf. Baker v. Nat'l State Bank, 161 N.J. 220, 228 (1999) ("This is not a case in which successor liability has been imposed by judicial mandate. Successor liability falls on [the successor corporation in a statutory merger] because it agreed by law to assume the liabilities of its predecessor.").

The trial court acknowledged that Cifelli Fuels "became responsible for paying due obligations of the Picerno entity" after the merger; its error was in failing to appreciate that obligation flowed from Cifelli Fuels stepping into the

shoes of Picerno Fuels under the loan documents by operation of N.J.S.A. 42:2B-20(g). Riggins' account receivable records, relied on by defendants, make plain Cifelli Fuels never reduced the balance due Riggins under the credit facility agreement to zero on April 11, 2011, or any other date, because it continued taking regular, uninterrupted fuel deliveries on and after April 1, pursuant to Picerno Fuels' supply agreements in accord with its representation to Riggins that except for the change in the business name and tax I.D. number, "[e]verything else is the same and will be business as usual." Accordingly, the provision of the mortgage providing "[w]hen all amounts due to the Lender under the Note and this Mortgage are paid, the Lender's rights under this Mortgage will end" was never triggered and Cifelli Fuels' and GCP's obligations to Riggins under the documents never satisfied.

We reverse summary judgment to the Picernos and GCP and remand for entry of summary judgment in favor of Riggins against the Picernos and GCP and such further proceedings as are appropriate in this commercial mortgage foreclosure. We do not retain jurisdiction.

Reversed and remanded.