SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2253-21

AHARON BRAUN and
RIVKA BRAUN,

Plaintiffs-Appellants,

v.

PR-1-MA BUILDERS, INC.,
NORTH MAPLE ASSOCIATES
LLC, KALPESH PATEL, and
PINKY PATEL,

Defendants-Respondents.

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Argued March 22, 2023 – Decided July 3, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. C-000211-21.

Larry S. Loigman argued the cause for appellants.

Michael B. York argued the cause for respondents (Novins, York & Jacobus, attorneys; Michael B. York, on the brief).

PER CURIAM

Plaintiffs Aharon and Rivka Braun[1] appeal from three separate Chancery Division orders entered on March 18, 2022: denying plaintiffs' motion to enforce a settlement agreement; granting defendants' motion for summary judgment; and discharging plaintiffs' lis pendens on the subject property. We affirm.

I.

In June 2020, plaintiffs and defendants North Maple Associates, LLC and PR-1-MA Builders, Inc. entered into a purchase contract to construct a single-family home in Toms River. North Maple owned the land and PR-1-MA was the builder. The $999,500.00 purchase price was to be paid according to the following payment schedule: $5,000.00 paid prior to signing the purchase contract, $94,950.00 upon signing, and $99,950.00 ninety days after signing with the balance of $799,600.00 due at closing. The estimated closing date was March 31, 2021.

The purchase contract further specified a procedure for amendments and options in Paragraph 3 which stated:

[1] We refer to plaintiffs by their first names to avoid any confusion caused by their common surname. No disrespect is intended.

> The Contract when fully executed is binding upon the Parties and is not subject to changes unless agreed upon by both parties. The buyer has [thirty] days from the date of execution of the contract to request an amendment to the contract in order to include additional options to the house in the contract purchase price. After the thirty days has elapsed all options are deemed as extras and shall be paid by Buyer to the Seller at such time as the buyer requests the same and Seller agrees to the installation of the options.

Thus, defendants were required to complete construction of the home "substantially in accordance with the plans initialed by the parties." Additionally, any changes requested by plaintiffs were to be made in compliance with Paragraph 14 Change Orders. The paragraph provided:

> Buyer agrees that any change(s) to the Drawings, Selections or Plans and Specifications must be made by the mutual agreement of the parties and evidenced by a written Change Order. Seller shall have no obligation to agree to such changes requested by Buyer¸ but in the event that Seller does agree, the Change Order shall be subject to Buyer's payment of restocking charges and an administrative overhead charge of . . . $300 per option and all other consequential expenses incurred by Seller in making such changes along with terms and conditions acceptable to Seller. . . . All Change Orders shall become part of this Contract. Buyer shall be responsible to pay any charges associated with necessary revisions to the Drawings as a result of any change requested by the Buyer. Buyer acknowledges that if the Contract is cancelled for any reason except as a result of Seller's breach, then Buyer shall receive no refund for any Change Order requested by Buyer. Buyer acknowledges that this is not intended as a penalty, but is due to the fact that Seller will be unlikely to recoup these costs in a third party sale.

The parties agreed the purchase contract was the entire agreement and replaced and cancelled any prior agreements. Arvo Prima, president of PR-1-MA, signed the contract on June 12, 2020, and plaintiffs signed on July 13, 2020. The parties also agreed on the initial plans and specifications as set forth in Addendum A to the contract.

In compliance with the purchase contract, plaintiffs made the $5,000 deposit in June 2020 and the $94,950.00 deposit in July 2020.

In August 2020, plaintiffs met with various vendors, suppliers, and defendants. Plaintiffs selected upgrades and customized exterior features which were not included in the contract and exceeded the contract price. Plaintiffs also added 4,427 square feet in structural changes to the existing floor plan which resulted in a 9,952 square foot home. The parties approved the $243,745 increase in the contract price in a document entitled "Extras to Contract (extras agreement)." However, plaintiffs failed to make the payment for the additional change orders or the $99,950 deposit due on October 11, 2020.

In October 2020, defendants began construction on the home. Plaintiffs made further revisions and modifications in the amount of $241,705 which was memorialized in a second extras agreement in November 2020. Although

plaintiffs agreed to the same payment schedule as set forth in the initial extras agreement, they failed to make the required payments.

Plaintiffs continued to hold design meetings with PR-1-MA's sales staff and outside vendors. Between February 11 and March 16, 2021, the parties executed seven additional extras agreements which upgraded and customized the interior and exterior of the home. These additional changes totaled $442,039.50 and were subject to the same payment schedule.

Thereafter, defendants met with plaintiffs and discussed the outstanding payments as well as a reduction of the construction costs. Plaintiffs agreed to proceed with construction which included all change orders and to make immediate payment.

Between March 10 and April 23, 2021, Prima made weekly requests to plaintiffs for the payment of the outstanding invoices. Plaintiffs failed to respond to Prima's requests and defendants halted construction of the home.

On April 28, 2021, Prima emailed plaintiffs and attached past due invoices which stated: "We have been very patient and understanding on this matter, but after several attempts to collect the money due and multiple conversations on the importance of receiving payment, I feel we are at an impasse." Prima requested payment by April 30 and informed plaintiffs that if payment was not

made, plaintiffs would be in breach of contract. Plaintiffs did not tender payment and were notified legal action would be taken.

In an email dated May 7, 2021, defense counsel notified plaintiff's' counsel of the "significant breach of the terms and conditions of the contract"—and the overdue balance of $442,039.50. Plaintiffs were directed to cure the breach by May 13, 2021. Additionally, plaintiffs' counsel was advised of PR-1-MA's intention to "immediately seek to mitigate its damages by relisting the property for sale and proceeding with an attempt to sell the property to a bona fide purchaser for value." Plaintiffs were also told they would be liable for "any and all losses incurred by [PR-1-MA] including but not limited to carrying charges, real estate taxes, change orders, legal fees." Plaintiffs' counsel responded that he would relay the message to his clients. Plaintiffs did not pay the outstanding balance.

Ten days later, defense counsel emailed plaintiffs' counsel regarding the defaulted contract. Counsel further advised plaintiffs' counsel that PR-1-MA would immediately attempt to sell the house to a third-party purchaser and plaintiffs remained liable for all damages.

On May 28, 2021, in an email to plaintiffs' counsel, defense counsel "confirmed" plaintiffs' breach of contract and notified plaintiffs the house would

be listed for sale on June 1, 2021. Plaintiffs' counsel replied, "the parties [were] in talks to cure and reinstate the contract," and plaintiffs "advised that [they] [would] send $350,000 to [the] seller next week." Defense counsel responded, "That [was] not accurate[.] [Y]our client[s] ha[d] made repeated promises none of which have been kept." Counsel reiterated "the house [would] be on the market [on] Tuesday."

In June 2021, plaintiffs requested a return of their deposit monies which defendant refused because the costs of construction incurred exceeded the deposit. Thereafter, PR-1-MA sold the home to defendants, Kalpesh and Pinky Patel, for $1,216,000.

Plaintiffs filed a verified complaint in the Chancery Division seeking specific performance of the real estate contract, and other relief. The next day, a notice of lis pendens was recorded.

In lieu of an answer, defendants moved for summary judgment and the discharge of the lis pendens.

Plaintiffs cross-moved, contending the parties had a settlement agreement that the court should enforce. Plaintiffs relied on a voicemail message left by defense counsel, that stated, "I think we can actually settle, and we'll just sell to your client. Just give me a call when you get a chance[,] and we'll see if that

works. And I figure we'll just close in [thirty] days." Plaintiffs' counsel stated that he returned the call that afternoon and defense counsel represented defendants were willing to settle and sell at the contract price. According to plaintiffs' counsel, plaintiffs wished to proceed.

Plaintiffs' counsel also certified that in a January 18, 2022 email to defense counsel, he conveyed plaintiffs' interest in settling the dispute and purchasing the home. In reply, defense counsel stated, "Let me know what they say. If I don't hear by Friday, we will move to dismiss." Plaintiffs' counsel clarified his clients' position and reiterated their willingness to settle, but "[t]he only question [was] if [plaintiffs' counsel would be] handling the closing or if someone else [would] be doing it, but they [did] want to move forward to complete the purchase." Defense counsel asked when plaintiffs wanted to close, and plaintiffs' counsel indicated within thirty days.

Lastly, plaintiffs' counsel certified he emailed defense counsel on January 20, 2022, "asking if the certificate of occupancy had been issued, or when it was anticipated to be issued." Defense counsel replied that defendants "elected to file a motion to discharge the[ ]lis pendens accompanied with a motion to dismiss the complaint."

Following oral argument, the trial judge issued an oral decision memorialized by a written order. The judge rejected plaintiffs' argument that the parties agreed to a settlement. Relying on well-established contract principles, the judge concluded there was no settlement agreement. The judge further concluded "the exchange between the parties was really nothing more than an invitation to begin settlement negotiations and to talk about how they would proceed to closing." The judge found there was no: agreement to "essential terms," "unambiguous offer," or "unambiguous acceptance," and thus, no agreement to settle.

The trial judge next addressed defendants' motion for summary judgment. The judge concluded summary judgment was appropriate because there were no disputed facts.

The judge determined plaintiffs failed to perform the specific conditions required by the terms of the contract. The trial judge noted the purchase contract required timely performance. The judge stated, "In this particular case, the times for payment of those additional amounts as were agreed to by these change orders were essential terms." He explained

> And it is for the defendant builder to have assurances that in fact they're going to get to closing and these extras are going to be paid for. And they accomplished

> that through these change orders that required payment ….
>
> And plaintiff did not comply with this despite – and again I find as a fact that numerous calls and inquiries [were made] and to no avail.

The judge noted that if plaintiffs' argument was accepted, PR-1-MA had no relief available. The judge stated PR-1-MA "[e]ssentially had to build this house with twice the value of extras and go to closing with a . . . buyer that [] indicat[ed] . . . that he couldn't pay for it[,] [a]nd that he[] refus[ed] to comply with the contract." Accordingly, the trial judge determined PR-1-MA's actions were reasonable and specific performance was not available to plaintiffs.

The trial judge also dismissed the lis pendens.

II.

On appeal, plaintiffs contend the trial court erred in granting defendants summary judgment and discharging the lis pendens. Plaintiffs further contend the trial court erred in denying enforcement of the settlement agreement, and instead, wrote a better contract for defendants.

A. Settlement Agreement

We begin by addressing plaintiffs' contention the parties had reached a settlement agreement. "A settlement agreement between parties to a lawsuit is

a contract[,] governed by [the general] principles of contract law." Savage v. Twp. of Neptune, 472 N.J. Super. 291, 305 (App. Div. 2022) (alterations in original). We review the interpretation and enforceability of a contract de novo. Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011) (citations omitted); Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019).

The enforceability of settlements is governed by contract law. GMAC Mortg., LLC v. Willoughby, 230 N.J. 172, 185 (2017). A settlement agreement, like a contract, requires an offer and acceptance by the parties, and it "must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting Borough of West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)). A legally enforceable contract "requires mutual assent, a meeting of the minds based on a common understanding of the contract terms." Morgan v. Sanford Brown Inst., 225 N.J. 289, 308 (2016). Once parties to a contract "agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract." Weichert Co. Realtors, 128 N.J. at 435. Alternatively, if the parties do not agree to one or more essential terms, their contract is ordinarily unenforceable. Ibid.

Here, plaintiffs contend that despite the language in the extras agreement requiring payment of fifty percent upon signing, PR-1-MA "clearly established" a practice, over seven months, of accepting change orders without expecting payment until closing. Plaintiffs further contend they intended to tender full payment at the time of closing, thus "curing" any delinquent payments. Lastly, they state the purchase contract did not contain a default provision and the extra agreement regarding payment before closing was ambiguous.

Plaintiffs' contentions are misplaced and unconvincing. Plaintiffs rely on a voicemail left by defense counsel, who stated, "I think we can actually settle, and we'll just sell to your client. Just give me a call when you get a chance[,] and we'll see if that works." The message was not a firm offer to settle the contract dispute. In addition, there was no unconditional acceptance by plaintiffs.

The emails between counsel demonstrate the parties never reached a final settlement agreement. The emails also establish there was no meeting of the minds as to the essential terms for payment or an unambiguous offer and unambiguous acceptance of settlement regarding the outstanding balance.

Moreover, defense counsel refuted in an email plaintiffs' counsel's inaccurate representation that the parties were "in talks" and $350,000 would be

sent the following week and further noted plaintiffs' "repeated promises" to pay had not been kept. Defense counsel unequivocally stated the house would be listed for sale. Plaintiffs have not demonstrated the parties reached a settlement. Therefore, we find no reason to disturb the judge's ruling denying plaintiffs' motion to enforce a settlement.

B. Summary Judgment

We apply the same standard as used by the trial court and review the grant or denial of a motion for summary judgment de novo. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). We must determine whether, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated there are no genuine disputes as to any material facts and they are entitled to judgment as a matter of law. R. 4:46-2(c); Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405-06 (2014) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

On appeal, plaintiffs do not assert a genuine issue as to any of the material facts; therefore, the facts are uncontroverted. Plaintiff signed numerous change orders that substantially increased the contract purchase price by $442,039.50 and failed to remit fifty percent payment at the time each change order was signed. Thus, plaintiffs were in breach of the contract and the extras agreements.

However, plaintiffs contend that the judge erred in concluding the terms of the settlement were not "fully defined" and "created a controversy" which had no basis in the record.

After reviewing the record under these standards, we reject plaintiffs' contentions.

To prevail on a breach of contract claim, a plaintiff must prove the following elements: (1) the parties entered into a contract containing certain terms; (2) the plaintiff did what the contract required them to do; (3) the defendant did not do what the contract required them to do, defined as a breach of the contract; and (4) the defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 512 (2019) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 482, (2016)).

We are satisfied that the trial judge's legal conclusions were supported by the uncontroverted facts and competent evidence in the record. Here, the trial judge made the threshold determination the purchase contract between plaintiffs and defendants was valid and enforceable. The judge also determined the extra agreements signed by the parties complied with the terms of the purchase contract.

Plaintiffs do not dispute the outstanding balances owed. The record demonstrates plaintiffs failed to make the third installment payment under the contract and the change order payments due at the time the extras agreements were signed. Despite defendants' repeated requests to plaintiffs for the payment of the outstanding balance, plaintiffs either ignored defendants' requests or made representations that payment would be made. At no time prior to defendants initiating suit, did plaintiffs cure their breach of the contract. Thus, the record does not establish any reason to alter the trial judge's decision.

In light of our conclusion, the court properly discharged the lis pendens.

Affirmed.