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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2624-21

BRICKLAND 88, LLC,

Plaintiff-Appellant,

v.

TOWNSHIP OF BRICK,

Defendant-Respondent.

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Argued June 15, 2023 – Decided July 20, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. C-000205-20.

Lawrence H. Shapiro argued the cause for appellant (Ansell Grimm & Aaron, PC, attorneys; Lawrence H. Shapiro and Layne A. Feldman, on the briefs).

Kevin B. Riordan argued the cause for respondent (Kevin B. Riordan, Esq., LLC, attorneys; Kevin B. Riordan and Gary P. McLean, on the brief).

PER CURIAM

Plaintiff Brickland 88, LLC (Brickland) appeals from two orders dated March 18, 2022. The first order denied plaintiff's motion for summary judgment against defendant Township of Brick (Township); the second order granted summary judgment to defendant, again denied plaintiff's summary judgment motion, and dismissed its complaint with prejudice. We affirm both orders.

I.

In 2015, plaintiff's predecessor in title, SRE partners, LLC (SRE), acquired title to Lot 1, Block 1171, as designated on the Township's municipal tax map (the Property), by foreclosing on the tax sale certificate it purchased in 2012. Shortly after recording the judgment of foreclosure, SRE transferred the Property via deed to plaintiff.[1] Defendant does not dispute that SRE and plaintiff paid taxes on the Property based on its purported size of 1.35 acres, as reflected on the municipal tax map; defendant also does not contest the fact that in October 2018, an employee at the surveying company of French & Parrello Associates informed the Township's administrator that the Property consisted of 0.58 acres, not 1.35 acres.

In June 2020, defendant's counsel notified plaintiff that defendant intended to begin condemnation proceedings to acquire title to the Property

[1] Both SRE and Brickland are solely owned by the same individual.

under the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to -50. Several weeks later, defendant's counsel emailed plaintiff and stated, "I believe it would be beneficial to both parties to complete this acquisition by contract, rather than condemnation [because it] . . . would be faster and involve less costs on both sides." To that end, defendant's counsel submitted a contract for plaintiff's review and proposed to close on the Property once "the ordinance approving the purchase [was] completed" and "the ordinance . . . bec[a]me effective." On August 3, 2020, plaintiff's attorney responded with proposed revisions to the contract.

On August 5, 2020, the parties entered into a contract (the Contract) whereby defendant agreed to purchase the Property for $290,000. The Contract included the following provisions:

> 2. Property. The [P]roperty to be sold consists of: (a) the land; and (b) all of the Seller's rights relating to the land. The real property to be sold consists of vacant land, and is located on Route 88, Brick, New Jersey, at the intersection of Burrsville Road, also designated on the municipal tax map as Lot 1, Block 1171 (the "Property").
>
> . . . .
>
> 9. Physical Condition of the Property. Th[e P]roperty is being sold "as is, where is." The Seller does not make any claims or promises about the condition, size or value of any of the [P]roperty included in this sale. The

> Buyer has inspected the [P]roperty and relies on this inspection and any rights which may be provided for elsewhere in this contract.
>
> . . . .
>
> 15. Authorization by Governing Body. As required by the Local Lands and Building Law, this contract is specifically conditioned upon approval by the Brick Township Governing Body, by the adoption of a duly approved Ordinance to authorize the acquisition, publication thereof, and final non-appealable completion of the notice period after adoption and publication.
>
> 16. Due Diligence Period. During the time of ordinance approval and adoption as set forth in Paragraph 15 herein, Buyer shall have the right to conduct an inspection of the [P]roperty for environmental contamination. If such inspection is not satisfactory, the Township may cancel this transaction. Buyer may also have access to the Property to prepare a survey.
>
> [(emphasis added).]

On August 25, 2020, the Township adopted an ordinance which stated in part:

> Section 2. (a) The improvements and purposes hereby authorized are for the acquisition and purchase of an approximately 1.35 +/- acre, 58,806 square foot property known as Block 1171, Lot 1 on the official tax map of the Township, commonly referred to as vacant land on Route 88 and Burrsville-Squankum Road (the "Property") by the Township.

> (b) The above improvements and purposes set forth in Section 2(a) shall also include, but are not limited to, as applicable, title searches, title policies, surveys, environmental testing and remediation, and all work, materials, equipment, labor and appurtenances necessary therefor or incidental thereto.
>
> [(emphasis added).]

In October 2020, plaintiff's counsel emailed defendant to ask why the closing was delayed. Defendant's counsel responded that he expected the closing to occur within the next two weeks. Subsequently, plaintiff sent defendant a "time of the essence" letter for the closing to occur on November 12, 2020.

On November 11, 2020, defendant's counsel wrote to plaintiff's counsel to advise him the Township would "not be proceeding with a closing of title." Defendant's attorney explained that "the Township obtained an appraisal of the Property . . . dated July 16, 2020 . . . [which] provided an opinion of an appraised market value for the Property of $280,000." Further, he stated, "the appraisal considered the Property, consistent with the tax maps, to include approximately 1.35 acres," but "[d]uring the course of due diligence, the Township commissioned a boundary survey" and "[t]he survey, dated September 24, 2020, determined that the entire property consisted of approximately [0].58 acres, which is less than half of the property size that formed the basis of the appraisal."

In December 2020, plaintiff filed a complaint against defendant, seeking specific performance of the Contract and monetary relief. Defendant answered the complaint the following month.

In February 2022, plaintiff moved for summary judgment. In its statement of undisputed material facts, plaintiff's counsel claimed: defendant refused to "complete its contractual obligations" under the Contract, based on a September 24, 2020 "survey prepared by French & Parrello Associates indicat[ing] the Property consisted of approximately 0.58 acres and not 1.35 acres as stated on the Township's tax maps." Additionally, the statement asserted defendant "was aware as early as October[] 2018[] that the Property may not be comprised of 1.35 acres."

Defendant opposed the motion and filed a cross-motion for summary judgment. Due to an admitted clerical error, defendant's response to plaintiff's statement of undisputed material facts was not filed with its opposition papers, but rather, prior to argument on the cross-applications. Included in defendant's response to plaintiff's statement of undisputed material facts was the assertion that "[a]ny agreement between [the parties] was not effective until the passage of the appropriate ordinance [in] August [] 2020[,] which conditioned the alleged agreement on the size of the property being 1.35 + or – acres. See

Exhibit C to [p]laintiff's [c]omplaint."[2]

Following argument on March 18, 2022, for reasons stated on the record, Judge Francis R. Hodgson denied plaintiff's motion and granted defendant's cross-motion. The same day, he entered conforming orders and dismissed plaintiff's complaint with prejudice.

In his oral opinion, the judge explained that pursuant to the terms of the Contract, defendant was not required to purchase the Property because "the ordinance did not approve the [C]ontract as written, although it ratif[ied] . . . the period of due diligence and the right to . . . conduct a survey." The judge also concluded that "alternatively, [the Contract] was a mistake," because "plaintiff still believe[d the Property] was 1.35 acres," "defendant believed it was 1.35 acres" and this "mistake [was] fatal to [the C]ontract."

On May 5, 2022, following the filing of plaintiff's appeal, Judge Hodgson amplified his oral opinion, consistent with Rule 2:5-1(b). In his amplification letter, the judge noted that prior to the entry of the March 18 orders, "[n]either party . . . disputed the material facts and both parties . . . moved for summary judgment." Further, the judge found:

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[2] Exhibit C to plaintiff's complaint is a copy of the ordinance passed at defendant's August 25, 2020 Council meeting.

> the parties executed a contract that was conditioned on the Township's approval through an ordinance.
>
> . . . .
>
> The ordinance was passed with specific provisions that required the [P]roperty to be acquired to be 1.35 acres +/-. . . . The ordinance also included provisions for surveys. . . . When the survey revealed the [P]roperty was less than half of the 1.35 acres authorized, . . . [d]efendant cancelled the [C]ontract. This difference cannot be described as negligible. Cf, Weart v. Rose, 16 N.J. Eq. 290, 297-98 (1863) ("where the difference between the actual and the estimated quantity of acres of land sold in the gross, is so great as to warrant the conclusion that the parties would not have contracted had the truth been known, in such case the party injured is entitled to relief in equity on the ground of gross mistake."). . . .
>
> [Defendant] would not have been authorized to purchase the [P]roperty for a price twice what was provided in the ordinance —which is in essence what [p]laintiff seeks here. The actual size of the [P]roperty is one-half the size authorized.
>
> In conclusion, this [c]ourt has found . . . [:] the parties entered into an agreement subject to a condition precedent, namely that the Township publish an ordinance authorizing the [C]ontract for the sale of the Property[;] and . . . the conditions set forth in the ordinance were not met[,] which resulted in cancel[l]ation of the [C]ontract.

II.

On appeal, plaintiff presents the following arguments for our consideration: (1) the Contract was not specifically conditioned on the size of

the Property; (2) the ordinance was not specifically conditioned on the size of the Property; (3) there was no mutual mistake as to the Property's size because each party was aware of the surveyed size of the Property prior to signing the Contract; (4) there was no "gross mistake" between the parties as to the size of the Property because the survey failed to account for "rights-of-way"; (5) the trial court erred in granting defendant's cross-motion because the Property's size is, at worst disputed, precluding the grant of summary judgment based on a "gross mistake"; (6) defendant did not "discover" new information from the survey, so it had no right to cancel the Contract based on "newly discovered" information; (7) the mere existence of a "due diligence period" in the Contract did not create a right to cancellation when the parties expressly agreed to remove the right to cancel based on the outcome of the survey; (8) defendant had an opportunity to obtain a new survey before signing the Contract and its lack of diligence did not excuse its breach; (9) no further discovery was needed because testimony cannot override a contract's express terms; (10) equities weighed in plaintiff's favor because it complied with its contractual obligations; and (11) defendant's trial court submissions in opposition to plaintiff's summary judgment motion were procedurally defective, warranting the denial of defendant's motion and the grant of summary judgment to plaintiff.

We "review a grant of summary judgment de novo, applying the same standard as the trial court." Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 549 (2022) (quoting Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that 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." Friedman v. Martinez, 242 N.J. 449, 471-72 (2020) (quoting R. 4:46-2(c)). "If there is no genuine issue of material fact, we must then 'decide 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).

"The filing of a cross-motion for summary judgment generally limits the ability of the losing party to argue that an issue raises questions of fact, because the act of filing the cross-motion represents to the court the ripeness of the party's right to prevail as a matter of law." Spring Creek v. Shinnihon U.S.A., 399 N.J. Super. 158, 177 (App. Div. 2008) (citations omitted).

In reviewing the grant of summary judgment, we consider "whether the competent evidential materials presented, when viewed in the light most

favorable to the non-moving party in consideration of the applicable evidentiary standard, 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, 523 (1995). Competent evidence requires evidence "beyond mere 'speculation' and 'fanciful arguments.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Hoffman v. Asseenontv. Com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009)).

A party does not create a genuine issue of fact simply by offering a sworn statement. Carroll v. N.J. Transit, 366 N.J. Super. 380, 388 (App. Div. 2004). Further, "'conclusory and self-serving assertions' in certifications without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." Hoffman, 404 N.J. Super. at 425-26 (citations omitted).

"[I]t is not the function of the court to make a better contract for . . . parties, or to supply terms that have not been agreed upon." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999) (citing Schenck v. HJI Assocs., 295 N.J. Super. 445, 450 (App. Div. 1996)). "If the terms of a contract are clear, we must enforce the contract as written and not make a better contract for either party." Ibid. (citation omitted). However, a contract may be rescinded where

"both parties were laboring under the same misapprehension as to [a] particular, essential fact." Beachcomber Coins, Inc. v. Boskett, 166 N.J. Super. 442, 446 (App. Div. 1979).

"The parties to a contract 'may make contractual liability dependent upon the performance of a condition precedent.'" Liberty Mut. Ins. Co. v. President Container, Inc., 297 N.J. Super. 24, 34 (App. Div. 1997) (quoting Duff v. Trenton Beverage Co., 4 N.J. 595, 604 (1950)). A condition precedent is an event that must happen before a contractual right accrues or a contractual duty arises. Restatement (Second) of Contracts § 224 (Am. Law Inst. 1981). "[G]enerally, 'no liability can arise on a promise subject to a condition precedent until the condition is met.'" Duff, 4 N.J. at 604. And "because a promisor's duty does not become absolute unless and until the condition precedent occurs, the failure or non-performance of the condition is a defense to an action against the promisor for breach of its promise." 4 Williston on Contracts § 38.7 (Lord ed. 2013).

Further, it is well settled that "while a public body may make contracts as an individual, it can only do so within its express or implied powers and those who deal with a municipality are charged with notice of limitations imposed by law upon the exercise of that power." Kress v. LaVilla, 335 N.J. Super. 400,

410 (App. Div. 2000) (citation omitted). Moreover, "[a] public body may only act by resolution or ordinance." Ibid. (alteration in original) (citation omitted). Governed by these standards, we have no reason to disturb either of the challenged orders.

Initially, we note that here, both parties move for summary judgment. In addition, plaintiff's counsel stated during argument on the parties' cross-applications that "[t]here [was] no[] real[] []dispute to any of the facts." Thus, we discern no error in the judge's finding that "[n]either party . . . disputed the material facts" in cross-moving for summary judgment, making the matter ripe for disposition.

In reviewing the parties' summary judgment motions, the judge found the following facts were undisputed: the parties executed a Contract for defendant to purchase the Property; the Contract "was conditioned on the Township's approval [of the purchase] by ordinance"; the Contract provided defendant had "the right to . . . conduct a survey"; defendant availed itself of this right and the survey obtained after the Contract was executed confirmed the Property was 0.58 acres in size; and the Township's council only approved "the acquisition and purchase of an approximately 1.35 +/- acre . . . property known as Block

1171, Lot 1 on the official tax map of the Township. . . ." These findings are amply supported by the record.

Nevertheless, plaintiff contends the March 18 orders should be reversed because the parties made no mistake in their understanding of the size of the Property before executing the Contract. In support of this argument, it relies on the fact that a survey predating the Contract reflected the Property as being 0.58 acres in size. Therefore, plaintiff contends "[b]oth parties . . . were aware . . . the survey indicated the Property was 0.58 acres instead of 1.35 acres." Further, plaintiff contends defendant was not entitled to summary judgment because plaintiff "never conceded . . . the Property is not 1.35 acres."[3] Plaintiff's arguments are misplaced.

While we agree the record includes a survey of the Property predating the execution of the Contract, we conclude that whether either party understood before signing the Contract that the survey showed the Property consisted of only 0.58 acres is not dispositive. What is dispositive is that the parties' Contract was conditioned on the Township's passage of an ordinance approving the purchase; the Township's ordinance only authorized "the acquisition and

[3] At argument on March 18, 2022, plaintiff's counsel stated his client was "of the opinion [the Property] is 1.35" in acreage.

purchase of an approximately 1.35+/- acre . . . property known as Block 1171, Lot 1"; and a survey defendant rightfully obtained after the Contract was executed revealed the Property was less than half the size authorized by the ordinance.

Thus, as Judge Hodgson aptly noted, the condition precedent to the Contract was not met and defendant was relieved from any obligation to purchase the Property. Moreover, the fact plaintiff remained of the "opinion" that the Property consisted of 1.35 acres and it "never conceded . . . the Property [was] not 1.35 acres," without more, was insufficient to defeat defendant's summary judgment motion.

Finally, we decline to conclude, as plaintiff argues, that defendant was not entitled to summary judgment because defendant failed to strictly adhere to the requirements of Rule 4:46-2. As discussed, due to a clerical error, defendant did not submit its response to plaintiff's statement of material facts when it filed its opposition papers, contrary to Rule 4:46-2(b).[4] Defendant also failed to file a separate statement of material facts in support of its cross-motion, contrary to Rule 4:46-2(a).

[4] The record reflects defendant's cross-motion and "response to plaintiff's statement of allegedly undisputed material facts" are both dated March 8, 2022.

However, defendant submitted a response to plaintiff's statement of undisputed material facts before Judge Hodgson heard argument on the cross-applications. Moreover, defendant's response plainly asserted "[a]ny agreement between [the parties] was not effective until the passage of the appropriate ordinance[,] . . . which conditioned the alleged agreement on the size of the [P]roperty being 1.35 + or – acres." Defendant's responding statement also referenced an exhibit to plaintiff's complaint, namely the ordinance at issue.

Under these circumstances, while we do not overlook the deficiencies in defendant's filings, we are convinced Judge Hodgson properly granted defendant's summary judgment motion and denied plaintiff's motion based on the lack of a dispute between the parties as to the terms of the Contract and the provisions of the ordinance at issue. See Kenney v. Meadowview Nursing and Convalescent Ctr., 308 N.J. Super. 565, 569-70 (App. Div. 1998) (concluding although neither party fully complied with Rule 4:46-2, summary judgment was still ripe as the material facts were not disputed).

To the extent we have not addressed plaintiff's remaining arguments, we are persuaded they lack sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION