SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2806-21

MARISA PHILLIPS and DOMINIC PHILLIPS,

Plaintiffs-Appellants,

v.

ANDREW B. WILCOX, JR.,

Defendant/Third-Party Plaintiff-Respondent,

v.

CHICAGO TITLE INSURANCE COMPANY, TOP SHELF MANAGEMENT, LLC, MAURVINO REALTY GROUP, LLC, d/b/a/ RE/MAX COMMUNITY, and DAVID BEACH,

Third-Party Defendants-Respondents.

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Argued October 4, 2023 – Decided October 23, 2023

Before Judges Currier, Firko, and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-0565-21.

Howard N. Sobel argued the cause for appellants (Law Offices of Howard N. Sobel, PA, attorneys; Howard N. Sobel and Margaret D. Nikolis, on the briefs).

Diana R. Sever argued the cause for respondent Andrew B. Wilcox, Jr. (Posternock Apell, PC, attorneys; Daniel Posternock and Diana R. Sever, on the brief).

Ryan W. Kelly argued the cause for respondents Maurvino Realty Group, LLC, and David Beach (Martin Gunn & Martin, PA, attorneys; William J. Martin and Ryan W. Kelly, on the brief).

PER CURIAM

Plaintiffs Marisa and Dominic Phillips appeal from the April 1, 2022 Law Division order granting summary judgment in favor of defendant Anthony B. Wilcox, Jr. dismissing plaintiffs' unjust enrichment complaint against him. The one-count complaint alleged plaintiffs lost their home to foreclosure, but they remained indebted to Sunnova Energy Corporation (Sunnova) for the installation of solar panels at the property in the sum of $56,000, which remain at the property, and they continue to pay for in monthly installments. Plaintiffs claim Wilcox should reimburse them because he is benefitting from the use of the solar panels and not paying for them. We disagree and affirm.

I.

Viewed in the light most favorable to plaintiffs, Templo Fuente De Vida Corporation v. National Union Fire Insurance Company of Pittsburgh, 224 N.J. 189, 199 (2016), the pertinent facts are as follows. Plaintiffs entered into a Power Purchase Agreement (PPA) with Sunnova for the installation of solar panels on their home for a period of twenty-five years. Pursuant to the PPA, the solar panels remained Sunnova's property, and plaintiffs had the option to purchase the solar panels provided they remained in good standing under the PPA. On February 24, 2017, Sunnova (or its affiliate) filed a UCC[1]-1 Financing Statement with the Gloucester County Clerk against Marisa Phillips[2] for the solar panels and associated equipment installed at the home.

On March 29, 2019, a final judgment of foreclosure was entered in favor of the mortgage lender, MTGLQ Investors, L.P., against plaintiffs. During the foreclosure proceedings, plaintiffs had defaulted and did not raise any issue about Sunnova's security interest in the panels. The foreclosure complaint alleged the mortgage was superior to Sunnova's security interest in the panels.

[1] UCC stands for Uniform Commercial Code.

[2] The record is unclear as to why the UCC-1 was only filed against Marisa and not Dominic Phillips.

Sunnova was named as a defendant in the foreclosure matter and served with the complaint but did not participate and did not remove the solar panels prior to the entry of final judgment.

The home was later marketed for sale by MLS Direct as being equipped with solar panels provided by Sunnova and "buyer will accept and work with [Sunnova] directly on services and contracts." Approximately one year later, the property was conveyed to defendant Top Shelf Management, LLC (Top Shelf) for $180,125. Top Shelf sold the property to Wilcox for $286,000 several months later. Plaintiffs continue to be indebted to Sunnova under the PPA and continue making timely payments. Wilcox has the use of the solar panels but has not assumed the obligations under the PPA.

On May 20, 2021, plaintiffs filed their unjust enrichment complaint in the Law Division against Wilcox alleging he bought the home subject to the recorded lien of Sunnova. In their complaint, plaintiffs allege Wilcox is being unjustly enriched because he is using the solar panels resulting in significantly reduced utility bills without paying for the panels. Plaintiffs allege they made "numerous demands" on Wilcox to assume the PPA and commence payment to Sunnova when he purchased the property, but he has ignored their demands.

Plaintiffs requested the entry of judgment against Wilcox in the sum of $56,000, plus attorney's fees, interest, and costs.

Wilcox filed an answer denying the allegations contained in the complaint and asserted a third-party complaint against Chicago Title Insurance Company (Chicago Title), Top Shelf, Maurvino Realty Group, LLC d/b/a Re/Max Community, and realtor David Beach. Wilcox alleged Chicago Title, Top Shelf, Re/Max, and Beach failed to disclose Sunnova's UCC-1 filing. He further alleged breach of contract (count one), breach of covenant and fair dealing/bad faith (count two), breach of fiduciary duty (count three), and violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -227 (count four) against Chicago Title; negligent misrepresentation/omission (count five) and fraudulent misrepresentation (count six) against Top Shelf; negligent misrepresentation (count seven) and fraudulent misrepresentation (count eight) against Re/Max and Beach; and violations of the CFA (count nine) against Top Shelf, Re/Max, and Beach.

Following a period of discovery, Chicago Title filed a motion to dismiss the third-party complaint in lieu of filing an answer pursuant to Rule 4:6-2(e) contending it had no duty to defend the unjust enrichment complaint on behalf of Wilcox because Sunnova's UCC-1 lien was extinguished by the final

judgment of foreclosure. Wilcox opposed Chicago Title's motion to dismiss and, in the alternative, joined in the motion to dismiss. Re/Max and Beach cross-moved to dismiss the third-party complaint. Wilcox moved for summary judgment arguing plaintiffs' complaint failed to state a cause of action for unjust enrichment, or in the alternative, the relief sought was precluded by the final judgment of foreclosure.[3] Plaintiffs opposed all of the motions.

On April 1, 2022, the motion court conducted oral argument on all of the dispositive motions.[4] The court granted Wilcox's motion for summary judgment that day and denied the motions to dismiss as moot. In its written decision incorporated in its order, the court determined there were no genuine issues of material fact presented to support plaintiffs' "singular claim" for unjust enrichment. The court specifically found the foreclosure complaint alleged plaintiffs and Sunnova "held interests in the property subordinate to the mortgage," Sunnova was personally served with the foreclosure complaint, and neither plaintiffs nor Sunnova answered the foreclosure complaint.

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[3] Default was entered against Top Shelf for its failure to answer the third-party complaint.

[4] Wilcox also filed a motion to compel discovery, which was pending before the court but rendered moot.

The court highlighted that the final judgment of foreclosure stated Sunnova did not file an answer and "stand[s] absolutely debarred and foreclosed of and from any and all right and equity of redemption, in and to the lands and every party thereof . . . ." (emphasis omitted). Because Sunnova defaulted and chose not to remove the solar panels, the court found its "claim to the physical property is extinguished."

In conclusion, the court found Wilcox was a bona fide purchaser of the property and Sunnova's solar panels are "unencumbered." A memorializing order was entered dismissing the complaint without prejudice. This appeal followed.

The following arguments are presented by plaintiffs for our consideration:

> (1) the court erred in holding Sunnova's UCC-1 financing statement was extinguished by the final judgment of foreclosure;
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> (2) the court erred in holding Sunnova's interest in the solar panels was extinguished given its failure to remove them;
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> (3) the court erred in holding Wilcox was not unjustly enriched given his admitted continued use and possession of the solar panels without payment; and
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> (4) the court erred in holding Wilcox was a bona fide purchaser for value despite his actual and/or constructive notice of Sunnova's perfected security interest.

II.

We review a decision granting summary judgment de novo, using the same standard applied by the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015) (citing Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014)). We will affirm a court's grant of summary judgment if the record establishes 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 material 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.'" Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). "If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Plaintiffs' contentions on appeal are entirely without merit. Sunnova's security interest falls under the purview of Article 9 of the UCC. Article 9 applies to a transaction that creates a security interest in personal property or

fixtures by contract. N.J.S.A. 12A:9-105(a). Plaintiffs maintain Sunnova's UCC-1 filing was superior to MTLGQ's mortgage. In support of their argument, plaintiffs cite to N.J.S.A. 12A:9-334(d), which governs the priority of security interests in fixtures:

> Except as otherwise provided in subsection (h) of this section, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:
>
> (1) The security interest is a purchase-money security interest;
>
> (2) The interest of the encumbrancer or owner arises before the goods become fixtures; and
>
> (3) The security interest is perfected by a fixture filing before the goods become fixtures or within twenty days thereafter.
>
> [N.J.S.A. 12A:9-334(d).]

As the court correctly found, plaintiffs and Sunnova failed to raise the argument that the UCC-1 filing took priority over the mortgage in the foreclosure action where a determination regarding the status of the PPA and the solar panels could have been made. Thus, the final judgment of foreclosure declared Sunnova was "absolutely debarred" from all right and equity of redemption. Wilcox—the second post-foreclosure purchaser of the property—

was a bona fide purchaser for value and took title free and clear of any encumbrances. Moreover, plaintiffs never moved for reconsideration or appealed from the final judgment of foreclosure and therefore, the court's decision extinguishing Sunnova's interest in the solar panels is final and cannot be raised for the first time on appeal. Consequently, plaintiffs have no cause of action against Wilcox for unjust enrichment.

In Maplewood Bank and Trust v. Sears Roebuck and Co., we held that a first mortgage lender has priority in the funds realized from a foreclosure sale of the mortgaged premises over a fixture financier. 265 N.J. Super. 25, 28 (App. Div. 1993), superseded by statute, L. 2001, c. 117, § 1, at 484 (codified as amended, in relevant part, at N.J.S.A. 12A:9-604). In that case, defendant Sears Roebuck and Co. sought a security interest in the new kitchen installed in the mortgaged premises valued at $33,320.40. Id. at 27. We noted that under the plain language of N.J.S.A. 12A:9-313(8),[5] Sears had two options—"removal of

[5] N.J.S.A. 12A:9-313(8) provides that:

> When the secured party has priority over all owners and encumbrancers of the real estate, he [or she] may, on default, subject to the provisions of subchapter 5, remove his [or her] collateral from the real estate but he [or she] must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not

the fixtures or foregoing removal of the fixtures." Id. at 29. In similar vein here, the fixture financier—Sunnova—has no right to recover the remaining payments for the solar panels from Wilcox, who is a non-debtor in possession of the property. Id. at 30. In sum, Wilcox purchased the property with unencumbered solar panels because the final judgment of foreclosure extinguished any security interest that Sunnova may have had.

III.

We next address plaintiffs' argument that Wilcox was unjustly enriched by continuing to use and possess the solar panels without paying for them and effectively assuming the PPA. The two elements of a quasi-contractual claim of unjust enrichment are: (1) defendant received a benefit; and (2) retention of the benefit without payment would be unjust. Goldsmith v. Camden Cnty. Surrogate's Off., 408 N.J. Super. 376, 382 (App. Div. 2009). A plaintiff must prove both elements and show he or she expected remuneration from the defendant at the time the plaintiff performed or conferred a benefit on the defendant and that the failure of remuneration enriched the defendant beyond

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> otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. . . .

his or her contractual rights. Thieme v. Aucoin-Thieme, 227 N.J. 269, 288 (2016).

A. Plaintiffs Have Not Conferred A Benefit On Wilcox

The solar panels became part of the property following the final judgment of foreclosure. Top Shelf purchased the property after the foreclosure. Wilcox subsequently bought the property from Top Shelf. There was never any privity of contract between plaintiffs and Wilcox. He purchased the home with unencumbered solar panels, for value, as reflected in the purchase price. Plaintiffs do not allege that they are holders or assignees of Sunnova's UCC-1 filing, and they do not claim any interest in the solar panels. And, plaintiffs' obligation under the PPA with Sunnova is not the subject of this appeal. Moreover, Wilcox has no obligation under the PPA because he was not a party to it and never assumed it.

Plaintiffs assert they continue to pay for solar panels on a home they no longer own or live in, and Wilcox has been benefitting by paying substantially lowered energy bills, which is inequitable. Plaintiffs also assert that Wilcox has not suffered any adverse consequences regarding the solar panels because plaintiffs continue to make payments under the PPA.

Plaintiffs did not confer a benefit on Wilcox because they had no relationship with him. Wilcox acquired the property with the unencumbered solar panels, but that was a benefit he paid for in the purchase price, not one bestowed on him by plaintiffs.

B. Wilcox Has No Obligation To Reimburse Plaintiffs For Their Payments To Sunnova

Plaintiffs allege Wilcox was notified of Sunnova's claim to the solar panels prior to purchasing the property and their expectation of reimbursement of their payments under the PPA after he became the owner. However, Wilcox claims his realtor informed him that the solar panels were owned free and clear of any liens or encumbrances as a result of the final judgment of foreclosure, which extinguished all real and personal liens.

The second element of unjust enrichment requires a showing that the failure of repayment enriched defendant beyond his or her contractual rights. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Plaintiffs have not met their burden on this second element because they have no contractual or other relationship with Wilcox, he did not accept the solar panels from plaintiffs, and he is not the recipient of an unfair benefit. Thus, plaintiffs' unjust enrichment claim fails as a matter of law because they have not established both

elements, and based upon our de novo review, summary judgment was properly granted.

IV.

Finally, we address plaintiffs' contention that Wilcox was not a bona fide purchaser for value because he was on actual and constructive notice of Sunnova's perfected interest in the solar panels. Plaintiffs claim Beach, a realtor, forwarded emails to Wilcox concerning the solar panels and that Wilcox "explicitly requested" information about the solar panels from Top Shelf's realtors, including Beach, prior to his purchase of the property. The record shows Top Shelf advised Wilcox that the solar panels were "owned free and clear of all liens, claims, and encumbrances."

A bona fide purchaser for value is "someone who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title." Black's Law Dictionary 1491 (11th ed. 2019). We have also held that "a bona fide purchaser is chargeable only with what appears in the record." Island Venture Assoc. v. N.J. Dep't of Env't Prot., 359 N.J. Super. 391, 397 (App. Div. 2003) (internal citations omitted).

The emails Wilcox received from Top Shelf, Beach, and other realtors did not put him on notice of an encumbrance on the property but instead simply informed him that Sunnova's interest in the solar panels was extinguished by virtue of the final judgment of foreclosure. Indeed, the emails establish Wilcox was properly advised that title to the property he was purchasing was clear, and thus, he was not duty bound to inquire any further about the solar panels. Michalski v. United States, 49 N.J. Super. 104, 109 (Ch. Div. 1958).

Wilcox was a bona fide purchaser for value who purchased the property from Top Shelf without notice of any encumbrance and plaintiffs did not sustain their burden of proof on this issue. Monsanto Emps. Fed. Credit Union v. Harbison, 209 N.J. Super. 539, 542 (App. Div. 1986). Having employed the same standard as the trial court, we conclude there are no genuine issues of material fact that precluded judgment as a matter of law under Rule 4:46-2(c).

Any arguments not specifically addressed lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.