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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3059-21

CROWN BANK,

Plaintiff-Respondent,

v.

GORILLA CAR WASH, LLC,

Defendant-Appellant,

and

ALPHA LOAN SERVICING, LLC, NAGJI VARA, VINCENT LANZA, t/a ENVIRONMENTAL CONSTRUCTION COMPANY, and JORGE ROSARIO,

Defendants-Respondents.

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Argued September 27, 2023 – Decided November 3, 2023

Before Judges Rose and Smith.

On appeal from the Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. F-014380-19.

Anthony N. Gaeta argued the cause for appellant (Gaeta Law Firm, LLC, attorneys; Anthony N. Gaeta and William A. Friedman, on the briefs).

Mark A. Roney argued the cause for respondent Crown Bank (Hill Wallack, LLP, attorneys; Michael Kahme and Mark A. Roney, of counsel and on the brief).

PER CURIAM

Defendant Gorilla Car Wash appeals from the trial court's order granting a final judgment in foreclosure. Defendant argues, among other things, the trial court erred because: defendant was denied essential discovery; plaintiff breached a related loan contract; the loan modification executed by the parties was unenforceable; and plaintiff acted in bad faith. We affirm for the reasons that follow.

I.

In December 2015, the parties entered into an agreement for plaintiff to loan defendant $915,000 for construction of a car wash at a commercial site defendant owned in Paterson. Defendant agreed to make interest-only payments for the first six months of the loan term. Principal and interest payments commenced on August 2, 2016.

As part of the loan transaction, defendant executed a mortgage in favor of plaintiff as security for the loan. The mortgage secured real property, which

defendant owned at 552-554, 556, and 558 Main Street in Paterson, and it was recorded with the Passaic County Clerk's office. As part of the transaction, defendant provided plaintiff a letter opining that the closing documents, including the loan agreement, were binding and enforceable.

In the loan agreement, the parties agreed on a process for defendant to draw down the construction loan through advances. This process included a title search performed in connection with defendant's draw requests to ensure the mortgaged property was free of liens or encumbrances prior to release of funds. In July 2016, a judgment lien[1] was recorded against the mortgaged property arising from a personal injury lawsuit filed against defendant. This lien was vacated by court order in September 2016. On February 3, 2017, the parties executed a loan modification which, among other things, increased the principal loan amount to $975,000, and expressly stated defendant had no defenses, offsets, or counterclaims regarding the loan or amount due. The loan modification was recorded on March 1, 2017.

On October 30, 2017, the parties agreed to extend the interest-only payment period. Days later, they agreed to ensure payment of outstanding taxes

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[1] The record shows that in July 2016, a default judgment was entered in the amount of $45,000 against defendant and multiple other parties in connection with an unrelated personal injury action.

before final construction payments were advanced. Defendant obtained the certificate of occupancy for the car wash in December 2017. In August 2018, defendant missed its loan payment and failed to make subsequent payments. Plaintiff declared defendant in default and demanded accelerated payment of the outstanding loan balance. Defendant did not make further payments.

In August 2019, plaintiff filed a foreclosure suit against defendant and his property. Defendant answered in December 2019. On December 17, 2019, the Chancery Division issued a case management order setting forth a discovery schedule. As part of the order the judge directed that "no motions . . . be filed without permission from the [c]ourt." The parties conducted discovery during the early weeks and months of the COVID-19 pandemic. They agreed to take depositions, but defendant demanded that plaintiff produce one of its employees, Jacinto Rodriquez, in person. Plaintiff offered to produce Rodriquez by videoconference only. Even though the parties had conducted other discovery, they deadlocked on this issue. On July 9, 2020, defendant wrote the Chancery Division, seeking a conference to resolve the deposition dispute. When no resolution was forthcoming, defendant did not seek leave of court to file a discovery motion. Discovery closed on July 17, 2020.

In October 2020, plaintiff moved for summary judgment on the foreclosure complaint. Defendant opposed, and the motion was eventually heard by a different Chancery judge in July 2021. The second judge granted plaintiff's motion for summary judgment, making detailed factual findings in an oral statement of reasons on August 19, 2021. The judge found that the February 3, 2017, loan modification contained express language waiving "set-offs, defenses, claims or causes of action of any nature whatsoever which the [defendant] has or may assert against [plaintiff] with respect to the loan documents." Noting that the modification was recorded, the judge concluded defendant was legally prohibited from asserting any claims or causes of action against plaintiff. Plaintiff moved for entry of final judgment and defendant objected. Final judgment was entered in May 2022. The judgment was amended in November 2022 to include plaintiff's counsel fees.

On appeal, defendant argues that the judge erred by granting summary judgment despite defendant's inability to depose Rodriquez. Defendant also argues plaintiff breached the loan agreement, precluding summary judgment. Defendant further contends that the modification terms were ambiguous, and therefore unenforceable. Finally, defendant contends that, in the event we conclude the trial court properly entered judgment against defendant, he was

entitled to setoffs and credits because plaintiff improperly withheld construction payments.

II.

In reviewing the grant or denial of summary judgment, the standard of review is de novo; this court will use the same standard as the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). We first consider whether there were genuine issues of fact. If not, we are required to "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted); see also Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) ("[T]his [c]ourt must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law.").

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with 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." R. 4:46-2(c). "An issue of 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." Ibid. The judge must engage in a weighing process and decide whether

> the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party . . . 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.
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> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J 520, 540 (1995) (citation omitted).]

Thus, "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Ibid. (citation omitted).

An opposing party who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954) (citing Taub v. Taub, 9 N.J. Super. 219 (App. Div. 1950)). A motion for summary judgment will not be defeated by "bare conclusions in the pleadings without factual support in affidavits," "self-

serving assertions," or "disputed . . . fact[s] of an insubstantial nature." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1, 2.2 on R. 4:46-2 (2020) (citations omitted). Even though the allegations of the pleadings may raise an issue of fact, if the other papers show that, in fact, there is no real material issue, then summary judgment can be granted. Judson , 17 N.J. at 75. The trial court must not decide issues of fact—it must only decide whether there are any such issues. Brill, 142 N.J. at 540.

III.

Our analysis is guided by "familiar rules of contract interpretation." Serico v. Rothberg, 234 N.J. 168, 178 (2018). "[G]eneral principles governing judicial interpretation of a contract" instruct that a "court's goal is to ascertain the 'intention of the parties to the contract . . . .'" Borough of Princeton v. Bd. of Chosen Freeholders of Cnty. of Mercer, 333 N.J. Super. 310, 325 (App. Div. 2000) aff'd, 169 N.J. 135 (2001). To do so, the court must "examine the plain language of the contract and the parties' intent, as evidenced by the contract's purpose and surrounding circumstances." Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 292 (App. Div. 2014) (quoting Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99, 115 (2006)).

"The plain language of the contract is the cornerstone of the interpretive inquiry; 'when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.'" Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 616 (2020) (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)). "In a word, the judicial interpretive function is to consider what was written in the context of the circumstances under which it was written, and [then] accord to the language a rational meaning in keeping with the express general purpose." Ibid. (quoting Owens v. Press Pub. Co., 20 N.J. 537, 543 (1956)). "[I]f the contract into which the parties have entered is clear, then it must be enforced as written." Serico, 234 N.J. at 178 (alteration in original) (quoting In re Cnty. of Atl., 230 N.J. 237, 254 (2017)); Barila, 241 N.J. at 616 (explaining that when the intent of the parties is "plain" and the contractual language is "clear and unambiguous" the court must enforce the agreement as written).

IV.

The record shows no dispute between the parties about the terms of the original loan and mortgage. Both documents were executed on December 15, 2015.

We next examine the loan modification's relevant terms. Paragraph one of the modification states in pertinent part:

> The Borrower hereby represents, warrants and confirms that there are no set-offs, rights, claims or causes of action of any nature whatsoever which the Borrower has or may assert against the Borrower [sic] with respect to the Note, the Mortgages, or other Loan Documents.

Paragraph five of the modification states:

> Except as otherwise provided herein, the Note, the Mortgages, the Assignments of Leases, and the other Loan Documents shall continue in full force and effect, in accordance with their respective terms, and the parties hereto expressly ratify, confirm and reaffirm all of their respective liabilities, obligations, duties and responsibilities, under and pursuant to the Loan Documents, as modified by this Modification A, and the Borrower agrees that the same shall constitute valid and binding agreements of Borrower, enforceable in accordance with their respective terms.

Paragraph eight of the modification states in pertinent part:

> Borrower represents, warrants and agrees to and with Lender as follows:
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> > (a) that each of the Loan Documents is in full force and effect;
> > (b) that none of the Loan Documents has been modified, except as set forth hereinabove;
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> > (c) that the Loan Documents and this Agreement have been duly authorized,

> executed and delivered by the Borrower and constitute legal and binding obligations of Borrower, enforceable against Borrower in accordance with their respective terms, except as such enforceability may be limited by (i) bankruptcy, insolvency, moratorium of other similar laws affecting the enforcement of creditors' rights in general, and (ii) general principles of equity;
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> . . . .
>
> (h) that Borrower has no offset, defense or counterclaim with respect to any of its obligations under any of the Loan Documents (any such offset, defense, or counterclaim as may now exist being hereby irrevocably waived by Borrower).

Additional terms established that: the modification would control in the event of conflict between the modification and the original loan agreement; the modification terms would survive the execution of "all transactions contemplated by [the] [m]odification [a]greement;" and the modification agreement would "bind and benefit the parties," as well as their successors and assigns. Finally, the modification contained terms acknowledging that defendant did not rely "upon [plaintiff] or any party" except for its own advisers "concerning any aspect of the transactions contemplated by this [m]odification [a]greement . . . ."

Defendant contends that since the modification's first paragraph references the word "Borrower" twice, it is ambiguous and therefore unenforceable. This argument is the sine qua non of defendant's opposition to summary judgment.

Our ambiguity jurisprudence is well-settled. See Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 207 (2017). A contract term is ambiguous only when it is "susceptible to at least two reasonable alternative interpretations." Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002) (quoting Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997)).

We examine the nine-page modification and conclude the second use of the term "Borrower" in paragraph one is a typographical error. Giving this paragraph its "plain and ordinary meaning," we conclude the term "Lender" reflected the parties' intentions. See Schor, 357 N.J. Super at 185. We discern no reasonable alternative interpretation of paragraph one, and "tortur[ing] the language . . . to create ambiguity" violates principles of contract construction. Ibid. We conclude paragraph one, as well as the rest of the relevant paragraphs, to be clear and unambiguous, hence we conclude the modification as a whole is enforceable.

The plain language in paragraph one shows defendant waived "set-offs, rights, claims or causes of action of any nature whatsoever which [defendant] ha[d] or may assert against [plaintiff] with respect to the [loan agreement], the [m]ortgages, or the other [l]oan documents" under paragraph one. Paragraph eight, subsection (h)'s plain language shows defendant waived its right to "offset, defense or counterclaim with respect to any of its obligations under any of the [l]oan [d]ocuments." When read as a whole, the modification bars defendant from asserting the multiple theories it raised before the trial judge and again on appeal in defense of the foreclosure action. The waiver language defendant agreed to is all-encompassing, and we draw no distinction between claims based on events that took place before February 3, 2017, and claims based on events that took place afterwards.

We turn to plaintiff's breach of contract claims. Defendant contends plaintiff breached the loan agreement by taking funds from defendant's loan account on six separate occasions totaling approximately $87,000. The alleged breaches include that plaintiff improperly drained its construction loan money to fund a "contingency reserve," an "interest reserve," "soft costs," a "loan advance," an "excess escrow disbursement," and an "SBA Guaranty Fee." Defendant also claims plaintiff wrongfully withheld construction advance

payments when a title search turned up the judgment lien against defendant. Defendant contends the facts which support these claims create a genuine issue sufficient to defeat summary judgment. If not, they argue they are entitled to this amount in set-off. We disagree, concluding the modification is enforceable and, as such, defendant's comprehensive waiver of its defenses, claims, and setoffs is dispositive.

Finally, we deem unpersuasive defendant's argument that summary judgment should have been denied because discovery was incomplete. In light of the modification terms, additional discovery could produce no facts to support a claim that defendant had not waived. To the extent that some claim or cause of action could have survived waiver, and we discern nothing of the sort, defendant did not exercise its option to seek leave for a motion to compel Rodriquez's deposition and any other discovery to which it felt entitled.

To the extent not addressed, defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R.2:11-3(e)(1)(e). We briefly comment that to the extent defendant otherwise challenges the judgment of foreclosure; we affirm for the reasons stated in the judge's cogent oral decision.

Affirmed.

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