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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-C-169-21

520 REALTY, P.C. d/b/a
THE GALLERY RESIDENTIAL
BROKERAGE, JOHN MEECHAN,
and AMY MEECHAN,

Plaintiffs,

v.

JEFFREY KNIFFIN, KARA
DIANE KNIFFIN, ERIN KNIFFEN,
MARY HILLEGAS, ABC
CORPORATIONS, and JOHN
DOES 1-10,

Defendants.

OPINION

Decided May 29, 2024.

John Meechan and Amy Meechan, plaintiffs pro se.

Birdsall & Laughlin, LLC (Robert M. Ford, Esq., appearing), attorneys for defendants Jeffrey Kniffen and Kara Kniffen.

FISHER, P.J.A.D. (t/a, retired on recall).

On the first day of trial, the parties reached a settlement – described in open court – that anticipated the drafting and execution of a formal written agreement. The parties' cross-motions reveal their inability to agree on the wording of a provision that would bar the discharge of defendants' obligations in bankruptcy.

To put this issue in its proper context, a trial about disputes arising from the parties' shared business started on March 4, 2024. It got only so far as the completion of their opening statements; the parties then informally discussed a resolution and later that day advised the court of a settlement. The material terms of their agreement were verbally placed on the record by defense counsel; plaintiffs, who were then and are now unrepresented, agreed that defense counsel had accurately described their agreement. All parties, under oath, expressed their consent to the material terms, recognized a written agreement would be drafted and executed, and acknowledged their agreement ended this lawsuit.

The agreement's material terms required that defendants pay plaintiffs $125,000 but, if defendants defaulted, plaintiffs would be entitled to a $250,000 judgment less any payments made. The $125,000 was to be conveyed in

installments. A $10,000 installment was due immediately. The second – a $30,000 installment – was to be paid within twenty days of the written settlement agreement's execution. And the remainder was to be paid in eighty-five $1,000 monthly installments.

As promised, defendants made the first $10,000 installment on March 4, 2024. That same day their attorney sent plaintiffs a draft of a written settlement agreement. Plaintiffs retained counsel, apparently for the limited purpose of counseling them about the agreement since counsel has not appeared in connection with these motions. While negotiating the form of the written agreement – and at the request of plaintiffs' counsel – defendants placed $31,000 (the second installment plus the first $1,000 monthly installment) in defense counsel's attorney trust account to be released on the agreement's execution.

The parties' present dispute relates solely to the stipulation that defendants' financial obligation would not be dischargeable in bankruptcy. The agreement drafted by defense counsel so provides; its version recognizes the fiduciary duties defendants owed plaintiffs and explains further that, despite an obligation to treat all partners equally, defendants paid themselves more than they paid plaintiffs. Defendants' proposal invoked 11 U.S.C. § 523 and expressed defendants' agreement that the factual statements about their

fiduciary duties would "collaterally estop" them from later denying those facts in bankruptcy court.

Plaintiffs objected to the sufficiency of this proposal. They countered with a version like defendants', except they added language about the degree of defendants' culpability. That is, plaintiffs' version would have defendants stipulate that they acted "under false pretenses, false representations, and fraudulent means," that they had acted "intentionally and/or recklessly" in "fail[ing] to uphold those duties owed to the [p]laintiffs," that defendants' acts and omissions were "willful and malicious," and that defendants "knew their actions were wrong, yet still proceeded intentionally, without just cause or excuse, knowing they could cause injury to plaintiffs."

Lastly, unlike defendants' version, which cited only to "§ 523 of the Bankruptcy Code," plaintiffs' version invoked "§ 523(a)(2A), (4), (6)." Those three subsections referred to in plaintiffs' version preclude the discharge of debts generated by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition," 11 U.S.C. § 523(a)(2)(A), those resulting from the debtor's "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny," 11 U.S.C. § 523(a)(4), and those resulting from the debtor's actions or omissions that caused

"willful and malicious injury . . . to another entity or to the property of another entity," 11 U.S.C. § 523(a)(6).

The oral agreement recited in open court did not have the specificity plaintiffs now demand. The parties agreed at that time only that their agreement would include a non-dischargeability provision and defendants' draft agreement included one. This alone is sufficient to end the dispute about whether the case was duly settled. The action will not be reopened.

But it is also interesting and important to note that the parties may well be debating the significance of something quite irrelevant. That is, there is a substantial question about whether, as a general matter, non-dischargeability clauses are void against public policy. The Appellate Division, in an unpublished opinion, suggested in dictum that it is likely that only a bankruptcy court may determine whether a debt is dischargeable notwithstanding the parties' agreement that it is not. See Horizon Blue Cross Blue Shield of N.J. v. Speech & Language Ctr., No. A-1353-19 (App. Div. Dec. 16, 2020) (slip op. at 8). If that non-binding holding constitutes a correct statement of law, then these cross-motions merely represent a dispute between the parties about which of two unenforceable provisions should be included in their settlement agreement.

That unpublished Appellate Division decision, of course, is not binding on this or any other court. See R. 1:36-3. But that case didn't end with the

Appellate Division. The Supreme Court granted certification to consider whether "an agreement that settlement payments are not dischargeable in bankruptcy is void against public policy under New Jersey law." Horizon Blue Cross Blue Shield of N.J. v. Speech & Language Ctr., 246 N.J. 330, 331 (2021). And then the case took an unexpected turn.

On December 7, 2021, the Supreme Court entered an order that declared certification was improvidently granted and dismissed the appeal. That fact alone would also have no binding impact on this court, see, e.g., Darr v. Burford, 339 U.S. 200, 226 (1950) (Frankfurther, J., dissenting) (recognizing that the Court "has said again and again and again that . . . a denial [of certiorari] has no legal significance whatever bearing on the merits of the claim"), but that disposition alone did not end the case. In dismissing the appeal, the Court affirmatively held – as stated in its order – that the enforceability of a contractual non-dischargeability provision[1] is "for the Bankruptcy Court to resolve if a bankruptcy petition is filed."

[1] The provision there in question pales in comparison to the competing versions here since the Horizon provision stated only that "the judgment debt will be a non-dischargeable debt, pursuant to 11 U.S.C. § 523(a)(2) in the event of a bankruptcy."

Stranger still, the Supreme Court's December 7, 2021 order went unpublished.[2] That fact gives rise to a colorable argument that Rule 1:36-3 prohibits this court from relying on or citing it. Nevertheless, despite the uncertainty, this court concludes that it is bound by the holding contained in the Supreme Court's unpublished Horizon order; even though unpublished, the order should be treated like "carefully considered" Supreme Court dictum to which lower courts are "bound." See Matter of R.H., 475 N.J. Super. 460, 466-67 (App. Div. 2023); Williams v. Raymours Furniture Co., 449 N.J. Super. 559, 563 n.2 (App. Div. 2017). So, although the unpublished Horizon order is a rare entrée in our Supreme Court's "shadow docket,"[3] this court will be guided, and governed, by it.

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[2] While not included in New Jersey Supreme Court Reports, the order can be found at the Judiciary's website under the "Supreme Court appeals" section, which lists the appeals now or at one time pending in the Court in reverse chronological order.

[3] Unlike the Supreme Court of the United States, our Supreme Court has an almost nonexistent "shadow docket." See Merrill v. Milligan, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting) (describing the Court's "shadow docket," essentially a body of dispositions rendered on motions for stays and the like, by which the Court "signal[s] or make[s] changes in the law, without anything approaching full briefing and argument"). Our Supreme Court rarely provides an affirmative holding without publishing a formal opinion. See R. 1:36-2(a) (declaring that "[a]ll opinions of the Supreme Court shall be published except when otherwise directed by the Court"). Instances in which the Court has issued a holding, like it did in Horizon, are highly unusual and seemingly always published. See State v. Carson, 227 N.J. 353 (2016) (indirectly providing, after considering only "the written submissions of counsel," a methodology for

The court understands from these authorities, and about what the Supreme Court itself has stated about its own pronouncements that may fall outside an essential holding, see State v. Rose, 206 N.J. 141, 183 (2011), that the Court's statement in its unpublished Horizon order should be viewed as binding on all lower courts. Albeit unusual, the unpublished order clearly stated that a non-dischargeability clause, like the parties' competing versions here, present questions for "the Bankruptcy Court to resolve if a bankruptcy petition is filed."[4]

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determining post-conviction relief petitions based on counsels' failure to file a direct appeal when requested); State v. Gonzalez, 226 N.J. 209 (2016) (denying certification but agreeing that the Appellate Division's decision that the use of "and/or" in a criminal jury instruction "injected ambiguity" in that case, but, unlike the Appellate Division in its published decision, the Court expressly noted that it did not intend to prohibit the use in a jury charge of "and/or" in all instances). So, it is difficult to imagine that the Court's failure to publish the Horizon order was intentional. Why would it so definitively express an opinion about the question presented in Horizon if it didn't intend for the lower courts to follow it? Because the Court routinely publishes its orders granting and denying certification and the making of other similar rulings, despite their lack of any jurisprudential value, see, e.g., Darr, 339 U.S. at 226, one must assume the Court's failure to publish the Horizon order was an oversight and, therefore, this court should view that order as if it had been published.

[4] That holding does not resolve the question whether bankruptcy courts should enforce these types of clauses. Over thirty years ago, the United States Court of Appeals for the Third Circuit was unable to resolve questions about the enforceability of such a provision. In that case, a three-judge panel considered the issue and rendered a two-to-one unpublished decision, holding that non-dischargeability provisions cannot be enforced by a federal district court, only a bankruptcy court. Cheripka v. Republic Ins. Co., 1991 U.S. App. LEXIS 30343 (3rd Cir. 1991). That panel decision was vacated by court order and scheduled for rehearing in banc. Cheripka v. Republic Ins. Co., 1992 U.S. App. LEXIS 898 (3rd Cir. 1992). The in banc court ended up evenly split, six to six, leaving the

From all this comes a distinct air of irrelevance and mootness. As the Court's last six words in its Horizon order suggests ("if a bankruptcy petition is filed" (emphasis added)), this dispute is pointless until a bankruptcy petition is filed. First, considering that plaintiffs already have in hand the first $10,000 payment, and the next $31,000 is already in defense counsel's hands and ready to be turned over (a total of nearly 33% of defendants' overall obligation) – leaving only the remaining $84,000 to be paid through less onerous $1,000 monthly payments – it is a fair for this court to wonder about the need for a resolution of this dispute. Second, our Supreme Court has made it clear that no matter what is included in the agreement, it'll be some other court – a bankruptcy court – that will determine the provision's enforceability. And third, as revealed by the Third Circuit's inability to provide guidance on the subject, see n. 4, it is unclear still whether a bankruptcy court would enforce it on a theory that such clauses may tend to preclude a bankruptcy court from rendering full and complete justice in the matter.

All this suggests that it is highly likely that whatever conclusion the court may reach about this dispute will make little or no difference or may – if a bankruptcy petition is never filed – constitute a purely academic question.

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question undecided. Cheripka v. Republic Ins. Co., 1992 U.S. App. LEXIS 38449 (3rd Cir. 1992). Those opinions were not published and have no binding effect, and the court of appeals appears not to have since taken up the subject.

Moreover, all these uncertainties about whether such provisions are against public policy, or enforceable, or where they may be enforced if enforceable, serve as background for the simpler question before the court. That is, the parties agreed in open court that a non-dischargeability provision was material to their undertaking, but they were unspecific about its content. Defendants have attempted to honor their representation by providing one version of a non-dischargeability provision; plaintiffs preferred something broader. There is nothing to guide the court about which of the two versions is more appropriate under the circumstances. But the court need not make such a choice. The court's sole obligation is to ensure that the "material" terms of the settlement are memorialized, and, to that extent, both versions conform to which the parties consented in open court. So, the court rejects plaintiffs' motion to reopen the matter and reschedule the trial because defendants have not, in presenting a draft settlement agreement, suggested something different from what they orally agreed on March 4, 2024.

It is fair to say that plaintiffs seek a version that guarantees they will be compensated regardless of defendants' pursuit of bankruptcy protection. But, for the reasons provided above, it seems clear to the court that there is nothing that may be incorporated within the settlement agreement that will provide that guarantee because there is <u>no</u> version that will guarantee a bankruptcy court's

enforcement of either non-dischargeability provision and nothing this court can order that would compel a bankruptcy court to so hold.

For these reasons, the court is satisfied that defendants' version is sufficient. To the extent such a provision may be enforceable, that which is urged by defendants contains a factual basis for non-dischargeability as well as defendants' consent to the application of issue preclusion to any attempt by them to argue differently about their fiduciary breach in bankruptcy court to the extent that preclusion might do plaintiffs any good. In the final analysis, defendants agreed to a non-dischargeability clause and one was included in their proposed settlement agreement that provides greater detail and substance than, for example, the provision questioned in Horizon, slip op. at 5. There is nothing about the parties' oral agreement expressed in open court on March 4, 2024, that would require defendants to provide the additional stipulations that plaintiffs seek or that would compel defendants to confess to acting intentionally or willfully in failing to properly compensate plaintiffs while they remained in business together.

Plaintiffs' motion is denied, defendants' motion is granted, and plaintiffs are directed to execute a settlement agreement that contains the non-dischargeability provision included in defendants' draft.