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OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-C-18-24

CRAIG LaTORRE as personal representative of the ESTATE OF L. DONALD LaTORRE, and DAVID S. LATTORE by assignee SIMON GALEAS,

Plaintiffs,

v.

VINCENT LALLY, and ROBERT BRADY,

Defendants,

and

VINCENT LALLY,

Third-Party Plaintiff,

v.

DAVID LaTORRE, and HENRY GORDON,

Third-Party Defendants,

and

HENRY GORDON,

Fourth-Party Plaintiff,

v.

STEVE KALEBIC,

Fourth-Party Defendant.

OPINION

Argued January 31, 2025 – Decided February 3, 2025.

Springstead & Maurice (Alfred F. Maurice, Esq., appearing), attorneys for defendant Robert Brady.

Law Offices of Steve M. Kalebic (Steve M. Kalebic, Esq., appearing), attorneys for defendant Vincent Lally.

Henry Gordon, third-party defendant/fourth-party plaintiff, appearing pro se.

No other appearances.

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

At the heart of this action is a lease agreement, which includes an option to purchase the leased premises; the claims also require the court's consideration of the rights of an alleged assignee of a money judgment entered against the option-holder. Specifically, this suit incorporates a handful of claims that seem to now involve only three parties: Robert Brady, the owner and lessor of a

residence on Ocean Avenue in Manasquan; Vincent Lally, the lessee and option-holder; and Henry Gordon, the alleged assignee of an unsatisfied money judgment against Lally. Returnable, on January 31, 2025, were three motions: Gordon's motion to enter default against Lally that has been decided by separate order; Gordon's summary judgment motion, which has been indefinitely adjourned at the parties' request; and Brady's summary judgment motion, which is denied in its entirety for the following reasons.

In moving for summary judgment, Brady seeks a determination: (1) that Lally breached the terms of a lease agreement, which contains Lally's option to purchase the Manasquan property, and that he legitimately terminated the lease agreement and the option because of that breach; and (2) that Gordon's claims are without merit and must be dismissed.

I

The first part of Brady's motion prompts a consideration of the terms of a March 1, 2023 written lease agreement between Lally and Brady. Bbr, Exhibit 1.[1] The includes a consideration of (a) the substantive requirements of the agreement, (b) then the contract terms applicable to termination and whether Brady acted in accordance with those provisions in purporting to terminate Lally's rights under the agreement, and (c) lastly, the parties' contentions about

[1] Bbr refers to Brady's brief in support of his motion for summary judgment.

whether Brady had a valid substantive reason for attempting to terminate the option.

A

Lally agreed in paragraph 1 of the agreement to pay Brady $3000 per month in rent; he also agreed to pay, as set forth in paragraph 2, the utility charges, the cost of homeowners insurance, and property taxes on the premises. Paragraph 3 requires that Lally "comply with all building, zoning and health codes and other applicable laws for the use of said premises" (subsection (b)), while also prohibiting Lally from conducting on the premises "any activity deemed extra hazardous, or a nuisance, or [that would result in] an increase in fire insurance premiums" (subsection (c)).

Paragraph 4 grants Lally an option to purchase the premises any time between March 1, 2023, and March 1, 2027, and paragraph 6 fixes $123,924 as the purchase price. Paragraph 7 declares that the option to purchase "is exclusive and non-assignable and exists solely for" the benefit of the agreement's parties (Lally and Brady and no one else); the paragraph further stipulates that the option "shall be deemed null and void" if Lally were to "attempt to assign, convey, delegate, or transfer" the option without Brady's "express written permission."

The last provision – paragraph 20 – states that the writing constitutes the parties' "entire agreement and understanding," that the writing "supersedes all prior discussions between the parties," and that no modification, amendment or waiver of its provisions "will be effective unless in writing signed by the party to be charged."

B

The agreement separately deals with the termination of Lally's two chief rights – the lease and the option to buy. Paragraph 3(d) allows for termination of the lease "[i]n the event of any breach of the payment of rent or any other allowed charge, or other breach of" the lease. And paragraph 11 allows for Brady's termination of the option upon a breach of the lease agreement or the option's terms.

In April 2024, Brady's attorney served a written notice, which purported to terminate both the lease and the option because of Lally's "failure to maintain the real estate taxes on the premises"; the notice claimed that this failure placed Brady "in jeopardy of losing the premises to a tax foreclosure as well as undermining the title to the premises." See Bbr, Exhibit 2. Brady's motion seeks a declaration that this written notice was effective and sufficient to terminate both the lease and the option to purchase.

It appears undisputed that when Brady served the notice, Lally had not paid the property taxes as the written agreement required and as asserted in the April 2024 notice "for the entire 2023 tax year and for the 2024 tax year to date." Ibid. The court focuses on Brady's claimed entitlement to summary judgment solely on this ground because that is the only reason expressed in the notice of termination.[2]

Even the adequacy of the way in which notice was given requires separate analysis. After considering the parties' arguments and their sworn statements, the court finds no reason to question the way in which Brady sought to terminate the option but cannot decide, by way of summary judgment, the sufficiency of the notice insofar as it sought to terminate the lease. There is a difference because the agreement provides different methodologies for the termination of these two rights.

Lally argues that Brady's notice was ineffectual because paragraph 3(d) obligated Brady, in seeking termination of the lease, to act "in accordance with New Jersey State law" and that Brady failed to give the notice or notices required

[2] Brady also now asserts that Lally allowed the property to fall into disrepair, an additional ground authorized by subsections (b) and (c) of the lease agreement's paragraph 3 to terminate Lally's rights. Because this alleged ground was not included in the notice and because the factual record is too barren about the condition of the property at the time of the notice – or even now – to allow the court to draw a firm conclusion about termination on that ground that would be tolerable under Rule 4:46, this aspect of the motion is denied.

by law before giving notice of termination. See N.J.S.A. 2A:18-61.1; Kuzuri Kijiji, Inc. v. Bryan, 371 N.J. Super. 263, 269-73 (App. Div. 2004). Paragraph 11, however, stipulates that in seeking to terminate the option Brady was only required to "giv[e] written notice of the termination." Unlike the way in which a tenancy may be terminated – that is impacted not only by the agreement but by legislative mandates as well – these parties were free to agree on their own methodology for terminating the option. So, the court concludes there is a legitimate dispute about whether the notice was sufficient to terminate the lease but there is no question that the April 2024 notice was contractually adequate to terminate the option.

C

The court thus turns to whether Brady had a substantive reason for terminating the option. To be sure, there is no doubt that a literal reading of the parties' agreement leads to the conclusion that Lally was obligated to pay the property taxes during the lease term and that paragraph 11 of the parties' agreement allows this failure to constitute a ground for terminating the option. If nothing more but the agreement and Lally's undisputed failure to timely pay property taxes was presented, Brady would be entitled to summary judgment and the court would declare the option terminated. But Lally argues that –

consistent with what occurred during prior years of this long-term arrangement[3] – he and Brady expressly or implicitly agreed or understood that strict compliance with the property-tax obligation was not expected. Although the agreement itself declares in so many words that it contains the parties' entire agreement and that the agreement could not be orally modified, Bbr, Exhibit 1, ¶ 20, it is recognized that the question prompts the invocation of the court's equity jurisdiction and that a court of equity might nevertheless disregard a contractual right if there has been a waiver or estoppel, or simply because the parties – through actions and conduct – mutually agreed to so proceed despite the absence of a writing declaring that assent.

That is, the court must consider the maxim that "equity abhors a forfeiture," Dunkin Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 182 (1985); Brunswick Bank & Trust v. Heln Mgmt. LLC, 453 N.J. Super. 324, 330 (App. Div. 2018), and what Brady seeks is a forfeiture of Lally's contractual right to purchase on a ground that Lally asserts was mutually deemed

[3] Lally asserts that, since 2015, Brady has leased to him the premises and granted him an option to buy. See Lally Certification, ¶s 7-8. In fact, he claims he was "ready, willing and able" to exercise the option and close title "in both 2016 and 2017 and the only reason for not closing at these times was Brady's inability to deliver clear title and [Brady's] further request that closing be delayed so that a substantial [j]udgment against him (which was approaching its twenty . . . year anniversary) could expire (thus eliminating the need for Brady to payoff same at our closing)." Lally Certification, ¶s 3, 10-11 (emphasis in the original).

by both he and Brady to be inconsequential – that the parties anticipated only that Lally would bring current any outstanding or unpaid taxes when they closed title, not that he would be required to timely pay the property taxes.[4] Our Supreme Court has held that a determination of whether contracting parties intended to abandon their agreement, or some part of it, "may be inferred from all their acts and circumstances" and that a contractual requirement may be "treated as abandoned where one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior." County of Morris v. Fauver, 153 N.J. 80, 96 (1998); see also DeAngelis v. Rose, 320 N.J. Super. 263, 280 (App. Div. 1999); Gillette v. Cashion, 21 N.J. Super. 511, 516 (App. Div. 1952); Schlossbach v. Francis-Smith, 3 N.J. Super. 368, 371 (Ch. Div. 1949). Equity will, however, will only assist in enforcing a modification by actions or conduct when "the intention to modify is mutual and clear." DeAngelis, 320 N.J. Super. at 230.

[4] Of course, the flip side is that the parties stipulated in their agreement – following years of this alleged course of conduct – that their prior discussions were irrelevant, see Bbr, Exhibit 1, ¶ 20, and that, without any expressed exception or reservation, the property taxes were to be paid, see id., ¶2. From these contractual provisions, a trier of fact could certainly reject Lally's "the-past-is-prologue" argument about this alleged course of conduct and might be persuaded that there was no mutual assent because of the agreement's failure to memorialize their alleged understanding about property taxes; that is, if the parties intended what Lally claims, why didn't they say so in their agreement? It all remains to be seen in the fullness of time.

In the final analysis, the question has been put to the court by way of a motion for summary judgment. Rule 4:46 requires a denial of the motion if the court finds from the motion record a genuine dispute about one or more material facts or, in the context of this case, if evidence was presented in opposition that might suggest the parties' mutual assent to a lack of insistence on absolute or strict compliance with the agreement's property-tax requirement. Lally has provided his own sworn statements in which he claims that for a considerable time Brady has acquiesced in Lally's failure to pay the property taxes with the understanding that they would be allowed to accrue and need only be paid to avoid a tax foreclosure. See, e.g., Lally Certification, ¶s 12-13. The parties' conflicting assertions about this alleged acquiescence cannot be resolved on the papers; they must await trial.

For these reasons, Brady's motion for summary judgment declaring that he properly terminated the lease or Lally's option or both must be denied.[5]

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[5] The parties vociferously argue about the sufficiency of the consideration to be paid for the property if the option is exercised. For example, in arguing that the sale price is grossly inadequate, Brady claims he was "unaware of the value of the property . . . because he was living out-of-state" and that, "[u]pon investigation," he has learned that the property possesses "greater value than [he] could have anticipated" for this "small land-locked piece of property." Bbr at 4. He claims Lally was aware of this and is now attempting to "take Brady's property and make a 'windfall' profit." Id. at 13. There is, however, no pleaded claim that the purchase price is unconscionable and the option, therefore, unenforceable. It is axiomatic, absent a claim and finding of unconscionability, a court will not look to the value of the promises exchanged, or craft for the

II

The second part of Brady's motion seeks dismissal of Gordon's claims. That too must be denied. In his moving brief, Brady concedes "[i]t is unclear what Gordon's interest is," Bbr at 13; if he means the motion papers do not provide clarity or much definition about Gordon's interest, the court must agree, but that is only a reason to deny the motion and allow for further consideration of Gordon's claim down the road. See Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 356-57 (App. Div. 2004) (observing that denial of summary judgment merely preserves issues for further consideration), aff'd, 184 N.J. 415 (2005).

Brady also argues that Gordon's claims must be dismissed because there was no privity between them. Brady is correct in that regard but that doesn't mean Gordon has no interest in the res of this suit. Gordon claims, by way of his own sworn statements, which are enough to defeat the summary judgment motion, that he is an assignee of someone who had a judgment against Lally and thus he has an interest to the extent he may be entitled under Rule 4:59 to levy against any property Lally possesses. That arguably gives Gordon standing, see

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parties an agreement they chose not to make for themselves. Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960); see also Cypress Point Condo. Ass'n v. Adria Towers, L.L.C., 226 N.J. 403, 415-16 (2016); Grow Co. v. Chokshi, 403 N.J. Super. 443, 464 (App. Div. 2008).

N.J.S.A. 2A:25-1, even if his interests can rise no higher than Lally's judgment creditor, see, e.g., Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 81 (App. Div. 2001); H. John Homan Co., Inc. v. Wilkes-Barre Iron & Wire Works, Inc., 233 N.J. Super. 91, 95 (App. Div. 1989), and even if there is presently doubt about whether a judgment creditor (or a judgment creditor's assignee) may levy on an unassignable option to purchase, see, e.g., Castriota v. Castriota, 268 N.J. Super. 417, 423-24 (App. Div. 1993); see also Sulcov v. 2100 Linwood Owners, 303 N.J. Super. 13, 28-29 (App. Div. 1997).[6] The court agrees that the matter is unclear, as are Gordon's claims of fraud or a fraudulent conveyance against Brady, and summary judgment should apply only when the parties' rights are free from doubt, Higgins v. Thurber, 413 N.J. Super. 1, 24 (App. Div. 2010), aff'd, 205 N.J. 227 (2011), and the relevant material facts are undisputed, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

* * *

[6] This fine point may prove to be a moot point. There may be doubt about the ability of an assignee of a judgment creditor to attach or levy against a judgment debtor's inchoate option to purchase property, but if a determination is made that Brady's attempt to terminate the option was ineffectual, Lally could then purchase the property and, once conveyed to Lally, the property would certainly be subject to levy by Lally's creditors, so long as it could be shown Lally has no other personal assets on which levy could be made. Pojanowski v. Loscalzo, 127 N.J. 240, 241-43 (1992); N.J.S.A. 2A:17-1.

For all these reasons, Brady's motion for summary judgment or for declaratory relief is denied in its entirety.