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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2119-14T1

CHARLES BRESSMAN,

Plaintiff-Respondent/
Cross-Appellant,

v.

J&J SPECIALIZED, LLC,

Defendant-Appellant/
Cross-Respondent.

Argued November 9, 2015 - Decided December 4, 2015

Before Judges Sabatino, O'Connor, and Suter.

On appeal from the Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. C-20-11.

Geoffrey T. Bray argued the cause for appellant/cross-respondent (Bray & Bray, L.L.C., attorneys; Peter R. Bray, on the brief).

Joshua S. Bauchner argued the cause for respondent/cross-appellant (Ansell Grimm & Aaron, P.C., attorneys; Mr. Bauchner, on the brief).

PER CURIAM

This long-standing dispute concerning a parcel of land formerly owned by the State returns to this court following a remand to the Chancery Division that we directed in December

2013. See Bressman v. J&J Specialized, LLC, No. A-5550-11 (App. Div. Dec. 6, 2013). As a result of that remand, the Chancery Division ruled that defendant J&J Specialized, LLC ("J&J"), the parcel's present record owner, must convey more than half of it to plaintiff Charles Bressman. The court directed the conveyance to be in accordance with an internal boundary line delineated by the project engineer and ratified by appointed boundary commissioners, subject to municipal approval for subdividing the parcel in that fashion.

J&J now appeals, arguing that the Chancery Division erred in a host of respects in its remand decision. J&J contends there is no sufficient legal, equitable, or evidentiary basis to support the post-remand final judgment entered on December 12, 2014 directing the conveyance of a portion of the property to Bressman. J&J maintains that, for various reasons, the trial court should not have granted Bressman specific performance of the parties' alleged written sale agreement, and that J&J should remain the sole owner of the full parcel. J&J also contends that the trial court misapplied N.J.S.A. 2A:28-1 in appointing commissioners to determine the proper location of the disputed subdivision line who, in turn, adopted the line proposed by the project engineer. Bressman cross-appeals the trial court's denial of his request for reasonable counsel fees, which he

requested under a fee-shifting provision contained within the written agreement.

For the reasons that follow, we vacate the final judgment and remand this matter to the Chancery Division once again for further proceedings. In particular, we conclude that the proofs and the trial court's findings are insufficient to support the enforceability of the alleged written agreement, and that the remedy of specific performance was inappropriately granted.

That said, although the written agreement was defective, we recognize there may be other grounds for granting appropriate relief to Bressman in light of the evidence that he was induced by J&J to refrain from bidding for the parcel at the State auction after being assured by J&J that the parties would split the property between themselves afterwards. Hence, we remand this matter to explore alternative remedies, including but not limited to relief under the unadjudicated third count of Bressman's complaint alleging unjust enrichment, or under pertinent concepts of equity to the extent supported by the law and the proofs.

I.

We need not repeat in full the extensive background recited in our December 2013 opinion. The following summary of the major events that preceded our remand will suffice.

Bressman is the managing member of Ablar Associates, LLC, a company that owns commercial retail property near the intersection of Route 46 and River View Drive in Totowa. Bressman, supra, slip op. at 3. Bressman's property fronts Route 46. J&J owns a nearby commercial property that fronts River View Drive. Ibid. Sandwiched between Bressman and J&J's properties lies a roughly 54,500 square-foot parcel of undeveloped land formerly owned by the State Department of Transportation ("DOT") on the corners of Route 46 and River View Drive. Id. at 3-4. Both parties expressed an interest in acquiring portions of this land to expand their businesses. Id. at 4.

In December 2009, the DOT placed the parcel, which it had declared surplus property, for public auction at a minimum bid price of $110,000. Id. at 4. Prior to the auction, Bressman and Brian Hamilton of J&J orally agreed in a so-called handshake agreement (the "oral agreement") that J&J alone would bid on the parcel at the auction on the parties' joint behalf. Upon acquiring the parcel, Hamilton was to retain a portion of it for J&J and sell Bressman the larger remaining portion. Ibid. According to Bressman's testimony, the purpose of this alleged oral agreement was to avoid a "bidding war" at auction. Bressman claimed that he disclosed this proposed bidding

arrangement to a DOT representative prior to the auction and the representative did not object to it.

At the auction, J&J successfully obtained the parcel for the minimum bid price of $110,000. Id. at 5. Bressman attended the auction but did not bid.

As anticipated by their oral agreement, the parties then attempted to negotiate the sale to Bressman of a portion of the parcel. During the ensuing negotiations, however, the parties had difficulty agreeing upon an appropriate boundary line that would subdivide the land. Id. at 5-6. Despite being unable to agree on precisely how to draw the line dividing the parcel, the parties executed a written land sale contract ("Agreement of Sale") on March 30, 2010. Id. at 6.

The purported Agreement of Sale executed by the parties, which refers to J&J as "Seller" and Bressman as "Buyer," included a clause stating that the parties intended to have Bressman, as the Buyer, obtain approvals from the Borough of Totowa to subdivide the property into two parcels containing approximately 18,000 square feet for J&J and approximately 38,904 square feet for Bressman. The Agreement of Sale further recited that the parties intended that "the Buyer Lot be sufficient in size to obtain Site Plan Approval for a retail building containing not less than 5,000 square feet of ground

floor retail space, together with sufficient parking spaces, ingress, egress and other appurtenances required by the Agencies to grant the Subdivision Approval and Site Plan Approval."

With respect to the location of the intended subdivision boundary line, the Agreement of Sale stated that:

> The exact dimension, size, scope, design and layout of the Buyer Lot shall be reasonably determined by the parties and the project engineer in order to obtain the Subdivision Approval and Site Plan Approval to accommodate Buyer's proposed 5,000 square foot retail building. It is understood and agreed that Exhibit "A" attached hereto is a depiction of the approximate location of the subdivision line of the Parcel and the general layout of the Buyer Lot. Exhibit "A" will be replaced with the revised plan for the Approvals once finalized.
>
> [(Emphasis added).]

As we noted in our prior opinion, Bressman, supra, slip op. at 16, the main problem triggering this litigation is that an Exhibit A depicting the boundary line was never attached to the mutually-executed written agreement. Indeed, the parties dispute to this day the existence and contents of Exhibit A and the actual location of the subdivision line. Bressman has advocated for a line which essentially runs in an east-west direction and creates a trapezoidal configuration for J&J's portion of the divided lot. Conversely, J&J has advocated for a line that also runs in an east-west direction but is somewhat

north of Bressman's preferred line and would create a more rectangular shape for J&J's portion of the divided lot. Bressman's proposed line would grant to J&J less space (18,000 square feet) than J&J's proposal (20,414 square feet).

The parties designated Bruce Rigg to be the project engineer. Rigg was charged with assisting them in determining the layout of the anticipated subdivisions referred to in the Agreement of Sale. Id. at 7, 9. However, the parties never jointly met with Rigg and their negotiations through counsel over the placement of the boundary line failed.

In January 2011, Bressman filed a complaint in the Chancery Division seeking, among other things, specific performance of the parties' written agreement. Id. at 10. J&J denied liability and filed a counterclaim. Both parties claimed that the other party had breached. J&J argued that Bressman breached by determining the boundary line with the engineer without J&J's input and by releasing the written agreement prematurely from escrow. Id. at 14. Bressman argued that J&J breached by failing to meet with him and the engineer to discuss the boundary line. Ibid.

In August 2011, J&J moved to amend its pleadings to also assert that the oral agreement precluding both parties from bidding at the public auction was illegal and against public

policy. Id. at 10. The trial court provisionally denied that motion, subject to whatever evidence on the illegality claim would be produced at trial.

After a five-day bench trial in which Bressman, Hamilton, Rigg, and two attorneys testified, the trial court found that there was an enforceable contract and granted Bressman specific performance. The court directed Rigg to prepare a subdivision map to accommodate "an application that conveys to [Bressman] approximately 38,904 sq. ft. and provides [J&J] approximately 18,000 square feet[.]"

Within this first decision, the trial court stated that there was insufficient proof of "an intentional breach by either party," but did not make clear whether a breach had nonetheless occurred. (Emphasis added). The court also required that the parties meet with Rigg and "zoning counsel" to discuss and approve a drawing of the boundary line. Id. at 11-12. J&J filed an appeal and Bressman cross-appealed.

In our December 2013 opinion on the first appeal, we concluded that the trial court's findings, as written, were insufficient to support the remedy of specific performance. Among other things, we noted the lingering uncertainty about the existence and contents of Exhibit A, and whether a lack of mutual agreement by the parties concerning the exact location of

Exhibit A and the boundary line rendered the written agreement unenforceable. Id. at 16-17. We also expressed concerns about the lack of a clear finding as to whether either party had breached the contract, even if "unintentionally." Id. at 14-15. In addition, we noted that the trial court had not ruled on J&J's argument that Bressman had breached his obligations by causing the written agreement to be released from escrow. Further, we expressed concerns about whether the parties' alleged agreement not to bid against one another at the DOT auction was illegal or otherwise void on public policy grounds. Id. at 19-22. Lastly, we noted the need for the trial court to reexamine Bressman's request for counsel fees, depending upon which party, if any, was a "non-breaching" party entitled to fees under the written agreement.

To summarize, we directed the trial court in our December 2013 opinion to address and resolve the following six issues on remand:

> (1) whether either party breached and, if so, the nature of the breach; (2) which of the parties' competing maps showing an approximated subdivision line was intended to be "Exhibit A" to the written agreement; (3) if the true or intended Exhibit A cannot be ascertained, whether the agreement is consequently too indefinite to be enforced; (4) whether plaintiff materially breached the written agreement with respect to its release from escrow; (5) whether the alleged oral agreement to avoid a "bidding war" at

> an auction of State land was illegal and against public policy, and if so, what remedy flows from such impropriety; and (6) whether plaintiff is a non-defaulting party entitled to counsel fees.
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> [Id. at 2-3.]

II.

Following our December 2013 decision, the trial court considered additional briefs from the parties on the six issues we had remanded. The court did not hear additional testimony or receive further exhibits.

On June 3, 2014, the trial court issued a post-remand letter opinion and accompanying order, again granting Bressman specific performance of the written agreement. The court did not alter its original opinion that Bressman and J&J's principal, Hamilton, were both credible in their competing testimony.

With respect to the remanded question of whether there was any breach, the trial court stated in its letter-opinion:

> Neither party refused to meet; they just were not available at the same time. The attorneys communicated "more or less" their clients' position. Both men were responsible for the failure to reach an agreement on the placement of the line. This is an unusual instance of mutual breach and could be viewed and treated as a mutual mistake.
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> [(Emphasis added).]

With respect to the open issues concerning "Exhibit A," the court did not identify on remand a true version of that Exhibit, or determine its contents. Instead, the trial court determined that the specification of Exhibit A was unnecessary because many of the concerns or possible restrictions raised by this court in its December 2013 opinion relating to the exact location of the boundary line (such as matters of ingress and egress) were moot. The court reasoned that "[t]he missing term, where precisely the subdivision line would be placed, should not be permitted to void the parties' agreement. There is no equity or fairness in that result."

As to J&J's claim of breach by Bressman in prematurely releasing the written agreement from escrow, the trial court ruled on remand that "the contract should not have been released from escrow until the [boundary] line had been agreed upon[,]" but that the finding "does not void the agreement" because that result "would not be equitable."

With respect to the parties' oral agreement to not bid against one another at the DOT auction, the trial court ruled that the arrangement was not illegal, and that public policy weighed against returning the parcel to the State to be re-auctioned for that reason. The court arrived at this conclusion based on the Attorney General's silence when notified of our

prior remand decision, and also the fact that the only two parties who would be eligible to bid at another auction would be Bressman and J&J. Ibid.; see N.J.S.A. 52:31-1.4.

Additionally, the trial court concluded that J&J and Bressman were responsible for their own respective attorney's fees under the Agreement of Sale because "[b]oth parties are responsible for the failure to fully complete all terms of the agreement." Hence, the court deemed neither Bressman nor J&J as a "defaulting party" under the fee-shifting provision in paragraph 12.13 of the Agreement of Sale.

The trial court also explored other possible equitable alternatives. These potential remedies included: (1) treating the matter as a "Boundary Line Dispute" under N.J.S.A. 2A:28-1 and appointing three commissioners to draw the boundary line; (2) rescinding the contract based on a sua sponte theory of mutual mistake; (3) reforming the contract based on mutual mistake; or (4) reforming the contract by treating the parties' failure to agree upon a boundary line as a scrivener's error. The court ultimately settled upon combining elements of the first and third of these remedies, treating the parties' mutual breach as stemming from a mutual mistake, and reforming the contract to allow three commissioners appointed by the court

under N.J.S.A. 2A:28-1 to determine the placement of the boundary line.

Three commissioners were subsequently appointed. They were provided with the trial court's June 3, 2014 order and opinion, the Agreement of Sale, and a map showing each party's boundary line.

The commissioners, maps in hand, walked the property "to ascertain if there were any overriding equitable concerns that would dictate a deviation from the Square Footage calculations contained in the Agreement of Sale." They observed none, and concluded in a written report to the trial court dated September 15, 2014 that Bressman's proposed map, as prepared by Rigg, should be adopted as the boundary line.[1]

Three days later on September 18, 2014, the trial court acknowledged the commissioners' findings and accepted their conclusion as to the proper location of the boundary line. The court subsequently issued a final judgment on December 12, 2014,

[1] The combined measurements for the two subdivided portions of the parcel attributed to J&J's proposal total 54,500 square feet. Bressman's measurements total 54,546 square feet. It appears from the commissioners' report that J&J's proposal only included the square footage of the portion it was to retain, leaving to the commissioners to infer the size of the remaining portion. Since the commissioners rounded the total size of the parcel to the nearest one hundred, the figures do not match exactly the measurements provided by Bressman, but we consider the difference de minimis.

ordering the parties to proceed with the Agreement of Sale using the commissioners' proposed division of the parcel.

III.

In its present appeal, J&J contends that the trial court fundamentally erred in once again ordering the specific performance of a property sales agreement that is missing a critically agreed-upon term: a mutually-designated boundary line for subdividing the property, i.e., the never-specified "Exhibit A." J&J further argues that the legal reasoning of the trial court continues to overlook critical deficiencies in the contract documents and the record, and that the court's finding of "mutual breach" cannot support the remedy of specific performance. We agree.

As we noted in our December 2013 opinion, the specification of "Exhibit A" was a material term of the property sale agreement. Bressman, supra, slip op. at 16. Nothing could be more material or essential to a contract for the sale of land than the location of the boundary line for such a conveyance. We recognize that the Agreement of Sale recites that Exhibit A was supposed to depict only an "approximate location" for the boundary line, with the precise location to be established at a later time with the assistance of the project engineer. Unfortunately, the existence or contents of Exhibit A have never

been established, despite two rounds of proceedings in the trial court. That critical omission precludes the remedy of specific performance.

When the parties to an alleged contract do not agree to an essential term, or an essential term is not described with sufficient specificity to allow the performance of the parties to "be ascertained with reasonable certainty[,]" the contract is unenforceable. Malaker-Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank, 163 N.J. Super. 463, 474 (App. Div. 1978), certif. denied, 79 N.J. 488 (1979); Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). The degree of specificity required in the contract terms is even greater when equitable remedies are requested. Alnor Const. Co. v. Herchet, 10 N.J. 246, 250 (1952). This is so because a "precise understanding of all the terms" is required before performance can be enforced. Id. at 250-51. "[I]t is not the function of the court to make a better contract for the 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 Assoc., 295 N.J. Super. 445, 450 (App. Div.), certif. denied, 149 N.J. 35 (1996)).

The failure to agree upon a boundary line in this case, or to determine the true "Exhibit A," is not a minor or legally

inconsequential omission. Indeed, the competing boundary lines advocated by the parties, which reflect a difference of over 2,400 square feet of real property to be retained by J&J, show that the uncertainty of the agreement and the parties' lingering dispute reflect a significant contractual defect.[2] Although we appreciate the trial court's effort to compensate for that material omission by invoking concepts of "mutual mistake" and "mutual breach," we cannot endorse its legal analysis.

The doctrine of mutual mistake does not permit a defective agreement to be reformed if the defect arises, as the trial court factually found here, from a mistaken assumption that the parties would be able to meet and agree on a boundary line at a future time. This is not truly an instance of "a mistake of both parties as to the contents or effect of a writing[.]" See Restatement (Second) of Contracts § 155. Instead, this is a

[2] Because the Agreement of Sale was not a fully-formed enforceable contract, J&J's claims of Bressman's breach of the escrow provision is of no moment. Even if it were, we agree with Bressman that the parties' conduct following the release of the agreement from escrow supports a defense of ratification. In addition, we need not address further the claim of illegality because J&J is no longer pressing that claim in the present appeal and the Attorney General has not appeared in this case, despite an express invitation to do so, to advocate that we rescind the auction sale on this basis. Nothing in this opinion, however, should be construed to signify that we affirmatively endorse the parties' pre-auction commitment to refrain from bidding against one another, or such an arrangement is necessarily in the public interest.

situation in which an essential ingredient of the contract — the placement of the boundary line — was never agreed upon at all, at least based upon the inconclusive proofs and the trial court's particular findings.

Nor does the notion of "mutual breach," as mentioned in the trial court's remand opinion, provide an adequate basis to order specific performance of a contract. Specific performance is generally not imposed unless the party seeking that remedy has proven that the opposing party breached the contract. See, e.g., Stopford v. Boonton Molding Co., 56 N.J. 169, 186 (1970) (discussing the antecedent question of breach before discussing the availability of equitable remedies); Fleischer v. James Drug Stores, Inc., 1 N.J. 138, 147-48 (1948) (considering the adequacy of specific performance in a situation where the defendant breached the terms of a commercial contract).

In addition, a party requesting specific performance must not have breached the contract itself. See, e.g., In re Estate of Hoffman, 63 N.J. 69, 81 (1973) ("[I]t is well established that one who has either broken a promise in some material respect or is unable substantially to perform his own obligations under an agreement cannot get a decree for specific performance."); Ballantyne House Assoc. v. City of Newark, 269 N.J. Super. 322, 336 (1993) (holding the same); Restatement

(Second) of Contracts § 369 (1981); 11 Williston on Contracts § 1425 (3d ed. 1968)). If, as the trial court found, both Bressman and J&J "mutually breached" the written agreement, then neither party is entitled to specific performance.

We reject Bressman's contention that we should impute into the remand decision an implicit finding that only J&J, and not Bressman, breached the sale agreement. That is simply inconsistent with the trial court's repeated findings that both parties share responsibility for their post-auction failure to meet and agree on a boundary line. Nor is Bressman entitled to counsel fees under the Agreement of Sale, because the contract is not enforceable.

The trial court also erred in appointing, sua sponte, commissioners under N.J.S.A. 2A:28-1 to resolve a "boundary dispute." That statute does not cover this litigation because the parties were not "owners of adjoining lands." Ibid. Although we appreciate the efforts of the commissioners in inspecting the former DOT parcel and attempting to discharge their assigned function, their report in this case lacked a proper statutory foundation.

IV.

For these various reasons, we reverse the trial court's decision and final judgment ordering specific performance and

the implementation of the subdivision boundary line designated by Rigg. That does not, however, end the litigation.

We fundamentally agree with the trial court in this one important respect: given the oral assurances made by J&J to Bressman before the auction that induced Bressman to forbear from bidding itself on the property, it would be inequitable to allow J&J to keep the entire parcel for itself without affording some form of remedy to Bressman. We do not specify here what precisely that remedy should be, but we offer at least two alternatives for the trial court's consideration.

First, it is significant that in count three of his complaint Bressman pleaded, as an alternative theory of relief, a claim of unjust enrichment. In essence, Bressman claims that J&J would be unjustly enriched if it is allowed to retain the entire parcel itself, given the assurances that it made to Bressman before the DOT auction. We reject J&J's contention that Bressman has "waived" this alternative theory in the litigation, which has been focused to date almost entirely on the breach-of-contract claims.

The unjust enrichment doctrine applies where a plaintiff shows that it "expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its

contractual rights." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Unjust enrichment is a remedy that may be imposed when there is "no express contract providing for remuneration[.]" Caputo v. Nice-Pak Prods, Inc., 300 N.J. Super. 498, 507 (App. Div.), certif. denied, 151 N.J. 463 (1997). The doctrine has been applied at times in the context of a conveyance of land. See, e.g., Heim v. Shore, 56 N.J. Super. 62 (App. Div. 1959) (after concluding that an alleged agreement for the defendant to sell the plaintiff fifty lots of real estate was too indefinite to enforce, the court remanded the matter to the trial court to determine whether, as an alternative, the plaintiff should be entitled to collect monetary damages from the defendant under a theory of unjust enrichment); see also VRG Corp., supra, 135 N.J. at 553 (noting that principles of unjust enrichment "may sometimes be a factor in creating an equitable lien" on proceeds generated after a conveyance of land, but finding the specific facts in that case insufficient to justify such a remedy).

Here, the trial court has already found that Bressman had orally promised not to bid against J&J at the auction (i.e., the benefit) in exchange for J&J's promise to later convey a majority portion of the auctioned parcel to Bressman (i.e., the remuneration). J&J never conveyed any of the property to

Bressman. Hence, J&J arguably was unjustly enriched by being permitted to retain the entire property for the unopposed auction price of $110,000. Further, since the Agreement of Sale has been declared unenforceable, there is "no express contract providing for remuneration." Caputo, supra, 300 N.J Super. at 507.

We direct the trial court to explore these concepts further and to adjudicate Bressman's heretofore-unresolved unjust enrichment claim. If the trial court agrees with our preliminary assessment that the proofs and circumstances support such a cause of action, the court shall consider whether Bressman is entitled to monetary damages or, alternatively, an equitable lien on revenues or profits that J&J prospectively might generate in reconveying the parcel to a third-party buyer or in developing the parcel itself.

As a second alternative, the trial court shall explore whether principles of equity warrant a form of a "sealed-bid" process, in which the disputed parcel would be conveyed to either Bressman or J&J, depending upon which party is the higher bidder. See, e.g., Muscarelle v. Castano, 302 N.J. Super. 276 (App. Div. 1997) (affirming the Chancery Division's order directing a sealed-bid process to resolve equitably a dispute between individual partners over real property owned by a

partnership). As a predicate to that process, the trial court should first determine whether Bressman should be regarded as having an equitable interest in the parcel, given the circumstances as they evolved here.

If Bressman proves to be the high bidder in a court-supervised sealed bid process,[3] then he should reimburse J&J fully for its $110,000 payment of the DOT auction price and all subsequent reasonable carrying costs. On the other hand, if J&J is the high bidder, then it can retain the entire parcel. In either instance, the trial court shall consider whether any excess bid amount over $110,000 should be paid to the State, as a sum representing or approximating what the State would have presumably received if both parties had competitively bid at the original auction.

Apart from these two possibilities, we leave it to the Chancery Division — as a court of equity with broad powers to do justice — to fashion some other alternative remedy to address the rather idiosyncratic situation presented here. See Sears v. Camp, 124 N.J. Eq. 403, 411-12 (E. & A. 1938). The trial court shall have the discretion to order additional briefs

[3] We do not mandate a second auction administered by the DOT, as the DOT is not a party to this litigation and it would be presumptuous to assume that the DOT is willing to undertake such a process.

and to entertain additional proofs, to the extent warranted to develop and rule upon these matters.

The final judgment is consequently vacated and the matter is remanded for further expeditious proceedings in the Chancery Division consistent with this opinion. We do not retain jurisdiction.