NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4137-13T2

JOHN BARBERO,

Plaintiff-Appellant,

v.

ALEXY JOHN and AJOHN'S WORLD PROPERTIES, INC., a Corporation of the State of New York,

Defendants-Respondents.

Argued October 14, 2015 – Decided December 2, 2015

Before Judges Yannotti and St. John.

On appeal from Superior Court of New Jersey, Chancery Division, Sussex County, Docket No. C-0005-12.

Stephen J. McGee argued the cause for appellant.

Howard A. Teichman argued the cause for respondents (The Law Offices of Bruce E. Baldinger, LLC, attorneys; Bruce E. Baldinger, on the brief).

PER CURIAM

Plaintiff John Barbero appeals from a Chancery Division order granting summary judgment in favor of defendants, Alexy John and AJohn's World Properties, Inc., and denying plaintiff's

cross-motion for leave to file a third amended complaint. Following our review of the arguments advanced on appeal, in light of the record and applicable law, we affirm.

I.

The record reflects the following facts and procedural history viewed in the light most favorable to the non-moving party. Robinson v. Vivirito, 217 N.J. 199, 203 (2014). Plaintiff, John Barbero, is the successor in interest to the original plaintiff, Clifton Fitness Center, Inc. (Clifton), a New Jersey corporation in dissolution. Barbero was the sole shareholder, officer and director of Clifton. Defendant, Alexy John (John), was the president and shareholder of Warwick Fitness Center, Inc. (Warwick), a New York corporation, and a managing member of Bergen County Fitness Center, LLC (Bergen), a New Jersey limited liability company, both currently in liquidation proceedings under Chapter 7 of the United States Bankruptcy Code. John is also the president and managing shareholder of defendant AJohn's World Properties, Inc. (AJohns), a New York corporation.

Clifton was the owner of two Olympus Gyms, one located in Warwick, New York (the Warwick Gym), and the other located in Hackensack (the Hackensack Gym), as well as the real estate upon which the Warwick Gym was located (Warwick Real Estate). In

March 2007, through the services of business broker, Thomas Michaels, Clifton reached an understanding with John's three business entities to sell the above-listed assets. Specifically, Warwick would purchase the assets of the Warwick Gym; Bergen would purchase the assets of the Hackensack Gym; and AJohns would purchase the Warwick Real Estate. Michaels circulated an initial letter detailing his understanding of the proposed transactions. The letter outlined the purchase prices and payment obligations for each acquisition, including a proposal for the promissory notes from buyers to seller to be cross-collateralized through a second mortgage on the Warwick Real Estate.

On April 15, 2007, written agreements were entered into between Clifton and Warwick for the sale of the Warwick Gym for $395,000, and between Clifton and Bergen for the sale of the Hackensack Gym for $475,000. Each of these agreements required each of the buyers, Warwick and Bergen, to provide a promissory note for the full purchase price, secured by a lien on all assets, and repayment on a twenty-year amortization schedule with a balloon payment due after a ten-year term. On the same day, a real estate purchase agreement was entered into between Clifton and AJohns for the sale of the Warwick Real Estate for $720,000. That acquisition was financed through a note and

mortgage given by AJohns to Wachovia Bank, N.A. (now Wells Fargo) in the amount of $576,000. All three acquisition agreements were silent as to any cross-collateralization. Additionally, the agreements all contained integration and merger clauses.

The transactions were simultaneously closed on June 5, 2007, at Wachovia's offices in White Plains, New York with all parties and their attorneys present. At the closing, Clifton transferred the assets to the respective purchasers, including the deed of the Warwick Real Estate to AJohns. A mortgage was given by AJohns to Wachovia, but no second mortgage was given by AJohns to Clifton. Indeed, sometime before the closing, defendants learned that Wachovia Bank, the first mortgage lender, would not permit a second mortgage or other encumbrance on the Warwick Real Estate.

For three years after the closing, counsel for both parties discussed the issue of the second mortgage, including discussions of the possibility of entering into an unrecorded mortgage, but no agreement was ever reached either verbally or in writing. Ultimately, defendants' counsel expressed that they would not be comfortable entering into an agreement that could cause a default of the mortgage with Wachovia and would not

discuss granting a second mortgage any further. As such, no second mortgage was ever granted to plaintiff.

Plaintiff subsequently commenced an action in the Law Division seeking to compel defendants to execute a mortgage on the Warwick Real Estate, alleging that defendants breached the agreement to cross-collateralize by failing to grant a second mortgage on the property. After the litigation began, Bergen and Warwick filed for bankruptcy.

Thereafter, defendants filed a notice of motion for summary judgment and accompanying statement of material facts, certifications and exhibits. Plaintiff filed a notice of motion for leave to file a third amended complaint and statement of material facts, certifications and exhibits in opposition of summary judgment.

On April 7, 2014, Judge Stephan C. Hansbury granted summary judgment in favor of defendants, dismissing plaintiff's complaint in its entirety, and denied plaintiff's motion to file a third amended complaint. The judge concluded: (1) the parol evidence rule precludes introduction of evidence regarding the negotiations; (2) the statute of frauds precludes imposing a mortgage on the Warwick Real Estate; (3) the allegations against John, individually, do not warrant piercing the corporate veil;

and (4) plaintiff's motion for leave to amend would be prejudicial and lacks merit. This appeal followed.

On appeal, plaintiff contends that summary judgment should have been denied due to genuine issues of material fact and the cross-motion to file a third amended complaint should have been granted. Plaintiff argues that the parol evidence rule does not bar relief, the statute of frauds, N.J.S.A. 2:1-15, does not bar relief, and John is liable because the tortious actions of AJohns are attributable to him, as an individual, and on the basis of his personal misrepresentation that a second mortgage would be granted.

We find no merit to these contentions and affirm substantially for the reasons stated by Judge Hansbury in his cogent and comprehensive written opinion. We add these brief comments.

II.

"The Court reviews de novo the trial court's entry of summary judgment dismissing [a party's] claims." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014) (citing Town of Kearny v. Brandt, 214 N.J. 76, 91, (2013); Coyne v. State of N.J. Dep't of Trans., 182 N.J. 481, 491, (2005)). A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and

admissions on file, together with the 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); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). The motion judge determines "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." Brill, supra, 142 N.J. at 540.

"The factual findings of a trial court are reviewed with substantial deference on appeal, and are not overturned if they are supported by 'adequate, substantial and credible evidence.'" Manahawkin, supra, 217 N.J. at 115 (citing Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 293 (2001), cert. denied, 535 U.S. 1077, 122 S. Ct. 1959, 152 L. Ed. 2d 1020 (2002)); see Brandt, supra, 214 N.J. at 92. However, a "'trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Brandt, supra, 214 N.J. at 92 (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Judge Hansbury made the following findings of fact regarding the agreements among the parties. All three written agreements contained merger and integration clauses, and as such, the parol evidence rule bars consideration of the alleged oral second mortgage agreement, and no exception applies. "In general, the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document." Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 268 (2006); accord Filmlife, supra, 251 N.J. Super. at 573; Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 378 (App. Div. 1960).

The rule does not bar the "[i]ntroduction of extrinsic evidence to prove fraud in the inducement . . . " Filmlife, supra, 251 N.J. Super. at 573. Such evidence "is admitted because it is not offered to alter or vary express terms of a contract, but rather, to avoid the contract or 'to prosecute a separate action predicated upon the fraud.'" Id. at 573-74 (quoting Ocean Cape Hotel Corp., supra, 63 N.J. Super. at 378).

The clauses were clear in all three agreements and the parties had sufficient legal representation at their execution. Judge Hansbury noted the record is devoid "of any evidence of fraud, unclean hands or misrepresentation. . . ." Accordingly, he properly concluded that the parol evidence rule barred

consideration of any oral agreements to cross-collateralize. Because the written agreements did not require a second mortgage, there are no material issues of fact in dispute and there can be no breach of contract for failure to execute a second mortgage.

Next, the three agreements here were patently sufficient writings under N.J.S.A. 25:1-13, memorializing the critical terms of the real estate transactions at issue and were signed by the parties to be bound. There is no such writing imposing the obligation of a second mortgage. The fact that the parties had discussions regarding a second mortgage in no way satisfies the statute of frauds. Accordingly, because there exists no written agreement obligating the granting of a second mortgage, there are no material issues of fact in dispute and there can be no breach of contract for failure to execute a second mortgage.

Lastly, Clifton entered into the transactions with separate business entities, Bergen, Warwick, and AJohns. Defendant John was never a party to or guarantor of any obligation individually. Plaintiff contends that John is "one and the same" as the entities of which he is the owner. However, plaintiff has not met the burden of alleging sufficient facts so that the court should set aside the corporate structure. Judge Hansbury found:

> Plantiffs have not shown any misrepresentations on the part of Defendants. Rather, the record demonstrates that the parties attempted to negotiate additional financing, which did not come to fruition. In fact, the record indicates that Defendants informed Plaintiff that no second mortgage would be provided. . . While both parties agree that ongoing discussions occurred after closing for further financing, there is no indication it was done so with fraudulent intent.

Accordingly, there exists no grounds on which to pierce the corporate veil and proceed against defendant John individually. As such, plaintiff is not entitled to the relief sought and summary judgment was proper. Importantly, as the judge explained, "[i]n essence, this Court is being asked to order execution of a loan document which violates the terms of the primary loan [with Wachovia]. The Court declines to do so."

Further, affording plaintiff all favorable inferences, the facts demonstrate that an amendment of the complaint would be futile. The judge noted, "[p]laintiff proceeds on these claims under the ground that an 'oral contract' for the transfer of a second mortgage existed. This is a legal theory upon which the court found was not meritorious in granting summary judgment in favor of Defendants." Moreover, even if the court did not consider the amended complaint to be futile, it would nevertheless be compelled to deny leave to amend based on the significant prejudice that would result to defendants. The

motion was not made until after defendants had filed their motion for summary judgment.

In fact, this dispute purportedly commenced in 2007 after the closing. The judge correctly stated, "[t]here is no reason why the claims could not have been brought in January 2012. There is no recently disclosed information to support this motion." We conclude the judge's decision was correct and the facts amply support an entry of summary judgment and denial of leave to file an amended complaint.

Affirmed.