NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2195-12T4

SHAUNAK P. TRIVEDI,

Plaintiff-Appellant,

v.

A.R. SYSTEMS INC., and
RANDHIR THAKUR,

Defendants-Respondents.

Submitted January 6, 2014 – Decided May 28, 2014

Before Judges St. John and Leone.

On appeal from the Superior Court of New Jersey, Middlesex County, Docket No. L-3088-11.

Susheela Verma, attorney for appellant (Ms. Verma and Christopher J. Portée, on the briefs).

Shailen K. Gupta, attorney for respondents.

PER CURIAM

Plaintiff Shaunak P. Trivedi appeals from the trial court's order granting in part his request for enforcement of the parties' settlement agreement. The court ordered defendant A.R. Systems, Inc. (A.R.) to pay promptly the current amount due under the agreement, but denied plaintiff's requests that the

entire amount be accelerated, that defendants pay counsel fees and costs, and that defendant Randhir Thakur be held personally liable for those amounts. We affirm.

I.

The record before us indicates the following. Plaintiff alleged that A.R., a New Jersey corporation, and Thakur, a shareholder and officer of A.R., convinced him to move from India to the United States to work for A.R. A.R. allegedly did not pay plaintiff the promised salary, which ultimately caused him to resign. Plaintiff filed a complaint alleging various causes of action. Defendants filed an answer and counterclaim.

Trial commenced on September 4, 2012. On September 13, in the midst of trial, the parties informed the trial judge that they had settled the matter. Counsel for plaintiff orally put on the record a settlement agreement in which both sides agreed to dismiss their claims and to not disparage each other. A.R. agreed to pay plaintiff a total of $105,000, including $60,000 for attorneys' fees. Specifically, A.R. agreed to pay $15,000 on October 1, 2012, $30,000 on November 1, and $7,500 each month thereafter until A.R. paid the total amount of $105,000.

As orally set forth on the record, the settlement agreement also provided that if plaintiff did not receive a payment within the first ten days of the month, plaintiff would give notice to

defense counsel, and A.R. would have five days to cure the non-payment. If A.R. failed to pay within the five-day grace period, the agreement provided that "there will be a default and plaintiff shall be entitled to accelerate the balance of the amount." Upon default, plaintiff could proceed to enforce the agreement in court, "and any attorneys' fees and costs incurred [and] caused [by] default shall be the responsibility of the defendants." Further, "[i]n case of default, the defendant, Mr. Thakur, shall be personally responsible for any of the amounts due and owed at that point in time, including the attorneys' fees and the costs that the plaintiff may incur."

Thakur, both personally and as an officer of A.R., and plaintiff testified that they were settling the case voluntarily and would be bound by the settlement agreement. Thakur testified that the terms of the agreement had been accurately described, and asked the court to approve the settlement as described on the record.

The trial judge then asked if someone was preparing an order. Defendant's counsel agreed to prepare a written settlement agreement memorializing the terms of the settlement. The court instructed that it be submitted under the "Five Day Rule". See R. 4:42-1(c).

This harmony soon dissolved into increasingly contentious exchanges between counsel. On September 17, defendant's counsel sent plaintiff's counsel a draft settlement agreement. On September 18, plaintiff's counsel said the draft contained redundant language and she would send her own draft. On October 1, plaintiff's counsel complained that A.R. had not sent the first payment of $15,000. On October 4, plaintiff's counsel sent defendant's counsel her draft, which he rejected as "unacceptable" on October 8. On October 10, defendant's counsel advised plaintiff's counsel that he had placed the first $15,000 payment in escrow, and would release it when he received a fully executed settlement agreement. On October 11, plaintiff's counsel replied that A.R. had defaulted, and that she had already prepared a motion to accelerate the balance and seek fees.

On October 19, plaintiff filed the motion to enforce the settlement, release the escrowed $15,000, accelerate the entire $105,000 amount, enter a judgment against defendants, hold Thakur personally liable, and obtain counsel fees and costs. Defendant filed a response and a cross-motion to compel plaintiff's signature of the agreement, and to impose counsel fees and sanctions.

The trial judge heard argument on the motions on December 7, 2012. The court ordered defendant to pay within ten days all the money presently due under the settlement agreement. The court further provided that, if defendant failed to do so, the court would reconsider and grant plaintiff's motion to enforce the settlement. The court denied all other forms of relief requested by the parties. Plaintiff appeals.

"Public policy favors the settlement of disputes. Settlement spares the parties the risk of an adverse outcome and the time and expense —— both monetary and emotional —— of protracted litigation. Settlement also preserves precious and overstretched judicial resources." Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 253-54 (2013). Because "'[t]he settlement of litigation ranks high in our public policy,'" we "'strain to give effect to the terms of a settlement wherever possible.'" Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008).

"'An agreement to settle a lawsuit is a contract, which like all contracts, may be freely entered into and which a court, absent a demonstration of "fraud or other compelling circumstances," should honor and enforce as it does other contracts.'" Ibid. (quoting Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div.), certif. denied, 94 N.J. 600

(1983)). Here, there is no question the parties freely entered into the settlement agreement, and no claim of fraud or similar circumstances was asserted by either party.

It is also undisputed that the parties intended to reduce the agreement to writing, as the trial court requested. That has not occurred. However, "[t]hat the agreement was to be memorialized in writing makes it no less a contract where, as here, the parties concluded an agreement by which they intended to be bound." Pascarella, supra, 190 N.J. Super. at 126. "Where the parties agree upon the essential terms of a settlement, so that the mechanics can be 'fleshed out' in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact the writing does not materialize because a party later reneges." Lahue v. Pio Costa, 263 N.J. Super. 575, 596 (App. Div.), certif. denied, 134 N.J. 477 (1993). Accordingly, the court properly held that the parties were bound by the oral agreement and that defendants must comply with its terms.

The dispute on appeal is whether the court properly ordered A.R. to comply with the agreement's normal payment schedule, rather than grant plaintiff's motion to impose the agreement's remedies for default, namely the accelerated balance, fees, and

personal liability for Thakur. On the particular facts of this case, we find no error.

At the motion hearing, the trial court asked both counsel why they had not lived up to the settlement. The court considered both plaintiff and defendant to be at fault for their inability to reduce the oral settlement agreement to writing. The court's view is supported by our review of each party's draft settlement agreement. Neither side accurately included all the terms of the agreement put on the record at the September 13 hearing.

The trial court acknowledged defendants' concern that the absence of a signed written settlement cast in doubt whether the parties had an agreement under which payments could be safely made. The court decisively dispelled that concern, instructing that payment could not be delayed "while you don't agree on a written agreement when it's already written" clearly in the September 13, 2012 transcript. The court added that a signed written agreement was unnecessary, and that defendant should make all future payments in a timely fashion.

The trial court also accepted defense counsel's representation that A.R. had paid the first $15,000 installment into its counsel's escrow account. The court made plain that A.R. had to pay that money to plaintiff within ten days.

Nonetheless, the timely payment into the escrow account was an indicium of good faith that the court could consider.

The trial court recognized the possibility that a party could utilize a disagreement over the written agreement as a convenient "way of putting off [its] obligations under the settlement agreement." The court warned defendants that if the amount currently due was not paid within ten days, defendants would face the full array of default penalties provided by the agreement. The court's warning apparently worked. Defendants represent without contradiction that, pursuant to the court's order, all payments have been made as they were due.

The judge had observed counsel and the parties, not only at the settlement but also through several days of trial. He thus acquired a "feel of the case." Jastram v. Kruse, 197 N.J. 216, 230 (2008).

> The "feel of the case" is not just an empty shibboleth——it is the trial judge who sees and hears the witnesses and the attorneys, and who has a first-hand opportunity to assess their believability . . . . Those personal observations of all of the players is "the feel of the case" to which an appellate court defers.
>
> [Ibid.]

Here, that feel of the case led the judge to conclude that the dispute between counsel did not rise to the level of a default

justifying the default penalties, and that those penalties were unnecessary to obtain compliance.

We hew to the principle that courts "'will not rewrite contracts in order to provide a better bargain than contained in'" the parties' agreement. Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 477 (App. Div. 2009). Nonetheless, courts are charged with the sometimes difficult task of determining whether a party has committed a breach triggering a contractual remedy. Here, both parties contributed to the failure to produce a written agreement, resulting in some uncertainty, and defendant A.R. timely made payment into escrow. Accordingly, we cannot say that the court erred in determining that defendant's conduct did not rise to the level of a default triggering the default penalties, and instead properly enforced the agreement's payment schedule.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION