Vieser v. Leventhal

2010 | Cited 0 times | New Jersey Superior Court | August 25, 2010

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Argued March 9, 2010

Dismissed June 9, 2010

Reinstated July 28, 2010

Before Judges Carchman and Ashrafi.

By opinion dated June 9, 2010, we dismissed the appeal in this matter without prejudice because it was not from a final judgment disposing of all claims against all parties. Vieser v. Leventhal, Docket No. A-4526-08T2 (App. Div. June 9, 2010). See R. 2:2-3(a); Vitanza v. James, 397 N.J. Super. 516, 518 (App. Div. 2008); Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 550 (App. Div. 2007). We incorporate the procedural history stated in our June 9, 2010 opinion for purposes of this decision.

By order dated July 28, 2010, we granted the motion of defendants Alan and Denise Leventhal, consented to by plaintiff Jaime Vieser, to reinstate the appeal because the parties have corrected the jurisdictional defect in accordance with direction we provided in our prior opinion. Plaintiff and defendants have now stipulated to dismissal of all remaining claims between themselves with prejudice, adding a proviso that plaintiff shall be permitted to reinstate all his claims for compensatory damages if we reverse the granting of partial summary judgment in his favor.

The dispute is about return of deposit money on a contract to sell a home. The Leventhals, as the sellers, appeal from partial summary judgment declaring that Vieser, who was the buyer, had a right to cancel their contract for the sale of the Leventhals' home because of radon testing results and that Vieser was entitled to refund of his deposit money. We now affirm that judgment.

I.

The summary judgment record reveals the following relevant facts.

In March 2005, Vieser signed an offer to purchase from the Leventhals a house in Mendham, New Jersey, for $4,475,000.[1]

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Vieser paid a deposit of $10,000 with his offer of purchase. After informal negotiations, the Leventhals signed a revised offer on May 6, 2005, subject to attorney review. In accordance with the agreement, Vieser deposited another $394,000 with his own attorney to be held in escrow pending closing on the sale.

On May 6, 2005, Vieser's attorney, Laura S. Munzer, wrote to the Leventhals' attorney, Andrew Mainardi, Jr., disapproving the contract and proposing modifications. Paragraphs three, four, and five of Munzer's modifications gave the buyer a right to cancel the contract based respectively on home, termite, and radon inspections. Paragraph five stated in relevant part:

5) . . . Radon Inspection: The Buyers shall have the right to inspect the premises within twenty (20) days of the Contract date for RADON GAS. . . . If such inspection reveals the presence of RADON GAS in excess of 4.0 pCi/L then the Buyers . . . shall notify the Seller of such, in writing, immediately upon receipt of the RADON GAS report, or within ten days following the conclusion of the test, whichever is shorter. The Seller will, at that time, notify the Buyers in writing whether the Seller will remediate such RADON GAS presence prior to closing and at the Seller's expense. If either the Seller determines not to make the specified remediation, or the Buyers do not agree to accept the corrections, prior to the making of any corrections, all deposit moneys paid, together with interest, if applicable, shall be returned to the Buyers and this Contract shall become null and void. [(Emphasis added).]

Mainardi replied to Munzer's proposal by letter dated May 9, 2005. Using the same paragraph designations, he proposed changes to Munzer's proposals for the home and termite inspections designated by paragraphs three and four, eliminating the buyer's right to cancel the contract if the sellers agreed to repair any problem revealed by those inspections. Next to the numeral five, however, designating the radon inspection proposal quoted above, Mainardi wrote "agreed."

In opposition to the later summary judgment motion, Mainardi's certification stated:

On May 9, I had a conversation with Ms. Munzer relating to the contents of her letter. I reviewed her letter with her and told her that my client was interested in purchasing another home and to do so, needed to know that this contract was going to proceed. For that reason, it was the sellers' position that there be no right to cancel based upon the results of home inspection report, termite provision, or radon so long as the sellers were prepared to remediate the conditions.

Mainardi asserted that the word "agreed" next to paragraph five in his May 9 letter was a "typographical error."

At the time of the transactions, however, Mainardi also wrote the following to Munzer on May 12, 2005:

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This represents the understanding we have reached during the attorney review period respecting amendment of the captioned contract. In essence, we agree to the terms of your letter of May 6, 2005 except Paragraphs 3, 4 and 7 as set forth in my letter of May 9th and Addendum.

Notably missing is any exception to paragraph five.

A few days after Mainardi's May 12 letter, the sellers orally advised the buyer of the presence of radon gas in four areas of the house. On May 17, Munzer notified Mainardi that her client had decided not to proceed with the transaction and requested return of the deposit money. According to Alan Leventhal, Vieser told him that the reason he cancelled the contract was that his wife wanted to move to Texas.

On May 18, sellers sent a letter and inspection report to the buyer confirming radon levels between 8.4 and 10.0 pCi/L. The letter also said that a new remediation system had been installed that day and predicted it would reduce levels to 4.0 pCi/L or less.

From May 18 to 23, the parties discussed reinstating the contract. On May 23, Munzer wrote to Mainardi that the parties had reached a new agreement with a reduced purchase price of $4.3 million. Mainardi stated in later correspondence that the reduction in price reflected $75,000 attributable to the radon readings. Munzer's May 23 letter also outlined a proposal for a separate agreement by which the sellers would have post-closing financial incentives if radon was reduced to certain levels.

On May 24, Munzer wrote to Mainardi stating that the agreement was reinstated and amended in accordance with the May 6, 9, and 12, 2005 letters between the attorneys. The May 24 letter referenced a purchase price of $4.3 million, a closing date of June 15, 2005, an agreement that the sellers could remain in occupancy until July 5, and the terms of the separate incentive agreement. Mainardi signed and returned the May 24, 2005 letter without further changes.

Thus, as the trial court found, the contract of the parties for purchase and sale of the property consisted of the initial real estate form contract signed by the parties in March and May 2005 and the letters of counsel dated May 6, 9, 12, and 24, 2005. Paragraph five pertaining to cancellation for radon results remained in the contract as previously quoted.

Between May 19 and 27, the sellers tested the house for radon, showing levels below 4.0 pCi/L. Between June 3 and 6, the buyer had his own radon tests conducted, showing levels below 4.0 pCi/L, except for 7.3 in the basement. The sellers claimed that the high reading in the basement was caused by someone inadvertently turning off the radon remediation system in that area.

On June 10, 2005, Munzer wrote to Mainardi listing items from the home inspection report that were not satisfactory to her client. She cancelled the contract on his behalf based on both the 7.3 radon

reading in the basement and defects noted in the home inspection report. Mainardi responded by a lengthy letter dated June 13, 2005, denying that the buyer had a right to cancel and stating that the sellers were prepared to remedy the high radon reading and the problems revealed by the home inspection.

Between June 10 and 13, the sellers tested for radon again and obtained two readings at 4.2 and 5.0 pCi/L. On June 17, 2005, Munzer wrote to Mainardi, repeating that the buyer was canceling the contract, this time specifically referencing paragraph five and radon readings obtained after June 10. On June 23, Mainardi wrote back stating that the buyer could not cancel the contract and that the response to paragraph five in his May 9 letter was a typographical error. The sellers conducted further radon testing between June 17 and 20, 2005, showing levels below 4.0 pCi/L. The buyer declined to reinstate the contract or close on the sale.

After the sellers refused to release the deposit money, the buyer filed suit in September 2006, seeking a declaratory judgment that he validly cancelled the contract and was entitled to a refund of his deposit money. The complaint also sought additional money damages and attorney's fees in separate counts alleging the sellers' breach of contract and breach of the implied covenant of good faith and fair dealing.

The sellers filed an answer and counterclaim seeking reformation of the contract, a declaratory judgment that the buyer breached the contract, and money damages and attorney's fees for that breach and the buyer's alleged breach of the implied covenant of good faith and fair dealing.

In December 2007, the buyer moved for summary judgment on his declaratory judgment count. After hearing argument, the trial court granted the motion by order and written opinion filed on March 17, 2008. The court subsequently denied the sellers' motion for reconsideration by order dated April 28, 2008. The sellers now appeal from those two orders.

II.

The sellers argue that the buyer did not have a right to cancel the contract based on the specific terms of the radon contingency provision stated in paragraph five, that any right to cancel that paragraph five granted was untimely exercised because the sellers had already made corrections for the radon condition, that a right to cancel as the buyer asserts rendered the contract illusory, that the contract should be reformed because of the typographical error in Mainardi's May 9, 2005 letter, and that the buyer cancelled the contract in bad faith because his wife wanted to move to Texas. We reject all these arguments.

"The interpretation of a contract is ordinarily a legal question for the court and may be decided on summary judgment unless 'there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation . . . .'" Celanese Ltd. v. Essex Cty. Imp. Auth., 404 N.J. Super. 514, 528 (App. Div. 2009)

(quoting Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000)); see also Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001) ("The interpretation of the terms of a contract are decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony.").

"In interpreting a contract, a court must try to ascertain the intention of the parties as revealed by the language used, the situation of the parties, the attendant circumstances, and the objects the parties were striving to attain." Celanese, supra, 404 N.J. Super. at 528 (citing Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 183-84 (1981); Atl. N. Airlines v. Schwimmer, 12 N.J. 293, 301 (1953); Driscoll Constr. Co. v. State of N.J., 371 N.J. Super. 304, 313 (App. Div. 2004)). If "the terms . . . are clear and unambiguous, there is no room for construction and the court must enforce those terms as written." Watson v. City of E. Orange, 175 N.J. 442, 447 (2003); accord Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 560 (App. Div. 2007). Summary judgment is generally an appropriate means of disposing of the litigation in such circumstances. See Celanese, supra, 404 N.J. Super. at 528.

The sellers argue that the buyer could not cancel the contract because they had already commenced radon remediation, and paragraph five provided that the buyer had a right to cancel only "prior to the making of any corrections." They emphasize the word "any" and interpret that word to include remediation begun on May 18, even before the contract was reinstated by the attorneys' correspondence of May 24, 2005.

We agree with the trial court's contrary interpretation of the radon contingency paragraph. Upon receipt of radon readings above 4.0 pCi/l, the buyer had the right to cancel the contract. The phrase "prior to the making of any corrections" clearly refers to the previous clause in paragraph five giving the buyer the right not to accept radon corrections proposed by the sellers. Read together, those provisions protect the sellers from paying for corrections that have been accepted only to have the buyer subsequently cancel the contract. The word "any" in that clause, however, does not allow the sellers to nullify the buyer's right to cancel by commencing remediation unilaterally and without regard to the results of subsequent radon testing. The disputed provisions of paragraph five do not mean that once the buyer accepts some corrections, he is permanently bound to the contract even if the corrections are unsuccessful in reducing radon to the threshold level.

We also disagree with the sellers' argument that the radon contingency provisions rendered the contract illusory. "An illusory promise has been defined as, a 'promise which by [its] terms make[s] performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue[.]'" Bryant v. City of Atlantic City, 309 N.J. Super. 596, 620 (App. Div. 1998) (quoting Restatement (Second) of Contracts, § 2, comment e (1979)). "Thus, if performance of an apparent promise is entirely optional with a promisor, the promise is deemed illusory." Ibid.

The buyer was aware that radon was present on the property before he agreed to reinstate the

contract on May 24, 2005, but he would not have been able to cancel if the sellers' remediation efforts prior to his June cancellations had brought the radon levels below 4.0 pCi/L. The June testing disclosed radon levels above 4.0, and the buyer did not, and was not required to, accept further remediation efforts.

We also find no merit in the sellers' argument regarding typographical error in agreeing to the terms of paragraph five. "The traditional grounds justifying reformation of an instrument are either mutual mistake or unilateral mistake by one party and fraud or unconscionable conduct by the other." St. Pius X House of Retreats v. Diocese Of Camden, 88 N.J. 571, 577 (1982). A claim for reformation must be supported by clear and convincing evidence. Id. at 580-81; Millhurst Milling & Drying Co. v. Auto. Ins. Co., 31 N.J. Super. 424, 433 (App. Div. 1954).

Despite their attorney's "typographical error" as a unilateral mistake, the sellers have not presented any evidence that the buyer ever agreed to modify his right to cancel based on radon levels exceeding 4.0 pCi/L. Furthermore, they have not presented evidence of fraud or unconscionable conduct by the buyer. There is no evidence on the summary judgment record that either Vieser or Munzer were aware of the sellers' unilateral mistake and took advantage of it, or that they otherwise engaged in fraudulent or unconscionable conduct.

Likewise, we find no merit in the sellers' argument that the buyer breached the covenant of good faith and fair dealing. That covenant "calls for parties to a contract to refrain from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive' the benefits of the contract." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224-25 (2005) (quoting Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965)).

In their claims of breach of the implied covenant, the sellers argue that the buyer's true motive in canceling the contract was not radon but his wife's desire to move to Texas. However, "where the right to terminate a contract is absolute under the wording in an agreement, the motive of a party in terminating such an agreement is irrelevant to the question of whether the termination is effective." Karl's Sales & Serv. v. Gimbel Bros., 249 N.J. Super. 487, 495 (App. Div.), certif. denied, 127 N.J. 548 (1991). Even if the sellers could prove that the buyer had second thoughts about purchasing the house for reasons other than the radon results, the contract gave him the right to cancel because radon levels were too high.

The facts not being in dispute that radon levels were above 4.0 pCi/L during testing in June 2005, and the radon contingency provisions being clear and unambiguous that the buyer had a right to cancel the contract for that reason, the trial court correctly granted partial summary judgment on count one of the buyer's complaint declaring that he was entitled to return of the deposit money.

Affirmed.

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1. Vieser's signature on the offer is dated March 29, 2004, but it appears from the record that the year was actually 2005.