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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-2841-02T5 &
A-3051-02T5

ITT COMMERCIAL FINANCE
CORPORATION, f/k/a ITT
INDUSTRIAL CREDIT COMPANY,
a New Jersey Corporation,

Plaintiff-Respondent,

v.

PIERRE DEVELOPMENT, L.L.C.,
a limited liability company
organized and existing under
the laws of the State of New
Jersey, PIERRE DEVELOPMENT
CORPORATION, a dissolved
corporation of the State of
New Jersey, THE GREAT ATLANTIC
& PACIFIC TEA COMPANY, a Maryland
Corporation, and AMBOY NATIONAL
BANK, a banking association
organized and existing under the
laws of the United States of
America,

Defendants-Appellants,

and

PNC BANK, N.A., a banking associa-
tion organized and existing under
the laws of the United States of
America and the successor in
interest to MIDLANTIC NATIONAL
BANK, and MYRON S. LEHMAN, in his
capacity as Trustee for Class "C"
creditors under a Chapter X Plan
of Arrangment of Volco Brass &
Copper Company,

Defendants.

Argued November 3, 2004 - Decided DEC 0 3 2004

Before Judges Lefelt, Alley and Falcone.

On appeal from the Superior Court of New Jersey, Chancery Division, Union County, Docket No. F-10777-00.

Alan J. Brody argued the cause for Appellants Pierre Development, L.L.C. and Pierre Development Corporation (Mr. Brody and Tod S. Chasin, of counsel; Messrs. Brody and Chasin, and Flavio L. Komuves, on the brief).

Scott T. Tross argued the cause for appellants The Great Atlantic & Pacific Tea Company and Amboy National Bank (Herrick Feinstein and Wolf & Samson, attorneys; Pashman Stein, of counsel; Mr. Tross, Jamiee Katz Sussner and Adam K. Derman, on the brief).

Frank Vecchione and Kevin McNulty argued the cause for respondent (Gibbons, Del Deo, Dolan, Griffinger & Vecchione, attorneys; Mr. Vecchione, Mr. McNulty, Frederick W. Alworth and Joseph A. Deer, on the brief).

Edward C. Eastman argued the cause for amicus curiae New Jersey Land Title Association (Lomurro, Davison, Eastman & Munoz, attorneys; Michael J. Fasano, on the brief).

PER CURIAM

Plaintiff ITT Commercial Finance Corporation held a first mortgage on about eleven acres of land in Kenilworth. Defendant Great Atlantic and Pacific Tea Company and defendant Pierre

Development, L.L.C., each own approximately one-half of the property, with Amboy National Bank having a mortgage upon Pierre's half and A&P having built a supermarket on its half. Judge Miriam Span granted summary judgment and permitted ITT to foreclose its mortgage despite defendants' argument that ITT had previously agreed to relinquish its total mortgage lien for $180,000. After granting ITT summary judgment, Judge Span conducted a plenary hearing and entered a final judgment of foreclosure, as of January 22, 2003, finding that ITT was owed over $14 million dollars. Pierre, A&P, and Amboy Bank all appeal.

I.

The facts are somewhat complex and span several years, beginning in May 1985 when ITT began loaning money, secured by a first mortgage, to an entity named Volco Brass and Copper Co., which was engaged in the manufacture, sale and distribution of brass and copper products from its Kenilworth property. By August 1985, when Volco filed a voluntary petition in bankruptcy for reorganization, ITT's loans to Volco were in default and in excess of $4 million dollars. Although the bankruptcy court granted ITT permission to foreclose its mortgage, it chose not to do so because the property was environmentally contaminated and ITT was quite concerned about being saddled with the remediation costs.

In February 1986, ITT and Volco executed a debtor-in-possession credit agreement, assignment and security agreement and a promissory note, by which ITT agreed to loan Volco additional sums to clean up the property for eventual sale. Any additional loans or advances by ITT were to "be secured by all of the assets of [Volco] including, but not limited to all real and personal property of the Debtor, together with all proceeds and products thereof, whether now existing or hereafter acquired or created." Throughout 1987 and indeed, through the immediate following years, ITT was monitoring the contamination situation.

By February 1988, the bankruptcy court had authorized Volco to sell the property without further court approval. By July 1990, ITT had discovered that the Department of Environmental Protection was not likely to approve the cleanup plan, without which approval the property could not be sold free from environmental cleanup responsibility. Consequently, ITT stopped loaning Volco money and essentially gave up any hope of collecting the loan. By that time, ITT had extended over $3 million dollars in additional loans. ITT wrote off its books the entire Volco loan balance.

About two years later, in June 1992, Volco and an entity named Plaza Properties, Inc. signed a contract for the sale of the property, which contemplated a closing by the end of December, with a possible ninety-day extension. The extension

also provided that if the buyer was unable to close by that time, the contract "will become null and void and have no use or effect."

A lawyer named David Biunno, who would later cheat ITT out of any compensation from the Volco sale, was Plaza's counsel. During negotiations between Plaza and Volco, Biunno convinced ITT to compromise its existing mortgage and outstanding debt of over $7 million dollars in return for a payment of $180,000 at the closing of the property sale. Considering the environmental contamination on the property, ITT was willing to compromise its lien for the relatively minor payment, provided the property closed when promised. If the closing was extended, ITT explained, in writing, to Biunno that "some additional consideration may be required." Nevertheless, paragraph 7(i), added to the contract between Volco and Plaza, provided without any dates specified, that ITT would "accept the [$180,000] . . . in full and final satisfaction of its mortgage lien at closing of title and release its mortgage lien upon the Property and shall execute a general release. . . ." ITT also separately consented in writing to paragraph 7(i), but did not execute the Volco-Plaza contract as a principal. At some point, Plaza assigned its interests in this contract to defendant Pierre.

Several months before the expected December 31, 1992 closing of the Volco-Pierre/Plaza sale, Pierre began negotiating

with A&P to purchase approximately half the property for about $6 million dollars. A&P wanted its purchase to be "free and clear of all encumbrances" and for the property to have received all governmental approvals, especially from the Department of Environmental Protection.

Evidently because of A&P's counsel's concerns about the immediacy of the closing and the extensive environmental remediation that was required, Volco and Pierre amended the 1992 contract to extend the closing until November 4, 1994, provided all conditions could be accomplished by that date. ITT never signed this amendment, although A&P's counsel recorded the Volco contract with the amendment in December 1992. Biunno admitted not disclosing the details of Pierre's negotiations with A&P because ITT was "not a party to the contract. They were only a contingency to the contract to be satisfied." A&P also had no contact with ITT, and was not concerned that ITT did not sign the amendment because Pierre "had to take care of the ITT mortgage" for the deal with A&P to close.

Meanwhile, A&P and Pierre signed an actual agreement for A&P's purchase of about half the property, with easements. Under the agreement, Pierre was obligated to convey marketable title free from all encumbrances. On earlier title insurance commitments to both Pierre and A&P, ITT's mortgage was written as an exception that would have to be satisfied before closing.

The title companies for A&P and Pierre, however, presumably after reviewing several bankruptcy documents including the bankruptcy court order authorizing Volco to sell the property without further permission from the court, amended its title commitments. The companies removed the exceptions for ITT's $4.343 million dollar mortgage from the commitment. The exceptions were deleted, according to Pierre's title company, "because of the bankruptcy proceedings."

During the extended period preceding the amended closing date, and with the assistance of A&P's sale deposit of over $2 million dollars, Pierre successfully remediated the environmental contamination present on the property. The Department of Environmental Protection cleared the property for sale.

On March 28, 1995, the two closings occurred back-to-back. No one from Volco or ITT appeared at the closing where Volco transferred the entire property to Pierre for $180,001, and Pierre then transferred approximately half the property plus easements to A&P. A typical closing statement was prepared for the Pierre-A&P closing, but it is not clear whether there was a closing statement prepared for the earlier Volco-Pierre closing. Biunno said there was a "typed title closing statement for the first transaction" reflecting a $180,000 payment to ITT. The record contains only a hand-written copy that Biunno said he

prepared as a "draft," showing a $180,001 line-item deduction from the closing proceeds denominated "ITT Commercial Credit."

Presumably, one dollar from the line-item was to go to Volco and $180,000 to ITT. However, Biunno stole the $180,000 and never remitted the funds to ITT.[1] Also, at the closing, title insurance commitments, to be followed by policies, were issued to both A&P and Pierre, with the ITT mortgage removed as an exception.

In late 1995 or early 1996, ITT learned of construction activity by A&P on the property. ITT ordered a title report, which still reflected its mortgage of record. ITT then checked with Biunno, who "stalled" and "lied," at one point claiming that ITT had been paid and that he would try and find the cancelled check. In any event, by February 1996, A&P had completed construction of its supermarket and the store opened for business.

In January 1998, Pierre applied to Amboy National Bank for a $3 million dollar loan. In July of that year, a title company issued a commitment for a mortgage policy regarding this loan. The report showed that the earlier bankruptcy order, which allowed sale without court approval, "does not state the sale is free and clear of liens. Proof required that no prior liens

[1] Biunno was later disbarred and convicted of this and other similar crimes committed against his clients.

remain attached to the subject premises." Nevertheless, in the report, presumably marked-up at closing, that reference was omitted, and the only mortgage lien showing as cancelled was a prior Amboy mortgage.

About two years after learning that the property had not only been remediated but also had an almost-completed supermarket on the premises, ITT in November 1998 sought to reopen the Volco bankruptcy to void Volco's transfer of the property to Pierre. Because ITT had also filed a complaint in the Law Division in February 1999, to void the transfer as fraudulent, Pierre convinced the bankruptcy court to abstain and on November 4, 1999, the federal court signed an order re-closing the bankruptcy action. The parties litigated their dispute in State court, eventually obtaining the decisions from Judge Span that form the basis for this appeal.

By the first half of 2002, when the parties were arguing ITT's summary judgment motion before Judge Span, A&P had spent more than $20,200,000 in connection with its purchase, remediation, and development of the portion of the property it had purchased. Pierre had spent more than $4 million to remediate and rezone the property, and to pay back taxes.

II.

Defendants Pierre, A&P, and Amboy Bank argue on appeal that Judge Span erred in the following ways: (1) the judge should

have limited ITT's damages to $180,000 plus interest; (2) the court should have found that ITT's agreement to accept $180,000 from Plaza/Pierre constituted a novation of the original loan documents; (3) the trial court should have ruled that ITT's loans to Volco after the bankruptcy petition was filed were not properly secured; (4) the court improperly rejected defendants' laches, estoppel, and waiver defenses; and (5) the trial court improperly refused (a) to reduce the principal amounts due ITT by the value added from improvements and the payment of taxes, and (b) to cut off the interest due ITT as of December 1992, when ITT presumably knew that defendants were about to spend millions of dollars remediating and rezoning the property, or, at the latest, as of December 1995, when ITT knew that defendants had cleaned up the property and were constructing a supermarket on the site.

After considering each of these arguments in light of the record and pertinent law, we affirm substantially for the reasons explained by Judge Span in her carefully researched, clear, and well-written decisions of June 28, 2002 and January 8, 2003. In our opinion, the judge correctly awarded summary judgment to ITT, permitting foreclosure, and correctly entered judgment in favor of ITT in the amount of $14,052,234.71. We add only the following to clarify our views on some of the issues presented.

III.

We see the pre-petition loan issue in this case quite simply. As Judge Span found, ITT's agreement to compromise its loan for $180,000 terminated by its own language read in conjunction with the contract between Volco and Plaza. The amendment of the contract to extend the closing date could not bind ITT without its consent.

Biunno's letter described the terms under which ITT had agreed to accept the $180,000 payment in exchange for releasing its mortgage. The letter was not parole evidence because it did not alter or vary the consent or contract. Filmlife, Inc. v. Mal "Z" Ena, Inc., 251 N.J. Super. 570, 573 (App. Div. 1991). Instead, the letter simply uncovered "an interpretation which the written words will bear." Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 149 (App. Div. 1960), certif. denied, 34 N.J. 66 (1961). ITT was relying upon the original contract's closing provisions.

Even if ITT chose to purposely avoid being considered a party to the Volco/Plaza contract, the contracting parties had an interest in ensuring that ITT's compromise was implemented. Therefore, they should have kept ITT informed of future developments, especially because they must have known of ITT's interests in a reasonably rapid closing, and ostensibly required ITT's release to complete the deal.

The contract should not be read to accord Volco and Plaza/Pierre the right to extend ITT's lien compromise into perpetuity without any further notice, written consent, or consideration. Nothing suggests that ITT knew of the closing extension or, in fact, the subsequent closing, until long after both occurred, so in fact ITT could not have intentionally relinquished a known right. W. Jersey Title and Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958).

In addition, a novation did not occur because by signing the consent, ITT was not making any deal with Plaza/Pierre. All it was agreeing to do was release its mortgage and Volco's repayment obligations if it were paid $180,000 at closing. Plaza's obligation was not to ITT, but was to provide the purchase price, and it was Volco's obligation to provide clear title, which it planned to do at closing by paying ITT $180,000 from Volco's share of the purchase monies. ITT did not intend a novation, but was merely consenting to release its mortgage lien. See In re Bankers Trust Co., 752 F.2d 874, 883 (3d Cir. 1984).

In our opinion, it is also not necessary to attribute fault or evil motive to any of the parties in this appeal. The only significant fact is that through a combination of occurrences detailed above, ITT's valid mortgage was not cancelled of record when it should have been and ITT's claims were not released.

ITT's lien remained on the property and it does not really matter in this case that the property was significantly enhanced in value through extensive environmental remediation and improvements. ITT, the lien holder, had twenty-years to foreclose and attempt to recover its loaned monies plus interest. See Nat. Partners Ltd. P'ship v. Mahler, 336 N.J. Super. 101, 108 (App. Div. 2000), certif. denied, 169 N.J. 607 (2001). That is what Judge Span correctly permitted.

Regarding the post-petition loans, the bankruptcy Financing Order provided that the ITT advances "shall be secured by all of the assets of the Debtor including, but not limited to all real and personal property of the Debtor." The order authorizing borrowing, expressly included "extensions of credit and other indebtedness which may now, or from time to time hereafter, be owing" by Volco to ITT. Moreover, the actual credit and security agreement between ITT and Volco was attached to the bankruptcy borrowing order.

In October 1992, Plaza and Pierre's title company reviewed the bankruptcy proceedings and found them to be satisfactory. A&P received copies of the bankruptcy papers and earlier title commitments to both Pierre and A&P, which listed ITT's mortgage as an exception. Pierre and A&P understood that ITT's mortgage was being deleted as an exception "because of the bankruptcy proceedings."

The record indicates that under these circumstances, defendants had actual notice that ITT had made additional post-petition loans to Volco and that such loans were secured by the property. Defendants do not contest the authority of the bankruptcy court to grant ITT a continuing security interest in the property.

Defendants claim, however, that no mortgage was ever recorded and they did not have actual notice of the particular documents that indicate ITT's security for post-petition loans. They assert Judge Span erred when she said they had actual notice of "all" the bankruptcy documents, because according to defendants they only had the following four documents: (1) confirmation order, (2) reorganization plan, (3) modification of the reorganization plan, and (4) order approving sale of real estate.

Assuming the accuracy of defendants' claim, the modification plan specified that "ITT would become a Member of the Class 1 Creditor Classification," and ITT's claims "shall include any and all claims . . . ITT may have by virtue of the contemplated Financing Order." The modification plan also indicated that ITT's loans would be "secured by a security interest in all assets of [Volco] . . . as authorized by the provisions of a proposed Amended Financing Order of this Court."

In our view, the documents defendants admit possessing provided sufficient notice to require further inquiry and examination. See Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 107 (App. Div. 1990), certif. denied, 126 N.J. 321 (1991). Considering the fact that it would be quite unusual for any business creditor to advance monies to debtors in bankruptcy without some type of security, the documents defendants possessed provided constructive notice of a probable secured interest sufficient to require further inquiry. See Garden of Memories v. Forrest Lawn Mem. Park Assoc., 109 N.J. Super. 523, 534-35 (App. Div.)(constructive notice of instrument referred to in a deed), certif. denied, 56 N.J. 476 (1970).

These were sophisticated business people dealing with a multi-million dollar property. To the extent that Pierre and A&P chose to rely on title insurance rather than to satisfy other inquiries they should have made about the status of ITT's security interest, they did so at their own peril.

We do not intend to change normal title searching practices by this decision. All that is required is that searchers not turn a "blind eye" to circumstances that fairly apprise it of some existing interest which affects title. Schwoebel v. Storrie, 76 N.J. Eq. 466, 469 (Ch. 1909).

Only when the searcher acquires information sufficient to impel further inquiry would it be necessary to seek answers that

may possibly be contained in closed bankruptcy records. A party which has actual notice of circumstances that indicate there may be additional outstanding claims against the property but does not pursue the issue to learn that in fact such claims actually exist may nonetheless be constructively charged with knowledge of the claims themselves. Friendship Manor, Inc., supra, 244 N.J. Super. at 108.

We also fully agree with Judge Span's rejection of defendants' laches, waiver, and estoppel defenses. It is true that usually equitable defenses require a trial. See Dorchester Manor v. Borough of New Milford, 287 N.J. Super. 163, 173 (Law Div. 1994), aff'd, 287 N.J. Super. 114 (App. Div. 1996). But, in this case, all the reasons asserted for application of laches, waiver, and estoppel center upon or involve defendants' failure to inform ITT of events within defendants' control, the illegal acts of Pierre's attorney, and the failure of defendants or their title companies to pursue information made known to them about ITT's security interest in the property. Given these circumstances, we agree with Judge Span that it would be inequitable, as a matter of law, for defendants to prevail. See Linek v. Korbeil, 333 N.J. Super. 464, 475 (App. Div.)(equitable defenses should not be used "to sponsor an inequitable result"), certif. denied, 165 N.J. 676 (2000).

Defendants also argue that Judge Span should not have ruled on their equitable defenses until the conclusion of discovery. Defendants fail to explain what it was they hoped to discover. Although they do list several ITT employees and others they hoped to depose, some depositions were in fact taken before summary judgment; and, of the other individuals defendants listed, all were deposed after summary judgment and before trial on the remaining issues. Had defendants learned something from those post-summary judgment depositions that significantly affected their position, there was no reason why they could not have brought such matter to the trial court's attention. Or, at the very least, they could in this appeal explain to us precisely how the timing of Judge Span's ruling prejudiced their position. Not only do defendants not satisfactorily explain their prejudice, they also did not indicate to the trial court before the summary judgment ruling what discovery they needed, who they were trying to depose, exactly what they hoped to learn and why such information was so critical.

Finally, we agree fully with Judge Span's interest decisions. ITT is not receiving any "windfall" or "ill-gotten gain." ITT is solely seeking repayment for sums actually loaned, whereas defendants, who have expressed the intent to retain the property rather than have it foreclosed, presumably stand to receive the real gain in value when the remediated and

improved property is someday sold. Pierre has already presumably profited from its sale to A&P.

We also cannot fault Judge Span's determination declining to cut-off ITT's interest for its delay in pursuing foreclosure. Only in hindsight can anyone conclude that ITT should have acted sooner after discovering the construction on the property. Nevertheless, the combination of internal changes within ITT, and Biunno's ongoing obfuscation, including his initial contention that ITT had been paid, were acceptable excuses for the delay. Additionally, the proofs demonstrate no bad faith on ITT's part. Its delay in pursuing foreclosure was primarily the result of defendants' failure to keep it informed and of Biunno's concealment.

Affirmed.