NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0091-10T2

IN THE MATTER OF THE ESTATE OF
LILLIAN L. FISCHER, DECEASED.

Submitted June 2, 2011 – Decided June 14, 2011

Before Judges Axelrad and J. N. Harris.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Atlantic County, Docket No. 107359.

Farley, Fredericks & Ferry, attorneys for appellant Catherine S. Richards (Frank J. Ferry, on the brief).

William R. Salmon, Jr., P.C., attorneys for respondent Emma Hinman (William R. Salmon, Jr., on the brief).

PER CURIAM

Appellant, Catherine S. Richards, appeals from a July 20, 2010 Chancery Division order requiring the transfer of certain securities to respondent, Emma Hinman. This matter has its genesis in a probate dispute between Richards, the domestic partner of the decedent, Lillian Fischer, and Hinman, the decedent's sister. The parties entered into a settlement of that probate matter in May 2009, after which a disagreement arose concerning the disposition of certain assets that had not been disclosed during the court-sponsored mediation, and

accordingly not expressly identified in the parties' written settlement agreement. The Chancery Division held an evidentiary hearing, and awarded Hinman the undisclosed assets. We affirm.

I.

Richards is ninety-one years old and the alleged sixty-year domestic partner of Fischer.[1] Hinman, the decedent's sister, is ninety years old. Fischer died intestate on December 31, 2008, at the age of eighty-six.

Richards and Fischer jointly owned two parcels of real estate, one located in Somers Point and the other in Croydon, Pennsylvania. The New Jersey real property was purchased in 1957 and titled in both names. The Pennsylvania property was acquired in 1967 and owned as joint tenants with right of survivorship.

Following Fischer's death, Richards was appointed administratrix of her estate on February 6, 2009. Approximately one month later, Hinman filed a complaint and order to show cause seeking to remove Richards as administratrix. On April 20, 2009, the matter was referred to mediation pursuant to Rule 1:40-6. The parties reached a settlement on or about May 27,

[1] A Certificate of Domestic Partnership was issued to Richards and Fischer by the local registrar of the City of Somers Point on August 19, 2004, more than four years before Fischer died. N.J.S.A. 26:8A-8.

2009, which was subsequently incorporated into an order dismissing the complaint with prejudice.

The handwritten settlement agreement provided, in relevant part:

> In consideration of the Plaintiff receiving title to the real property situate [in] . . . Croydon, Bucks County, Pennsylvania, Catherine Richards shall, as party Defendant, receive title to the securities listed on Schedule "A" attached hereto; and further,
>
> In consideration of any additional assets of the above-captioned estate, in addition to the foregoing real property and securities being located by Plaintiff, Plaintiff shall be entitled to 100% of the value of said additional assets[.]

Pursuant to the agreement, Richards would receive title to the listed securities referenced in a Schedule A and Hinman would receive title to the Pennsylvania property and "100% of . . . [unidentified] additional assets."

On June 23, 2009, in furtherance of the settlement agreement, a deed was prepared and executed by Richards and her sister, Dorothy R. Kelly, conveying the Pennsylvania property to Hinman.[2] The instrument was recorded on December 16, 2009. Sometime thereafter, Hinman claimed that she was entitled to

[2] Richards had placed joint title to the Pennsylvania real estate in her sister's name following Fischer's death.

certain "additional assets" —— stock certificates of publicly-traded companies —— not identified in Schedule A.

Following discovery, on July 19, 2010, a one-day evidentiary hearing was conducted to resolve the distribution of securities not listed in Schedule A of the settlement agreement. Hinman and a representative from ComputerShare, the company with electronic possession of the stock certificates, testified telephonically. The depositions of Richards and her sister were also considered by the court without objection.

At the hearing, Hinman testified that a few years before Fischer's death, she created a list of her sister's stock investments from paperwork Fischer had lying around her home. Therefore, when she saw the Schedule A list of securities at the mediation she "knew that there were other stocks so [she] contacted ComputerShare about it and [it] gave me the list." Hinman testified that she declined to alert the mediator to the other securities she knew existed because "[n]obody asked me anything about it." However, she also admitted that at that time, she believed she would be entitled to those securities under the settlement agreement and further that it was her sister's intention that she receive them, notwithstanding the existence of the domestic partnership. It is undisputed that none of the additional securities were described in Schedule A.

Richards opposed Hinman's interpretation of the settlement agreement on the basis that Hinman was only to receive additional assets discovered after the date of settlement. Because Hinman admitted that she was aware of the additional securities prior to settlement, Richards urged that she, and not Hinman, was rightfully entitled to the additional assets because if they had been disclosed at mediation, they would have been included in Schedule A. She further alleged that Hinman acted in bad faith by failing to disclose the existence of additional assets to either the mediator or to her as administrator of the estate.

The Chancery Division held that as a matter of fact, Hinman was aware of all of the disputed "stock interests" on the day of the mediation. It further found that Hinman's understanding that she would receive any assets of the estate additional to the stock shares listed in Schedule A was a more logical interpretation than that advanced by Richards and constituted a reasonable reading of the settlement agreement.

Specifically, the court construed the language, "[i]n consideration of any additional assets of the above-captioned estate, in addition to the foregoing real property and securities being located by Plaintiff, Plaintiff shall be entitled to 100% of the value of said additional assets," to entitle Hinman to any "additional assets" she discovered either

prior to or after the settlement. With respect to Hinman's duty to disclose the additional securities before the settlement agreement was entered into, the court concluded that Hinman had no such duty, noting that there was no "exchange of discovery" or "clear identification of each party's positions about these issues." Accordingly, it found no basis for concluding that Hinman acted in bad faith, and explicitly rejected the suggestion that she "was acting out of some bad motive" when she engaged in the mediation process.

On July 20, 2010, the court entered a judgment directing that the securities be transferred to Hinman forthwith. This appeal followed.[3]

II.

On appeal, Richards presents the following points for our consideration:

> POINT I: DID THE RESPONDENT BREACH THE COVENANT OF IMPLIED GOOD FAITH AND FAIR DEALING THAT IS IMPLIED IN EVERY CONTRACT UNDER NEW JERSEY LAW?
>
> POINT II: DID THE RESPONDENT INTENTIONALLY FAIL TO DISCLOSE SECURITIES THAT SHE WAS AWARE OF PRIOR TO THE AGREEMENT OF MAY 27, 2009 TO THE DETRIMENT OF THE APPELLANT?

[3] A later order, entered after the notice of appeal was filed, confirmed that the "stock interests" be transferred into Hinman's name, but the "certificates themselves are then to be delivered to [Hinman's attorney] who is to hold those certificates pending the resolution of the appeal."

We do not find either of Richards's arguments persuasive, and we affirm the Chancery Division's final judgment.

Several fundamental principles guide our review. First, "a settlement agreement between litigating parties is a contract[.]" Grow Co. v. Chokshi, 403 N.J. Super. 443, 464 (App. Div. 2008) (citing Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div.), certif. denied, 94 N.J. 600 (1983)). "[C]ourts do not rewrite contracts in order to provide a better bargain than contained in their writing[.]" Ibid. (citing Christafano v. N.J. Mfrs. Ins. Co., 361 N.J. Super. 228, 237 (App. Div. 2003)).

Second, our Supreme Court has long encouraged the settlement of litigation. See Puder v. Buechel, 183 N.J. 428, 437-38 (2005); Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). "Settlements permit parties to resolve disputes on mutually acceptable terms rather than exposing themselves to the adverse judgment of a court." Morris Cnty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 366 (Law Div. 1984), aff'd o.b., 209 N.J. Super. 108 (App. Div. 1986). "Settlements also save parties litigation expenses and facilitate the administration of the courts by conserving judicial resources." Ibid. However, it does not mean that courts will rewrite or unduly expand settlement agreements in order to deem settled or waived things not legitimately encompassed. The settlement of

lawsuits is favored not only because of the helpful consequence of relieving saturated judicial and administrative calendars, but because of the idea that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way that is least disadvantageous to everyone.

The settlement agreement at the center of this appeal is a species of contract. Interpretation and construction of a contract are subject to de novo review. Kieffer v. Best Buy, 205 N.J. 213, 222 (2011); Cent. Paper Distrib. Servs. v. Int'l Records Storage & Retrieval Serv., Inc., 325 N.J. Super. 225, 231 (App. Div. 1999), certif. denied, 163 N.J. 74 (2000). Although the Chancery Division's factual findings will be upheld when supported by "sufficient credible evidence" in the record, Real v. Radir Wheels, Inc., 198 N.J. 511, 527 n.11 (2009), we owe no deference to the legal conclusions drawn from established facts and review a contract "with fresh eyes[,]" Kieffer, supra, 205 N.J. at 223; see also Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009).

Richards's first point argues that Hinman breached the implied covenant of good faith and fair dealing by failing to divulge the existence of additional securities at the mediation. Every contract entered into under the laws of this state contains an implied covenant of good faith and fair dealing. Kalogeras v. 239 Broad Ave., L.L.C., 202 N.J. 349, 366 (2010).

The implied covenant of good faith and fair dealing "applies to settlements as it does to any other contract." Brundage v. Estate of Carambio, 195 N.J. 575, 608 (2008); see also Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 475 (2009). "'Good faith'" imports "'standards of decency, fairness or reasonableness'" and "requires a party to refrain from 'destroying or injuring the right of the other party to receive' its contractual benefits." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 109-10 (2007) (internal citations omitted). "The party claiming a breach of the covenant of good faith and fair dealing 'must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.'" Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 225 (2005) (quoting 23 Williston on Contracts § 63:22, at 513-14 (Lord ed. 2002)).

The covenant of good faith and fair dealing focuses on the performance and enforcement of a valid agreement more than it regulates contract formation. See id. at 224; Restatement (Second) of Contracts § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (emphasis added)). Therefore, the implied covenant of good faith and fair dealing

does not require "either side in negotiations to reveal any and all information that might help the adversary and hurt his or her own client," Brundage, supra, 195 N.J. at 609, but directs that "'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract[,]'" once it is entered into. Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997) (quoting Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965)).

In this case there is no evidence that Hinman was suddenly attempting to frustrate Richards's right to the securities in Schedule A or "destroy[ ] [her] reasonable expectations and right to receive the fruits of the contract[.]" Sons of Thunder, supra, 148 N.J. at 425. Under the settlement agreement, Richards was entitled to receive "title to the securities listed on Schedule 'A' attached hereto" and no more. Because Hinman's claim to additional securities not listed in Schedule A does not strip Richards of the benefit of the bargain there can be no breach of the implied covenant of good faith and fair dealing.

Richards's second point asserts that Hinman intentionally withheld relevant information at the mediation and as such, the Chancery Division's order awarding Hinman the additional

securities should be reversed and amended to reflect an award in her favor. We disagree.

One definition of fraud is "'the obtaining of an undue advantage by means of some act or omission that is unconscientious or a violation of good faith.'" United Jersey Bank v. Kensey, 306 N.J. Super. 540, 550 (App. Div. 1997) (quoting Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 624 (1981)), certif. denied, 153 N.J. 402 (1998). The five elements of legal fraud are:

> (1) a material representation by the defendant of a presently existing or past fact; (2) knowledge or belief by the defendant of that representation's falsity; (3) an intent that the plaintiff rely thereon; (4) reasonable reliance by the plaintiff on the representation; and (5) resulting damage to the plaintiff.
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> [N.J. Econ. Dev. Auth. v. Pavonia Rest. Inc., 319 N.J. Super. 435, 445-46 (App. Div. 1998).]

An aggrieved party must demonstrate the elements of fraud by "clear and convincing evidence." Id. at 445.

In the absence of an affirmative misrepresentation, silence may constitute fraud where there is a duty to disclose. Id. at 446; United Jersey Bank, supra, 306 N.J. Super. at 551. Whether a duty exists is a question of law. United Jersey Bank, supra, 306 N.J. Super. at 551 (citing Carter Lincoln-Mercury, Inc. v. Emar Group, Inc., 135 N.J. 182, 194 (1994)). In general,

parties have no duty to disclose "unless a fiduciary relationship exists between them . . . the transaction itself is fiduciary in nature, or . . . one party 'expressly reposes a trust and confidence in the other.'" N.J. Econ. Dev. Auth., supra, 319 N.J. Super. at 446 (quoting Berman v. Gurwicz, 189 N.J. Super. 89, 93-94 (Ch. Div. 1981), aff'd, 189 N.J. Super. 49 (App. Div.), certif. denied, 94 N.J. 549 (1983)).

Here, no fiduciary relationship existed between Richards and Hinman and the transaction was not fiduciary in nature. In fact, their adversarial relationship placed each side on notice to conduct her own due diligence. Although Richards stood as a fiduciary with respect to Fischer's estate, as administratrix, In re Estate of Lash, 169 N.J. 20, 27 (2001), no such relationship existed —— as a result of the settlement agreement —— between the parties themselves.

Moreover, there is no claim in this case that Hinman thwarted or otherwise obstructed litigational discovery. Both sides were eager to avoid the expenditure of emotional and financial resources, so it is understandable that they readily engaged the mediation process without fully completing discovery. Accordingly, Hinman had no independent duty to school Richards about the contours of her then-present knowledge of the existence of other assets.

Moreover, both parties were represented by counsel and entered into the settlement knowingly, voluntarily, and with an equal opportunity to negotiate the terms. Richards contracted at arms length to receive the securities delineated in Schedule A attached to the settlement agreement. She further unequivocally agreed that Hinman would be entitled to certain unspecified "additional assets" of the estate. If Richards failed to investigate the existence, or the potential value, of said assets prior to entering into a settlement, it was through no fault of Hinman. Richards also could have attempted to obtain a warranty or other acknowledgment from Hinman regarding her knowledge of the assets owned by the decedent before executing the settlement agreement. A court will not make a better contract than the parties have made for themselves. Kieffer, supra, 205 N.J. at 223; Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 170 (2007).

Affirmed; the stay is vacated.

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

CLERK OF THE APPELLATE DIVISION