SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3563-20

EXCEL HOLDINGS URBAN RENEWAL, LLC,

Plaintiff-Respondent,

v.

TOWN OF HARRISON and HARRISON REDEVELOPMENT AGENCY,

Defendants-Appellants.

Submitted October 11, 2022 – Decided December 6, 2022

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4930-19.

Castano Quigley LLC, attorneys for appellants (Gregory J. Castano Jr., on the briefs).

Pearlman and Miranda, LLC, attorneys for respondent (Michael J. Caccavelli, of counsel and on the brief; Grace Chun, on the brief).

PER CURIAM

This appeal arises from a dispute over the calculation of the annual service charge—commonly referred to as a payment in lieu of taxes (PILOT)—for a hotel owned by plaintiff Excel Holdings (Excel). Excel and its parent company acquired the hotel from the company that negotiated the long-term tax exemption with defendants Town of Harrison and Harrison Redevelopment Agency (collectively, defendants). Defendants contend the annual service charge should be based on the income of Excel's parent company, which operates the hotel and receives the gross income from such. Defendants appeal from the June 25, 2021 orders entered by Judge Anthony V. D'Elia granting Excel's motion for summary judgment and denying their cross motion for summary judgment. Defendants also appeal from orders entered by Judge Joseph V. Isabella on March 13, 2020, denying their motion to disqualify plaintiff's counsel and declaring that no conflict of interest exists.

After carefully reviewing the record in light of the governing legal principles, we conclude Judge D'Elia correctly interpreted the financial agreement between the parties. That agreement clearly provides that the annual service charge is based on a percentage of Excel's revenues, not the

revenues of Excel's parent company. We likewise affirm Judge Isabella's denial of the Town's motion to disqualify Excel's counsel.

I.

The PILOT Agreement

On December 15, 2000, the Town entered into a financial agreement with Harrison Waterfront Urban Renewal, LLC (Waterfront) in connection with its construction of a 170-room hotel on property in the Town's waterfront redevelopment area. As part of that agreement, the Town granted approval for a long-term tax exemption (LTTE) pursuant to the Long Term Tax Exemption Law of 1992 (LTTEL), N.J.S.A. 40A:20-1 to -22. Section 4.1 of the agreement provides, "the Entity shall make payment to the Town of Harrison [in lieu of taxes in] an amount equal to the greater of: the Minimum Annual Service Charge [($170,000)] or an Annual Service Charge equal to [fifteen] percent of the gross revenue of the Entity."

Section 2.5 of the financial agreement explicitly acknowledges that "[u]pon construction, an operating entity will lease the project from the Entity." A summary of the lease between Waterfront and its affiliate was disclosed to the Town as a part of Waterfront's application for the LTTE. The financial agreement thus memorialized an understanding of the ownership

structure and that the "gross revenue of the entity" would be based on the amount generated through the master lease. In accordance with that understanding, the annual audit required by the agreement has always been based on the master lease rent, and the Town had consistently calculated the annual service charge based on those revenues.

On May 23, 2018, Excel and its parent company acquired the hotel. As part of the acquisition of the hotel, Excel assumed all the rights and obligations of Waterfront under the financial agreement. This was done with the consent of the Town. The master lease, however, was not assigned. Instead, Excel executed a new master lease with a new affiliated entity as the tenant-operator. The terms of the new master lease are substantially identical to the original master lease; the only change is the parties to the agreement. Following acquisition of the hotel and assumption of rights under the financial agreement, Excel assumed payment of the annual service charge.

Section 6.2(a) of the financial agreement provides, "[w]ithin ninety (90) days after the close of each fiscal or calendar year, . . . the Entity shall submit . . . its Auditor's Report for the preceding fiscal or calendar year." Excel submitted an independent auditor's report from Baker Tilly for the period ending December 31, 2018.

The Town thereafter sent two revised invoices to Excel, significantly increasing the annual service charge. A revised 2018 invoice, dated July 24, 2019, indicated that Excel owed $600,947.05. That invoice explained:

> [p]er Section 4.1 of the [financial agreement] dated December 15, 2000, the Annual Service Charge shall be adjusted based upon an Auditor's Report. The audit submitted by Baker Tilly, dated May 28, 2019, reported Rental Income based upon a Master Lease dated May 23, 2018. Please be advised that use of a Master Lease in an attempt to limit revenue is not valid under the New Jersey Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq.[,] **see Town of Secaucus v. City of Jersey City and 101 Hudson Street Associates c/o Linpro Co., 20 N.J. Tax 384 (2002).**
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> Based upon reports . . . that were submitted to the state, the Entity had unaudited Gross Receipts of $4,483,314 for the period May 23, 2018 through December 31, 2018. These unaudited Gross Receipts included only room rentals; any other income was not reflected in these reports. It is requested that the Entity resubmit an Auditor's Report based upon actual rental receipts and other income.

Excel also received a mid-year invoice, dated July 24, 2019, which indicated that it owed an additional $312,039.40. The mid-year invoice contained the same explanation that the Town would no longer confine the calculation of the annual service charge to the amount of the master lease but

would instead calculate the annual service charge based on the gross receipts of the parent company.

On July 30, 2019, counsel for Excel sent a letter to the Town disputing the revised calculation of the annual service charges. On December 18, 2019, Excel filed a verified complaint and submitted a proposed order to show cause with temporary restraints seeking to preliminarily restrain the Town from (1) demanding Excel make payments in excess of the financial agreement dated December 15, 2000; and (2) declaring a default under the financial agreement pending determination of the annual service charge calculation. On January 8, 2020, Judge D'Elia entered the order to show cause with temporary restraints pending a hearing. On February 14, 2020, Judge D'Elia convened a hearing after which he ordered that defendants were preliminarily restrained and enjoined from (1) demanding additional payments from Excel under the financial agreement; (2) declaring a default under the terms of the financial agreement; and (3) pursuing any other remedies to compel payment of additional charges under the financial agreement pending determination of the annual service charge calculation.

Both parties moved for summary judgment. On June 25, 2021, the judge entered orders granting Excel's motion for summary judgment and denying the Town's motion for summary judgment.

Motion for Attorney Disqualification

On February 4, 2020, prior to the hearing on the order to show cause, the Town moved to disqualify Excel's counsel, Pearlman & Miranda, LLC (the Firm). The Town alleged a conflict of interest because the Firm had previously represented it in three separate matters.

The first matter addressed whether Red Bull Arena and the land on which it was constructed was exempt from local property taxes pursuant to the County Improvement Authorities Law and the Local Redevelopment and Housing Law. The settlement of this litigation resulted in a PILOT agreement between the parties. The Firm's representation of the Town in the Red Bull lawsuit ended in 2016.

The second matter involved negotiations for the development and implementation of a plan for parking facilities on certain property located in the Town. The Firm's involvement in the parking facilities transaction ended in 2017.

The third matter involved the re-financing of the debt on the Hudson County Improvement County Garage in the Town. As bond counsel, the Firm was engaged to provide an objective legal opinion on whether the bonds were valid and binding obligations of the Town. The Firm's representation of the Town in the bond transaction ended in 2018. The Firm has not provided the Town with any legal services since that time.

On February 20, 2020, Excel cross-moved for partial summary judgment on the issue of the alleged conflict of interest. On March 13, 2020, Judge Isabella issued a written opinion and entered orders (1) denying the Town's motion to disqualify counsel and (2) granting partial summary judgment in favor of Excel and declaring that no conflict of interest exists as to warrant disqualification of counsel.

Defendants raise the following contentions for our consideration:

> POINT I
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> THE TRIAL COURT MUST BE REVERSED TO PRESERVE THE TAX COURT'S HOLDING
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> POINT II
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> BECAUSE PUBLIC ENTITIES ARE FORBIDDEN FROM WAIVING CONFLICTS OF INTEREST PLAINTIFF'S COUNSEL SHOULD HAVE BEEN DISQUALIFIED AT THE OUTSET OF THE LITIGATION

II.

We first address defendants' contention that the trial court erred by not disqualifying plaintiff's counsel at the outset of the litigation. "[A] determination of whether counsel should be disqualified is, as an issue of law, subject to de novo plenary appellate review." City of Atlantic City v. Trupos, 201 N.J. 447, 463 (2010); see also Greebel v. Lensak, 467 N.J. Super. 251, 257 (App. Div. 2021).

Rule of Professional Conduct 1.9 concerns attorneys' duties to former clients and resulting conflicts of interest and provides that "[a] lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing." RPC 1.10 imputes an attorney's conflict of interest under RPC 1.9 onto other lawyers in his or her firm.

In evaluating motions for the disqualification of counsel pursuant to RPC 1.9(a), courts must "balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose his counsel." Twenty-First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 273–74 (2012) (quoting Dewey v. R.J. Reynolds Tobacco Co.,

109 N.J. 201, 218 (1988)). However, "to strike that balance fairly, courts are required to recognize and to consider that 'a person's right to retain counsel of his or her choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement.'" Id. at 274 (quoting Dewey, 109 N.J. at 218).

A party seeking disqualification must initially show the attorneys previously represented the party "and that the present litigation is materially adverse to [the party's] interests." Trupos, 201 N.J. at 462. If the movant makes that showing, "the burden shifts to the attorneys sought to be disqualified to demonstrate that the matter or matters in which . . . they represented the former client are not the same or substantially related to the controversy in which the disqualification motion is brought." Id. at 462–63. Still, "the burden of persuasion on all elements under RPC 1.9(a) remains with the moving party, as it 'bears the burden of proving that disqualification is justified.'" Id. at 463 (quoting N.J. Div. of Youth and Fam. Servs. v. V.J., 386 N.J. Super. 71, 75 (Ch. Div. 2004)).

Our Supreme Court has stated RPC 1.9(a)'s "prohibition is triggered when two factors coalesce: the matters between the present and former clients must be 'the same or . . . substantially related,' and the interests of the present

and former clients must be 'materially adverse.'" Trupos, 201 N.J. at 462 (quoting RPC 1.9(a)). Furthermore, "[a] public entity cannot consent to a representation otherwise prohibited by [RPC 1.9]." RPC 1.9(d).

Neither party disputes that the interests of Excel are materially adverse to the Town's interest. The critical question before us, therefore, is whether the matters in which the firm previously represented the Town and the current litigation are "the same or substantially related."

Our Supreme Court has provided the standard for determining whether matters are substantially related, triggering the prohibition set forth in RPC 1.9(a):

> [F]or purposes of RPC 1.9, matters are deemed to be "substantially related" if (1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation.
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> [Twenty-First Century Rail, 210 N.J. at 274–75 (alteration in original) (quoting Trupos, 201 N.J. at 467).]

In Trupos, the Court considered "whether the prior and subsequent representations fell within the language in RPC 1.9(a) that prohibits representation in substantially related matters[,]" when an "attorney who had

previously been retained by a municipality to represent it in tax appeals . . . thereafter undertook to represent individual taxpayers in their tax appeals in subsequent years." Twenty-First Century Rail, 210 N.J. at 274 (citing Trupos, 201 N.J. at 452–55). The Court concluded that "the similarities between the initial engagement and the challenged representation were only superficial ones, and that a careful scrutiny of the two different periods of representation, the interests of the parties, and the matters in dispute fell short of the test." Ibid. (internal citations omitted).

In ruling on the Town's motion to disqualify the Firm from representing Excel, Judge Isabella carefully scrutinized "the similarities between the initial engagement and the challenged representation," Twenty-First Century Rail, 210 N.J. at 274, concluding that the firm's prior representations presented no more than a "superficial" similarity. The judge explained the parking facilities and bond transactions were unrelated to the PILOT program and were limited in scope in duration. He continued that, while the Red Bull litigation eventually led to a PILOT payment as part of the settlement, the similarity was "insufficient to warrant disqualification" because the Firm did not represent the Town with respect to the PILOT program and did not receive confidential information about the PILOT program. The judge was satisfied with the

Firm's certifications that it did not receive confidential information from those prior representations. He also noted that the attorney working for Excel did not work for the Firm until 2018.

On appeal, the Town relies wholly on the certification from the Town Clerk who asserted that the Firm "received confidential information from the Town that could be used against the Town in this matter." That conclusory assertion is not sufficient. We are satisfied Judge Isabella considered that circumstance and rejected it as a basis for disqualification.

In sum, the Town has failed to demonstrate a substantial relationship between the present matter and the Firm's prior representations, and thus has not met its burden of persuasion. Accordingly, the motion to disqualify counsel was correctly denied.

III.

We turn next to defendant's contention that the trial court erred in granting summary judgment in Excel's favor with respect to the calculation of the annual service charge. An appellate court employs that standard and reviews the Law Division decision de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). No special deference is afforded to the trial court's interpretations of the law and legal consequences that flow from established

facts. Invs. Bank v. Torres, 243 N.J. 25, 47 (2020) (citing Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)).

If no genuine issue of material fact exists, the inquiry turns to "whether the trial court correctly interpreted the law." DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). "The practical effect of [Rule 4:46-2(c)] is that neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014).

When "the issue raised on appeal involves the interpretation of a contract and the application of case law to the facts of the case, we review the trial court's decision de novo." N.J. Transit Corp. v. Certain Underwriters at Lloyd's London, 461 N.J. Super. 440, 453 (App. Div. 2019), aff'd o.b., 245 N.J. 104 (2021). "Accordingly, we pay no special deference to the trial court's interpretation and look at the contract with fresh eyes." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011).

"It is well-settled that 'courts enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.'" In re Cnty. of Atlantic, 230 N.J. 237, 254 (2017) (internal quotation marks omitted) (quoting Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014)). "A reviewing court must consider contractual language 'in the context of the circumstances at the time of drafting and . . . apply a rational meaning in keeping with the expressed general purpose.'" Ibid. (internal quotation marks omitted) (quoting Sachau v. Sachau, 206 N.J. 1, 5–6 (2011)); see also Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 441 (2014) (the terms of a financial agreement must be enforced in accordance with the "meeting of the minds" at the time of the drafting).

"'[I]f the contract into which the parties have entered is clear, then it must be enforced' as written." Cnty. of Atlantic, 230 N.J. at 254 (quoting Maglies v. Est. of Guy, 193 N.J. 108, 143 (2007)). "Where an agreement is ambiguous, 'courts will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation.'" Id. at 255 (quoting Cnty. of Morris v. Fauver, 153 N.J. 80, 103 (1998)).

"Generally, the terms of an agreement are to be given their plain and ordinary meaning." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). However, interpretation of a contract should not be decided on summary judgment when "there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation," in which case "the doubtful provision should be left to the jury." Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000) (first citing Michaels v. Brookchester, Inc., 26 N.J. 379, 387 (1958); and then citing Garden State Buildings v. First Fid. Bank, 305 N.J. Super. 510, 525 (App. Div. 1997)).

The terms of the contract are clear, and thus the contract must be enforced as written. Section 4.1 of the financial agreement provides, "the Entity shall make payment to the Town of Harrison [in] an amount equal to the greater of: the Minimum Annual Service Charge or an Annual Service Charge equal to [fifteen percent] of the gross revenue of the Entity." The "Entity" is defined in the financial agreement as:

> [Waterfront], which Entity is formed and qualified pursuant to N.J.S.A. 40A:20-5. It shall also include any subsequent purchasers or successors in interest of the Project, provided they are formed and operate under the Law and, when required, the transfer has been duly approved by the Town.

Because of the approved transfer of the financial agreement from Waterfront to Excel, Excel is now the "Entity" within the meaning of the financial agreement.

The Town relies on Town of Secaucus v. City of Jersey City to justify its recalculation of the annual service charge to include the gross profits of the parent company, thus capturing the profit generated by the project as a whole. 20 N.J. Tax 384, 407 (Tax 2002). That reliance is misplaced. Secaucus was superseded by a 2003 amendment to LTTEL which "ratified and validated" the "terms and conditions of any tax exemption approved pursuant to [LITTEL]" including "the structure and methods used to calculate excess profits and annual service charges." N.J.S.A. 40A:20-22. The Town is incorrect in its reasoning that the 2018 assignment to Excel "broke the chain of continuity that had shielded plaintiff's predecessor from the Tax Court's decision [in Secaucus]." The 2018 assignment did not create a new PILOT Agreement. The existing contract and its method of calculating the annual service charge, as ratified by the legislature, remains in effect. That contract allowed for the assignment, and the Town consented to Waterfront assigning its rights under the financial agreement to Excel.

We stress that a reviewing court "must consider contractual language 'in the context of the circumstances at the time of drafting and . . . apply a rational meaning in keeping with the expressed general purpose.'" Cnty. of Atlantic, 230 N.J. at 254 (emphasis added) (internal quotation marks omitted) (quoting Sachau, 206 N.J. at 5–6). The financial agreement was made between the Waterfront and the Town. The calculation of the annual service charge contemplated in that agreement was based on the understanding that the "gross revenue of the entity" would only capture the amount generated through the master lease. Because of the approved transfer of the financial agreement from Waterfront to Excel, Excel is now the "Entity" within the meaning of the financial agreement. The approved assignment of the contract does not change its substantive terms. It only changes who is obligated to perform those terms and who has standing to enforce them. In these circumstances, the Town is not entitled to change the basis for calculation of the annual service charge. Accordingly, Excel's motion for summary judgment was properly granted.

To the extent we have not addressed them, any remaining arguments raised by defendants lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.