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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0642-05T3

MOHAMED BEDEWI and
CAROL BEDEWI, his
wife,

Plaintiffs-Appellants,

v.

CEDAR LAKE PROPERTY
OWNERS, INC.,

Defendant-Respondent,

and

TOWNSHIP OF DENVILLE,

Defendant.

Argued June 6, 2007 – Decided: September 5, 2007

Before Judges Stern, A. A. Rodríguez and Sabatino.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, L-1919-03.

Frederick E. Popovitch argued the cause for appellants (Popovitch & Popovitch, attorneys; Mr. Popovitch, on the brief).

Gregory E. Peterson argued the cause for respondent (Connell Foley, attorneys; Karen

Painter Randall, of counsel; Mr. Peterson, on the brief).

PER CURIAM

Mohamed Bedewi and Carol Bedewi ("Mohamed" and "Carol" when referenced individually, collectively "plaintiffs") are husband and wife, appealing from the August 26, 2005 judgment, which dismissed with prejudice their complaint, as well as counterclaim filed by defendant, Cedar Lake Property Owners, Inc. (Association). Plaintiffs sought to set aside a conservation easement that they had granted to the Township of Denville (Township). We affirm substantially for the reasons expressed by Judge Robert Brennan in his August 26, 2005 written opinion, concluding that his findings of fact are adequately supported by the evidence.

These are the salient facts. In 1997, plaintiffs entered into a contract to purchase a vacant eleven-acre lot in the Township. Plaintiffs had to apply for a variance to develop their property because it was bordered by two unimproved roads, Cedar Lake North Road and Vans Drive. In December 1997, plaintiffs filed an application to subdivide the property, but because this was considered a major subdivision, which would be too difficult to gain approval, they withdrew the application.

In March 1998, plaintiffs filed an application for a variance to build on a substandard road because they wanted to

build a residence on the property. Following public hearings, the Board denied the application, finding that plaintiffs had failed to prove that the proposed roads were adequate and that "the ownership of the private road network was somewhat vague." The Board explained that plaintiffs' application did not offer to make any improvements to the roadways to allow the roads to accommodate police and other emergency vehicles.

Plaintiffs purchased the property, although they had not obtained the variance to build a residence on it. They filed a third variance application to develop the property. The Township's planner, Stephen M. Lydon, sent a memo noting that the "property greatly exceeds the zone requirements." Also, the planner noted that storm water from the property would collect in a swale on the side of the proposed driveway. The planner also recommended that plaintiffs provide the Board with a letter from the Department of Environment Protection (DEP) approving the wetland delineation. The Association confirmed that it would allow plaintiffs to use all access easements to roads as long as plaintiffs became paid-up members. The Association manages the property of Cedar Lake Park where plaintiffs' land is located. The Association has the power to grant easements to certain streets on the land and to administer, develop and improve the property.

The Board noted that a variance would be necessary due to the height of the retaining walls. At a subsequent Board meeting, plaintiffs' engineer testified. Michael Phillips, an attorney who represented "a number of property owners affected by this [application]" questioned the engineer about a number of issues including steep slopes, absence of the requisite letter from DEP and other issues with the property.

On April 19, 1997, Mohamed contacted the Association's president to arrange a meeting to discuss a possible agreement limiting development of the property. After this meeting, a lawyer for the Association sent a letter to plaintiffs memorializing their conversation, noting that "[a] conservation easement will be created covering the entire property." At a third hearing on this variance application, the Association submitted that plaintiffs would enter into a conservation easement and they would grant plaintiffs an easement.

On June 4, 1999, another agreement was reached between plaintiffs and the Association. The agreement grants plaintiffs an easement to traverse Little Bear Road, a paper street. The Association also agreed not to appeal any decision by the Board granting approval of plaintiffs' development plan. Plaintiffs agreed to join the Association and noted their agreement to

convey to the Township a conservation easement. The Association would have standing to enforce this conservation agreement.

Three days later, the Board approved plaintiffs' application for a variance to build on their property. In the resolution it was noted that plaintiffs "agreed to a conservation easement to limit future development and access to their property." It continued, "[t]he parameters of said conservation easement will be to limit the areas of disturbance on-site to the proposed areas where infrastructure is being built in a reasonable perimeter around same while providing the sites['] only access through the proposed driveway."

Three years later, plaintiffs filed an application for a permit and variance to construct a barn on their property. The Association objected to the application. The Board denied the application. Plaintiffs sent an open letter to their neighbors, urging them to question the Board's decisions on certain issues. In the letter, they addressed the conservation easement, but did not claim they signed it under duress.

Plaintiffs filed a complaint pursuant to the Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, against the Association and Township seeking a declaration that the conservation easement is null and void because it was given under duress. Plaintiffs also sought compensatory and punitive damages. The

Association answered the complaint and counterclaimed. The claims against the Township were dismissed on summary judgment.

The Association moved for summary judgment. Judge Brennan denied the motion. A bench trial was held. In a written opinion, the judge dismissed with prejudice plaintiffs' complaint and the Association's counterclaim.

In his opinion, Judge Brennan addressed plaintiffs' attempt to invalidate the conservation easement and noted that the easement was "recorded in its final form more than a year after its initial drafting." He also noted that plaintiffs did not try to invalidate the conservation easement made with the Township. From this evidence, he found that plaintiffs "incorrectly assert . . . that it was the Association that compelled them to enter into the conservation easement." He also found plaintiffs' claim that they were pressured at several Planning Board meetings to be "unfounded." The judge further found that "[a]t no time at trial did plaintiffs offer any evidence that the Association . . . wrongfully pressured plaintiffs into executing the conservation easement." Further, he found "[t]here was no dispute [that] the Association was unopposed to [plaintiffs'] development of the property and accommodated them by permitting access to the Association roads prior to [plaintiffs'] obtaining the Association membership."

The judge noted individual objections to plaintiffs' variance application, but noted that they were not acting on behalf of the Association. He also found that in the meeting with Tom Lido, a Board member and shareholder of the Association, there was no evidence that he represented the Association in his assertions. Further, the judge held that the Association "cannot be held liable on plaintiffs' claims where there is absolutely no evidence of any wrongdoing by the [Association]."

Judge Brennan analyzed the elements of duress by using the New Jersey Model Civil Charges, which developed their instructions from Ajamian v. Schlanger, 20 N.J. Super. 246, 249 (App. Div. 1952), aff'd, 29 N.J. Super. 497 (App. Div. 1953), rev'd and remanded, 14 N.J. 483 (1954), cert. denied, 348 U.S. 835, 75 S. Ct. 58, 99 L. Ed. 659 (1954) and Rubenstein v. Rubenstein, 20 N.J. 359 (1956). Under these elements, as discussed below, the judge found that plaintiffs had not proven they were under duress when they agreed to the conservation easement. He held that plaintiffs "have clearly and unequivocally endorsed the agreement in complying with its limitations. An agreement is not voidable on the theory that a party to the agreement . . . merely seeks to enforce its terms."

Trial judges must make factfindings that are sufficiently clear and complete to permit review. When a party alleges an error in a judge's factfinding, the scope of appellate review is limited. State v. Locurto, 157 N.J. 463, 470-471 (1999). The court will only decide whether the trial court's findings could reasonably have been reached on sufficient or substantial credible evidence present in the record, considering the proof as a whole. Ibid. The court gives due regard to the fact finder's judgment of credibility. Ibid.

Plaintiffs contend that the easement warrants rescission because it was the result of the Assocation's actual and/or threatened influence over the Board, which constituted duress. We disagree.

Duress relates to the "unreality of the apparent consent" of a party to a contract. Rubenstein, supra, 20 N.J. at 366. The "controlling factor in determining whether duress has occurred is the state of mind of the person subjected to coercive measures; the test is essentially subjective." Allen v. Planning Bd. of Evesham, 137 N.J. Super. 359, 364 (App. Div. 1975). An important element to consider when deciding whether there was duress is the wrongfulness of the pressure exerted against the contracting party. Cont'l Bank of Pa. v. Barclay Riding Acad., 93 N.J. 153, 177 (1983). Generally,

> [m]eans in themselves lawful must be so oppressively used as to constitute an abuse of legal remedies. The act or conduct complained of need not be "unlawful" in the technical sense of the term; it suffices if it is "wrongful in the sense that it is so oppressive under given circumstances as to constrain one to do what his free will would refuse."
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> [McBride v. Atlantic City, 146 N.J. Super. 498, 503 (Law Div. 1974), aff'd, 72 N.J. 201 (1976) (quoting Rubenstein, supra, 20 N.J. at 367).]

The main issue of duress that plaintiffs base this suit on is a conversation that Mohamed had with Lido and Mary Jean White, a shareholder of the Association. During that conversation, Mohamed testified that:

> Lido presented himself to me and explained to me that he was on the [Association Board]. And he...asked me if I could possibly move . . . the driveway . . . from its present location.
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> And in exchange for that he said that he has very close ties with Mr. Anderson, who's on the Board of Adjustment, and he assured me that he could convince him to . . . review . . . the application in a favorable light and possibly vote for it.

After this conversation and the numerous Board meetings about plaintiffs' variance applications, plaintiffs felt that they had no choice but to make an agreement for a conservation easement. They "realized that . . . if we don't do this then [the variance

application is] going to get denied and we'd end up having to go through litigation for another year and a half or two."

Plaintiffs claim that duress can occur in land-use application cases, relying on Baltica Constr. Co. v. Planning Bd., Twp. of Franklin, 222 N.J. Super. 428 (App. Div. 1988). In that case, the plaintiff was granted subdivision approval, but as a condition of the approval the plaintiff had to bear the cost of installing a waterline. The plaintiff sued the defendant planning board, but in the meantime installed the waterline. Id. at 429. This court held that the plaintiff could seek judicial redress and recover for the improvement costs within one year of paying for the improvement. Ibid. The only instance of duress mentioned in that case is that of "business compulsion" which "is exercised when payments are induced by the wrongful pressure of the payee and the payor has no immediate and adequate remedy in the courts to resist them." Id. at 437. However, the facts here do not constitute "business compulsion." Plaintiffs were not obligated to make any payments induced by wrongful pressure by the payee. Therefore, Baltica Constr. Co. does not support plaintiffs' duress claim.

The judge found that plaintiffs offer no persuasive evidence to support their duress claim. First, there is no evidence that the Board's decision as to the variance

application was influenced by the granting of the conservation easement. In fact, the Association did not become a party to the easement until about a year after the hearings on the variance application had been concluded. There does not appear to be any relationship between the Board's decision on the variance and the conservation easement.

Second, plaintiffs never claimed they entered into the agreement under duress until three years after they had been living with the agreement when they decided to build a barn and discovered they could not because of the conservation easement. Third, the Board was the entity that had the authority to approve or deny the variance application, not the Association.

Plaintiffs also contend that they "did not 'endorse' the easement; they filed for relief shortly after there was a dispute over the terms of the easement." We disagree.

This court has held that even if a party can void a contract because of duress, the same party can ratify the contract when the party is no longer under duress. Ajamian, supra, 20 N.J. Super. at 249. A party who claims duress has ratified the contract if, after the duress is no longer being asserted, the party does any of the following: (1) waits an unreasonable time to disaffirm the contract; (2) does any material act which assumes the transaction to be valid; or (3)

deals with the subject matter of the contract as if the contract were still valid. Ibid.

Plaintiffs argue that the trial court erred in finding that they had ratified the agreement by "complying with its limitations." The trial court found that plaintiffs' failure to claim any problems with the conservation easement until they tried to construct a barn three years after the agreement was signed, was an endorsement of the agreement.

We conclude that pursuant to New Jersey law, the judge made the correct decision. For the three years between the time the agreement was executed and the time they tried to get a variance for the barn, there is no evidence they took any action to deem the agreement void because of duress and no evidence that they objected to any part of the contract. Therefore, we affirm the trial court's decision and hold that even if the contract was induced by duress, plaintiffs ratified the contract and waited an unreasonable time.

Plaintiffs' final two contentions were not raised below. Although an appellate court will consider allegations of error not brought to the trial judge's attention, it frequently declines to consider issues that were not presented at trial. Generally, unless such an issue goes to the jurisdiction of the trial court or concerns matters of substantial public interest,

the appellate court will not consider it. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); see Pressler, Current N.J. Court Rules, comment 2 on R. 2:6-2 (2007). Here, plaintiffs did not raise Issues III and IV at trial; therefore, we will only reverse on such grounds if the trial court committed plain error, which was "clearly capable of producing an unjust result." R. 2:10-2.

The first contention not raised at trial was that the Association "holds the easement as a constructive trustee." Plaintiffs argue that if this court agrees with plaintiffs' contention that the Association holds the easement as a constructive trustee and finds that plaintiffs made the agreement under duress, the easement should be conveyed back to plaintiffs.

Plaintiffs have not proven that they agreed to the conservation easement under duress, as explained above. Therefore, if there is no merit to their underlying claim of duress, then there is no merit to the claim that the Association holds the easement as a constructive trustee. Therefore, there is no error.

Finally, plaintiffs contend that "there was no meeting of the minds between the parties regarding what was being conveyed in the conservation easement." We disagree.

Generally, "[a] written contract is formed when there is a 'meeting of the minds' between the parties evidenced by a written offer and an unconditional, written acceptance." Morton v. 4 Orchard Land Trust, 180 N.J. 118, 130-131 (2004). Ibid. Furthermore, if an attorney is involved in the formation and signing of an agreement, the court will be reluctant to make a finding of duress. Konsuvo v. Netzke, 91 N.J. Super. 353, 366-367 (Ch. Div. 1966).

Here, plaintiffs signed the agreement on August 7, 2000 and their attorney certified that they did so. At the time of the signing, they had ample opportunity to review the terms and object to them but they did not. In fact, they did not object to the terms until three years later, when they decided to construct a barn on their property. For these reasons, we reject plaintiffs' contentions and find the evidence demonstrates a meeting of minds between the parties on the agreement.

Affirmed.