NORTH SIXTH PROPERTIES vs. MORNING CALL

Summary Judgment—Coordinate Jurisdiction Rule.

In April 2020, Morning Call fell behind in its rent obligation to North Sixth Properties. North Sixth filed a Complaint asserting Breach of Lease and Breach of Guaranty Agreement. North Sixth filed a motion for Judgment on the Pleadings, which was denied. Two years later, after developing the record, North Sixth filed a motion for Partial Summary Judgment. Morning Call contested the motion under the Coordinate Jurisdiction Rule.

Under the Coordinate Jurisdiction Rule, a judge may not overrule the prior decision of another judge of the same court. Where two motions differ in kind, the rule does not apply. Summary Judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Where the motion for Summary Judgment has been supported with corroborating documentation, the adverse party must demonstrate by specific facts that there is a genuine issue for trial.

The Court granted partial summary judgment as to both counts. The Motion for Partial Summary Judgment was procedurally distinct from the Motion for Judgment on the Pleadings. Morning Call's legal impossibility argument due to COVID-19 failed, because the business continued to operate during the pandemic.

In the Court of Common Pleas of Lehigh County, Pennsylvania—Civil Division. No. 2020-C-1538. North Sixth Properties OP, LP, Plaintiff vs. The Morning Call, LLC and Tribune Publishing Company, LLC, Defendants.

TIMOTHY T. STEVENS, ESQUIRE, on behalf of the Plaintiff.

STEPHEN W. WIENER, Esquire, on behalf of the Defendants.

PAVLACK, *J.*, February 28, 2023. Plaintiff North Sixth Properties OP, LP filed a Motion for Partial Summary Judgment on November 30, 2022; Defendants The Morning Call, LLC and Tribune Publishing Company, LLC responded; argument was held and this matter is ripe for adjudication.

On July 1, 2013, The Morning Call, LLC (Morning Call) entered into an Amended and Restated Lease that includes multiple subsequent amendments with a lease term expiring on June 30, 2023 (Lease) for the property located at 101-149 North Sixth Street and 124-148 N. Sixth Street, Allentown, Pennsylvania (Subject Property). Tribune Publishing Company, LLC (Tribune), on July 1, 2013, executed a Guaranty in which Tribune unconditionally guaranteed the obligations of Morning Call under the Lease. Both the Amended Lease and the Guaranty were entered into with

PA-Morning Call, LLC, the former owner and landlord of the Subject Property. On June 2, 2016, PA-Morning Call, LLC sold the Subject Property to North Sixth Properties OP, LP and entered into an Assignment and Assumption Agreement with North Sixth Properties OP, LP.

According to North Sixth Properties OP, LP, Morning Call and Tribune became in arrears on the rent obligation starting in April, 2020. The instant legal action commenced with the Complaint filed on July 13, 2020 asserting in Count I—Breach of Lease and Count II—Breach of Guaranty Agreement. Following the close of the pleadings,[1] on December 9, 2020, North Sixth Properties OP, LP filed a Motion for Judgment on the Pleadings. At that time, the case was assigned to the Honorable MICHELE A. VARRICCHIO who entered the Order of January 29, 2021 denying the Motion for Judgment on the Pleadings. Judge VARRICCHIO, in a footnote, acknowledged the limited record in the case at the time of her review and specifically stated that "[t]he Court may revisit this issue at the appropriate future stage of litigation, after development of the evidentiary record." January 29, 2021 Order of Court. Following the entry of the Order of January 29, 2021, the parties conducted depositions of various witnesses associated with the parties in this case.

Before the court at this time for disposition is the Motion for Partial Summary Judgment filed by North Sixth Properties OP, LP on November 30, 2022. Morning Call and Tribune assert that this court must deny the Motion for Partial Summary Judgment based upon the Coordinate Jurisdiction Rule.

The Coordinate Jurisdiction Rule is contained under a broader scope of rules called the Law of the Case Doctrine which preclude a trial court from revisiting in another phase of the same case an issue decided by an appellate court or over which jurisdiction is lost. A pretrial ruling by the same judge sitting in the same capacity may always be revisited in order to clarify or correct error until such time as an appellate court binds the trial court on an issue or jurisdiction is lost. See: Gateway Towers Condominium Association v. Krohn, 845 A.2d 855, 861 (Pa. Super. 2004); *cf.* Leoni v. Whitpain Tp., 709 A.2d 999, 1001 (Pa. Commw. 1999)

[1]Complaint filed July 13, 2020; Answer and New Matter filed August 25, 2020; Reply to New Matter filed August 27, 2020.

("coordinate jurisdiction" rule militates against one trial judge revisiting rulings of another trial judge in same case). The "law of the case doctrine" refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of the same court or by a higher court in the earlier phases of the matter. Commonwealth v. Starr, 541 Pa. 564, 664 A.2d 1326 (1995). "Among the related but distinct rules which make up the law of the case doctrine are that: (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court." *Id.* at 1331. The last of these is commonly referred to as the "coordinate jurisdiction rule." The "rule of coordinate jurisdiction" holds that a judge may not lightly overrule the prior decision of another judge of the same court. The Supreme Court has held that when distinct procedural postures present different considerations and/or where two motions differ in kind, the rule of coordinate jurisdiction does not apply and the second judge may revisit an earlier ruling. Gerrow v. John Royle & Sons, 813 A.2d 778, 782 (Pa. 2002); Ryan v. Berman, 813 A.2d 792, 794-95 (Pa. 2002); Goldey v. Trustees of University of Pennsylvania, 544 Pa. 150, 675 A.2d 264, 267 (1996); Riccio v. American Republic Ins. Co., 550 Pa. 254, 705 A.2d 422 (1997).

The instant review is based upon a Motion for Partial Summary Judgment filed November 30, 2022, almost two years after the filing of the Motion for Judgment on the Pleadings and after further discovery was pursued by the parties to the litigation in order to develop the evidentiary record. The court is not reopening the issues decided by Judge VARRICCHIO. The request before this court is procedurally distinct and is permitted to allow this court to examine both the pleadings and the record. The previous judge was limited to the pleadings. This subsequent examination of a different type of motion is not only permitted but specifically

contemplated by the Rules of Civil Procedure. The present determination encompasses a broader review of the discovered facts and is therefore properly within the consideration of this court.

Although Morning Call and Tribune neither offer substantive opposition to the Motion for Partial Summary Judgment nor demonstrate by specific facts contained within their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue of material fact for trial, this court expands upon the analysis of the court in granting the motion before us.

Motions for summary judgment are governed by Pa. R.C.P. 1035.2, which provides:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
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> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
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> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa. R.C.P. 1035.2

> A trial court should grant summary judgment only in cases where the record contains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summers v. Certainteed Corp., 606 Pa. 294, 997 A.2d 1152, 1159 (2010). The moving party has the burden to demonstrate the absence of any issue of material fact, and the trial court must evaluate all the facts and make reasonable inferences in a light most favorable to the non-moving party. *Id.* The trial court is further required to resolve any doubts as to the existence of a genuine issue of material fact against

> the moving party and 'may grant summary judgment only where the right to such a judgment is clear and free from doubt.' Toy v. Metro. Life Ins. Co., 593 Pa. 20, 928 A.2d 186, 195 (2007).

Bourgeois v. Snow Time, Inc., 242 A.3d 637, 649–50 (Pa. 2020).

Where a motion for summary judgment has been properly supported with corroborating documentation, the adverse party must demonstrate by specific facts contained within their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue of material fact for trial. Sovich v. Shaughnessy, 705 A.2d 942, 944 (Pa. Commw. 1998), citing Marks v. Tasman, 527 Pa. 132, 135, 589 A.2d 205, 206 (1991).

To successfully maintain a cause of action for breach of contract the plaintiff must establish: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages. Gorski v. Smith, 812 A.2d 683[, 692] (Pa. Super. 2002), *appeal denied,* 579 Pa. 692, 856 A.2d 834 (2004) (citing Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999)).

North Sixth Properties OP, LP argues that it is entitled to partial summary judgment, and in so asserting, relies on the Pennsylvania Superior Court decision in 9795 Perry Highway Management, LLC v. Bernard, 273 A.3d 1098 (Pa. Super. 2022), where the Superior Court affirmed the trial court's denial of the commercial tenant's Petition to Strike or Open a confessed judgment. There, a tenant operating an escape room in the leased property fell behind in rent starting in April 2020. The tenant asserted that they should be excused from paying rent based upon the Commonwealth's COVID-19 Closure Order of March 2020 and relying upon the doctrines of frustration of purpose and/or impracticability/impossibility of purpose. The Superior Court held that the trial court had not abused its discretion since the doctrines of frustration of purpose and/or impracticability/impossibility of purpose were not applicable to the facts of the case.

Under the doctrine of frustration of purpose, "[w]hen people enter into a contract which is dependent for the possibility of its

performance on the continual availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is *prima facie* regarded as dissolved." Hart v. Arnold, 884 A.2d 316, 335 (Pa. Super. 2005).

The Restatement (Second) of Contracts section 261 provides: "[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." Restatement (Second) of Contracts §261 (1981).

> To establish frustration of purpose, [f]irst, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he or she had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. Second, the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. This involves essentially the same sorts of determinations that are involved under the general rule on impracticability.

Perry, supra [at 1104,] citing Step Plan Services, Inc. v. Koresko, 12 A.3d 401, 413 (Pa. Super. 2010).

"However, a party's wholly subjective expectations are insufficient to avoid enforcement of an otherwise clear agreement based on the frustration of purpose doctrine. Lastly, the doctrine of frustration of purpose is to be applied sparingly." Perry, [273 A.3d at 1104].

Specifically, the Superior Court, in Perry, supra, stated "As to the doctrine of impracticability/impossibility, we have referenced

the Restatement (Second) of Contracts in explaining that the doctrines of impossibility or impracticability will not apply if a performance remains practicable and is merely beyond a particular party's capacity to render it ... the financial inability of one of the parties to complete obligations under the contract will not effect a discharge." *[Id.], citing* Luber v. Luber, 418 Pa. Superior Ct. 542, 614 A.2d 771, 774 (1992); see also, Felix v. Giuseppe Kitchens & Baths, Inc., 848 A.2d 943, 947 (Pa. Super. 2004) ("It is well settled that a party assumes the risk of his or her own inability to perform contractual duties. A claim of personal inability to perform the actions contemplated ... does not rise to the level of legal impossibility.").

In the instant case, Morning Call and Tribune have offered nothing more than the existence of COVID-19 to assert their argument of impossibility to perform and frustration of purpose regarding their duties under the contract. Specifically, they rely on the Governor's Closure Order of March 2020. Examination of Governor Wolf's Closure Order of March 2020 illustrates that the Governor labeled the business of Morning Call and Tribune by placing it in the category of business that had permission to continue physical operations. Thus, their business operations were never shut down by the existence of COVID-19 or the Governor. As more fully detailed during the depositions of people working for Morning Call, specifically Paul Fernandez, Manager of Distribution who assumed the duty of Manager of Building Maintenance and Security (Deposition of Paul Fernandez, July 20, 2022, pp. 5-8) and Anthony Salamone, Reporter (Deposition of Anthony Salamone, July 20, 2022, p. 6) employees continued to occupy portions of the Subject Property for business uses. Mr. Salamone testified that Morning Call continued to publish the newspaper in paper and digital versions throughout the COVID pandemic. (Dep. of Salamone, p. 15). Mr. Salamone himself continued to go to his office at the Subject Property during the COVID pandemic and had full use of the building, including going to the newsroom and his office desk. This was the case for other reporters as well. (Dep. of Salamone, pp. 15-18). This use of the Subject Property continued until September 15, 2020, when he was required, pursuant to a company-wide Memorandum dated August 12, 2020, to vacate the

building. (Dep. of Salamone, pp. 17-18). Mr. Fernandez echoed that Morning Call continued to publish both digital and print versions of the daily newspaper during the COVID pandemic without interruptions. (Dep. of Fernandez, p. 19). Mr. Fernandez verified that during the COVID pandemic some employees worked from home but other employees were still coming into their offices at the Subject Property. (Dep. of Fernandez, pp. 20-21).

There can be no doubt that operations were permitted to continue, and, in fact, continued at the Subject Property during the COVID pandemic all while not making the requisite rental payments. North Sixth Properties OP, LP is entitled to partial judgment as a matter of law because, with the existence of an undisputed Lease and Guaranty, Morning Call and Tribune breached their duties imposed.

ORDER

AND NOW, this 28th day of February, 2023, upon consideration of the Plaintiff, North Sixth Properties OP, LP's Motion for Partial Summary Judgment Pursuant to Pa.R.Civ.P. 1035.1 *et seq.*, and Defendants' Response thereto,

IT IS HEREBY ORDERED and DECREED that the Motion for Partial Summary Judgment is GRANTED as to Count I for Breach of Lease against the Defendant, The Morning Call, LLC with respect to liability for non-payment of rent;

IT IS FURTHER ORDERED that the Motion for Partial Summary Judgment is GRANTED as to Count II for Breach of Guaranty Agreement against the Defendant, Tribune Publishing Company, LLC on liability per the terms of the Guaranty Agreement; and

IT IS FURTHER ORDERED that the Trial scheduled on April 24, 2023 at 9:00 a.m. in Courtroom SA, Lehigh County Courthouse, 455 W. Hamilton Street, Allentown, Pennsylvania shall be limited to assessment of damages claimed by the parties.