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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0625-21**

AMBOY BANK,

Plaintiff-Respondent,

v.

M.V.N. HOMES INC. and
MURTAZA ALI KHAN,

Defendants-Appellants.

Submitted November 15, 2022 – Decided December 7, 2022

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law
Division, Monmouth County, Docket No. DC-007836-
20.

Vincent E. Halleran, Jr., attorney for appellants.

Hill Wallack, LLP, attorneys for respondent (Michael
Kahme and Francesca A. Arcure, of counsel and on the
brief; Mark A. Roney, on the brief).

PER CURIAM

In this collection action, defendants M.V.N. Homes Inc. (MVN) and Murtaza Ali Khan appeal from a judgment in the amount of \$12,500 plus costs entered in favor of plaintiff Amboy Bank (Amboy) following a bench trial. We affirm.

Defendants had a long business relationship with Amboy. On March 11, 2004, Amboy issued an irrevocable standby letter of credit (LOC) for the benefit of the Township of Plumsted (Plumsted) in the amount of \$152,454.15, in connection with a loan given to MVN. Khan personally guaranteed the LOC. Defendants agreed to reimburse Amboy, on demand, the amount of any draft drawn on the LOC. Defendants also agreed to pay interest at the rate of J.P. Morgan Chase prime rate plus 1.5 percent per annum, on any amount not immediately reimbursed. Defendants further agreed to any charges or expenses paid or incurred in connection with the LOC. To secure the LOC, MVN executed and delivered a General Security Agreement to Amboy, granting a security interest on a certificate of deposit (CD). Amboy perfected its security interest by taking possession of the CD. The CD was replaced as security for the LOC by a second mortgage affecting designated real property located in Plumsted (the Property).

On August 15, 2019, Amboy wrote to Plumsted, requesting that the LOC in favor of Plumsted be released, and advising that the LOC, which matured on March 11, 2020, would not be renewed.

On September 2, 2020, Plumsted passed Resolution No. 2020-278 that confirmed upon its receipt of \$12,500, Amboy's obligations under the LOC would be satisfied. On October 6, 2020, Amboy received a \$12,500 draw request from Plumsted. The draw request met the terms and conditions of the LOC and Amboy remitted \$12,500 to Plumsted. Amboy remitted \$12,500 to Plumsted in accordance with its demand. In turn, Amboy demanded that defendants reimburse Amboy in the amount of \$12,500 plus costs by November 6, 2020. Defendants did not make the reimbursement payment to Amboy. As a result, Amboy filed this District Court action on November 23, 2020.

On February 5, 2021, Amboy filed a motion for summary judgment. Defendants then cross-moved for summary judgment, arguing the complaint should be dismissed pursuant to the entire controversy doctrine, because the LOC should have been included in prior litigation between Amboy and defendants. The prior litigation was a mortgage foreclosure action filed in Ocean County (Docket No. F-7898-16) and a Law Division action filed in Monmouth County (Docket No. L-1003-16). Final judgment was entered in

favor of Amboy in the foreclosure action on October 28, 2016. A second amended judgment was entered in favor of Amboy in the Law Division action on February 17, 2017.

On March 15, 2021, the court entered orders denying both motions for summary judgment in this action. The case proceeded to trial the next day. The court issued an oral decision and order that dismissed the complaint with prejudice pursuant to the entire controversy doctrine related to the foreclosure and Law Division actions.

Amboy promptly moved for reconsideration, arguing it was palpably incorrect to apply the entire controversy doctrine in this matter. On April 23, 2021, a different judge granted reconsideration, vacated the dismissal of the complaint, and set the matter down for trial. In his written statement of reasons, the judge acknowledged the error and stated, "the entire controversy doctrine is inapplicable to the instant matter and thus the decision to dismiss the [c]omplaint with prejudice was incorrect."

A one-day bench trial took place on July 6, 2021. Amboy's Senior Lending President, Robert L. Beni, testified on behalf of Amboy. Khan testified for defendants. The Letter of Credit Agreement, LOC, General Security Agreement, eight letters, and discharge were admitted as evidence without

objection. The court reserved decision to review the documents. On July 12, 2021, the court entered judgment in favor of Amboy in the amount of \$12,644 in accordance with its written detailed statement of reasons.

The judge made the following findings of fact:

Robert Beni, senior lending vice president, testified on behalf of [p]laintiff. He stated that [d]efendant MVN applied for an Irrevocable Standby Letter of Credit to be issued in favor of the Township of Plumsted to secure site improvements on a property located on Lakewood Road in Plumsted Township. The Letter of Credit (LOC) Agreement dated March 11, 2004 was executed by defendant Murtaza Ali Khan on behalf of MVN and was personally guaranteed by him. Plaintiff also granted both a land loan and a construction loan for the purchase and development of the property.

In or about March of 2020, at the time of its maturity, [p]laintiff bank reached out to Plumsted Township for the release of its LOC. By letters in March, August, October, Plumsted Township advised that there were remaining items to be completed for the project as required under the approving resolution. By letter of October 6, 2020, from the Township attorney, "demand [was] made for the sum of \$ 12,500.00, upon receipt of which the Bank would have satisfied its obligations under the LOC and the LOC would be terminated and of no further effect."

Amboy, by letter of October 26, 2020 notified [d]efendants that it had rendered the sum of \$12,500.00 to Plumsted Township in satisfaction of its demand for outstanding site improvements for the project. Demand

for payment under the terms of the LOC Agreement was made.

Defendants claim that the matter should be dismissed based upon the entire controversy doctrine. In 2016 plaintiff filed a foreclosure action and secured a judgment of foreclosure. Simultaneous with the filing of its foreclosure action, plaintiff filed suit on a loan which included monies loaned to the [MVN] for the property which is the subject of the LOC it extended to [MVN] for the purchase and construction on the subject property. Plaintiff obtained a judgment of foreclosure on the property which was the subject of the LOC. Defendants also assert that [p]laintiff previously brought suit under a note signed by MVN, a portion of the funds being targeted for the subject property of the LOC. Defendants assert that at the time of the Law Division action to collect under the Note issued by [p]laintiff to [MVN], the LOC was still outstanding, and [p]laintiff could have called it in for payment. Defendant submits that under the entire controversy doctrine, [p]laintiff had the duty to include all cognizable claims in one action.

There were three prior Foreclosure actions by Amboy against property owned by Defendant. Final judgment was entered in October 2016 in two of the cases and the third was dismissed. A monetary judgment was entered against defendants and in favor of [p]laintiff in a suit on a note. The LOC was not included in that action. Plaintiff argues that the foreclosure action and the litigation on a separate loan are not germane to this action under the LOC. The terms and amount of the loan in the prior action are different than the claim under the LOC which is the basis of the within claim. Defendant[s] do[] not challenge the validity of the LOC documents, including the personal guaranty. Defendant Ali Khan testified

that the prior litigation included three separate notes, all secured by mortgages. Mr. Khan stated that one mortgage was in the amount of \$152,454.00, the same amount as the LOC. Thus, he submits that the claims arising under the LOC should have been included in the prior actions.

In her analysis, the judge noted that "money judgment claims on the note or bond, assumption and guarantees are deemed non-germane and cannot, without leave of court for good cause shown, be joined in a mortgage foreclosure action." The judge reasoned:

It appears that the LOC Agreement was not germane to either Amboy's foreclosure actions against MVN or the [L]aw [D]vision complaint for money owed on certain notes. The foreclosure was based on the mortgage given by [MVN] to Amboy. Money judgment claims on a note or bond, assumption and guarantees are deemed non-germane to the foreclosure.

The LOC was given to Plumsted [Township] to secure [MVN's] obligations to the Township. MVN agreed to reimburse Amboy for any draws by Plumsted Township on the [LOC]. Defendant Khan personally guaranteed the LOC. Defendants do not challenge the validity of the LOC documents nor do they deny Khan guaranteed MVN' s obligations to Amboy.

Defendants' entire controversy doctrine defense ignores the fact that there is a third-party beneficiary to the [LOC] and that [p]laintiff had no cause of action to raise the [LOC] and LOC Agreement in the prior actions against [d]efendants. Plumsted [Township] is the third-party beneficiary to the LOC. The cause of action under the LOC did not arise until the claim was

made by Plumsted [Township]. It is irrelevant that it was Amboy that initially contacted Plumsted [Township] in order to obtain a release or termination of the LOC. The draw on the LOC arose after the prior actions had been concluded. The LOC expired March 2020 at which time it would automatically renew unless cancelled or terminated. Amboy had no right to unilaterally cancel the LOC without the ability of Plumsted [Township] to draw on it. Until the Township either released Amboy, or drew upon the LOC, this cause of action was not ripe. Accordingly, the [e]ntire [c]ontroversy [d]octrine is not applicable to this action.

It is uncontroverted that Amboy paid \$12,500.00 to Plumsted [Township] pursuant to the LOC it issued. [MVN] claims that it was not notified of Plumsted's demand under the LOC and was not given the opportunity to contest or negotiate with the Township. At the time of the draw, the foreclosure on the property had already occurred. Defendant Khan admitted that the project had not been completed. He knew that there were still outstanding issues. Khan made no attempt to resolve those issues.

The court finds that the entire controversy doctrine is not applicable to this cause of action for the reasons stated above. There is no question that Amboy paid \$12,500.00 to Plumsted Township under the LOC. There is no question that the purpose of the LOC was to secure [d]efendant's completion of site improvements for its approved project. There is no question that [d]efendant Khan personally guaranteed performance under the LOC Agreement. Accordingly, [j]udgment is entered in favor of [p]laintiff Amboy Bank in the amount of \$12,500.00 plus court costs of \$144.00 for a total of \$12,644.00.

Defendants then moved for reconsideration. On September 3, 2021, the court denied reconsideration, finding that defendants did not present any new arguments or evidence. This appeal followed.

Defendants raise the following points for our consideration: POINT ONE

THE TRIAL COURT ERRED BY FAILING TO APPLY THE ENTIRE CONTROVERSY BAR TO PLAINTIFF'S COMPLAINT.

POINT TWO

THE TRIAL COURT ERRED WHEN THE COURT STATED THAT THE SECOND MORTGAGE WAS NOT GERMANE TO AMBOY'S FORECLOSURE ACTION AND THE SECOND NOTE WAS NOT GERMANE TO THE LAW DIVISION.

POINT THREE

THE TRIAL COURT ERRED WHEN THE COURT STATED THAT THE PLAINTIFF HAD NO CAUSE OF ACTION TO RAISE THE LETTER OF CREDIT AND [LETTER OF CREDIT] AGREEMENT IN ITS PRIOR ACTION AGAINST DEFENDANT.

POINT FOUR

THE TRIAL COURT ERRED WHEN IT RULED THAT AMBOY HAD NO RIGHT TO CANCEL ITS LETTER OF CREDIT PRIOR TO PLUMSTED EITHER DRAWING UPON IT OR AGREEING TO CANCEL IT.

We find these arguments unavailing and affirm substantially for the reasons expressed by the court in its comprehensive and cogent statements of reasons granting reconsideration and entering judgment in favor of Amboy. We add the following comments.

Our review of "the findings and conclusions of a trial court following a bench trial" is limited. Allstate Ins. Co. v. Northfield Med. Ctr., PC, 228 N.J. 596, 619 (2017). We do not "engage in an independent assessment of the evidence as if [we] were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1999). Instead, we apply a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 594-95 (2020). We "give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Gripenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015). Deference is likewise given to credibility findings. State v. Hubbard, 222 N.J. 249, 263-64 (2015).

"A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'" State v. Mohammed, 226 N.J. 71, 88 (2016) (quoting State v. Gamble, 218 N.J. 412, 424 (2014))." Thus, "[w]e may not overturn the trial court's factfindings unless we conclude that those findings are 'manifestly unsupported' by the 'reasonably

credible evidence' in the record." Balducci, 240 N.J. at 595 (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)).

However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" and are reviewed de novo. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (alteration in original) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The interpretation of a contract is a legal issue generally subject to de novo review. Balducci, 240 N.J. at 594 (citing Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011)).

"The entire controversy doctrine 'embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court.'" Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019) (quoting Cogdell ex rel. Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989)). "The doctrine 'seeks to impel litigants to consolidate their claims arising from a "single controversy" whenever possible.'" Ibid. (quoting Thornton v. Potamkin Chevrolet, 94 N.J. 1, 5 (1983)).

"Three significant concerns in the administration of justice support claim preclusion under the entire controversy doctrine: '(1) the need for complete and final disposition through the avoidance of piecemeal decisions; (2) fairness to parties to the action and those

with a material interest in the action; and (3) efficiency and the avoidance of waste and the reduction of delay."

[Ibid. (quoting Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 605 (2015)).]

Rule 4:30A codifies the entire controversy doctrine and provides:

Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by [Rule] 4:64-5 (foreclosure actions) and [Rule] 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions).

"The purpose of the doctrine is not to bar meritorious claims." Olds v. Donnelly, 150 N.J. 424, 447 (1997). The Supreme Court "has always emphasized that preclusion is a remedy of last resort. Id. at 446.

"When a court decides whether multiple claims must be asserted in the same action, its initial inquiry is whether they 'arise from related facts or the same transaction or series of transactions.'" Dimitrakopoulos, 237 N.J. at 109 (quoting DiTrollo v. Antiles, 142 N.J. 253, 267 (1995)). "The doctrine does not mandate that successive claims share common legal issues in order for the doctrine to bar a subsequent action." Ibid. "Instead, 'the determinative consideration is whether distinct claims are aspects of a single larger controversy because they arise from interrelated facts.'" Ibid. (quoting DiTrollo,

142 N.J. at 267-68). "It is the core set of facts that provides the link between distinct claims against the same parties . . . and triggers the requirement that they be determined in one proceeding." Wadeer, 220 N.J. at 605 (2015) (alteration in original) (internal quotations omitted) (quoting DiTrolino, 142 N.J. at 272).

The entire controversy doctrine is "an equitable doctrine whose application is left to judicial discretion based on the factual circumstances of individual cases." Dimitrakopoulos, 237 N.J. at 114. The "polestar of the application" of the entire controversy doctrine is "judicial fairness." Wadeer, 220 N.J. at 605 (quoting DiTrolino, 142 N.J. at 271). "The doctrine's equitable nature 'bar[s] its application where to do so would be unfair in the totality of the circumstances and would not promote any of its objectives, namely, the promotion of conclusive determinations, party fairness, and judicial economy and efficiency.'" Dimitrakopoulos, 237 N.J. at 114 (alteration in original) (quoting K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59, 70 (2002)). "In considering whether application of the doctrine is fair, courts should consider fairness to the court system as a whole, as well as to all parties." Id. at 115 (quoting Wadeer, 220 N.J. at 605).

Our careful review of the record convinces us that the judge's factual findings at issue are supported by sufficient credible evidence in the record. We are likewise convinced that the entire controversy doctrine does not preclude this action. No draw amount on the LOC was outstanding in either 2016 or 2017. The LOC was not drawn upon until 2020. Therefore, there was no cause of action for any sums due on the LOC in 2016 or 2017. Accordingly, no claim against defendants under the LOC had accrued during that period.

Moreover, Amboy did not request Plumsted Township to release the LOC until August 15, 2019. The LOC's maturity date was March 11, 2020. This too occurred long after the foreclosure and Law Division actions were filed and concluded with finality.

In addition, Rule 4:64-5 states:

Unless the court otherwise orders on notice and for good cause shown, claims for foreclosure of mortgages shall not be joined with non-germane claims against the mortgagor or other persons liable on the debt. Only germane counterclaims and cross-claims may be pleaded in foreclosure actions without leave of court. Non-germane claims shall include, but not be limited to, claims on the instrument of obligation evidencing the mortgage debt, assumption agreements and guarantees.

"[T]he entire controversy doctrine applies to foreclosure actions, but only to claims that could have been filed in the foreclosure action, that is, only to

claims that were germane to the foreclosure proceeding." Delacruz v. Alfieri, 447 N.J. Super. 1, 12 (Law. Div. 2015). We review a judge's decision relating to germane claims de novo, as it is a legal issue. Joan Ryno, Inc. v. First Nat'l Bank, 208 N.J. Super. 562, 570 (App. Div. 1986).

Here, the monies due on the LOC were not germane to the foreclosure. In addition, the foreclosure was filed in 2016 and final judgment was entered in favor of Amboy on October 28, 2016. As we have noted, there was no money due on, or breach of, the LOC until 2020. Amboy's claims against defendants under the LOC had not yet accrued during the pendency of the foreclosure action.

We reach a similar conclusion regarding the Law Division action. It was filed in 2017 and the second amended judgment was entered in favor of Amboy on February 17, 2017. Accordingly, Amboy's claims against defendants under the LOC had not yet accrued during the pendency of the Law Division action and could not have been included in that action.

Finally, by any measure, fairness considerations militate strongly in favor of not applying the entire controversy doctrine to this case. Amboy's claims against defendants were clearly meritorious. Applying the doctrine to claims that had not yet accrued and were not ripe would make no sense.

Defendants' arguments lack sufficient merit to warrant further discussion
in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION