SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2914-20

CROWN BANK,

Plaintiff-Respondent,

v.

HOTEL INVESTORS, LLC,

Defendant-Appellant,

and

LINUS VENTURES, LLC, a/k/a LINUS HOSPITALITY, LLC, a/k/a LINUS PROPERTIES, LLC, DIGVIJAY GAIKWAD, VEDANSHI INVESTMENTS LIMITED LIABILITY COMPANY, SAMIR DESAI, SANDEEP PATEL, E & N CONSTRUCTION, INC., QUAKER WINDOW PRODUCTS CO., INC., CITY ERECTORS, INC., AA CONSTRUCTION 1 CORPORATION, NATIONAL PLUMBING AND HEATING, INC., a/k/a NATIONAL PLUMBING AND HEATING, INC., HARTER EQUIPMENT, INC., AMERTECH

ENGINEERING, INC., and
STATE OF NEW JERSEY,

Defendants.

Submitted May 25, 2022 – Decided June 13, 2022

Before Judges Whipple, Geiger, and Susswein.

On appeal from the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. F-020243-18.

Archer & Greiner, PC, attorneys for appellant (Jerrold S. Kulback, on the briefs).

Windels Marx Lane & Mittendorf, LLP, attorneys for respondent (Douglas A. Stevinson, of counsel and on the brief).

PER CURIAM

In this commercial mortgage foreclosure action, defendant Hotel Investors, LLC (defendant)[1] appeals from the following orders and judgments: (1) a March 1, 2019 order striking defendant's answer, dismissing defendant's separate defenses, and transferring this action to the Office of Foreclosure; (2) a March 19, 2019 final judgment of foreclosure; (3) a May 25, 2021 order denying reconsideration and vacating final judgment; (4) a May 25, 2021 order

[1] For ease of reference, we refer to Hotel Investors, LLC as defendant in this opinion. We refer to the other defendants by name.

granting plaintiff's motion to amend the final judgment of foreclosure and writ of execution; and (5) a June 1, 2021 amended final judgment of foreclosure. We affirm the trial court's decisions, including the amended final judgment of foreclosure and the denial of defendant's motion for reconsideration.

We take the following facts from the record. On April 12, 2013, plaintiff Crown Bank extended two commercial loans to defendant to fund the construction of hotels in Monroe and South Brunswick Townships. The first loan was in the principal amount of $6,020,718 and was secured by a recorded first lien position construction mortgage affecting Block 55, Lot 9.07 of Monroe Township and Block 8, Lot 3.012 of South Brunswick Township, an area known as Interchange Plaza. The second loan was in the principal amount of $3,612,431 and was secured by a recorded second lien position construction mortgage affecting Interchange Plaza.

Plaintiff and defendant also entered into construction loan agreements for each of the loans. In 2015, defendant defaulted by failing to pay its vendors for work performed on construction projects. On February 16, 2016, plaintiff and defendant entered into the first modified loan agreement, which extended the loans' maturity to September 2, 2016. The modification agreement stated:

> Crown Bank has previously issued a Default Notice dated January 19, 2016 to the Borrower which the

> Borrower acknowledges and agrees the default has occurred per the note and mortgage and agrees the Bank is entitled to charge the default rate. However, Crown Bank agrees not to collect or impose the default rate of interest at this time as long as there is no default under the "Loan documents" or this "Agreement" going forward.

On November 10, 2016, defendant failed to pay real estate taxes falling due on the mortgaged premises, which resulted in a municipal tax lien of $7,011.87. On December 1, 2016, plaintiff and defendant entered into a second modification agreement after defendant failed to remit four consecutive loan payments and requested to extend the maturity date of the first and second loan agreements to complete the construction. The agreement also required defendant to retain a new contractor and to obtain a Certificate of Occupancy and required plaintiff to make advances to the new contractor.

As part of the agreement, defendant stipulated to the outstanding principal amounts due under the loans and agreed that "there [we]re no setoffs, rights, claims or causes of action of any nature whatsoever" against plaintiff. Defendant further agreed it would discharge or reserve mechanics liens and bring taxes current. Defendant "waive[d] the right to object to and consent[ed] to [plaintiff] filing a foreclosure action in the event of default under the Loan

documents which [is] not . . . cured within twenty-one . . . days of notice to [defendant]."

Plaintiff agreed to make advances to Arcon Hybrid Construction, Inc. (Arcon), the new contractor, for not less than five units at a time in accordance with the loan agreement. Arcon submitted payment applications in February 2017 and ultimately stopped work in August 2017 until payment was received. Defendant contends the failure to make payments to Arcon constituted a breach of the loan agreement, evidenced by emails between plaintiff and Arcon.

Between 2016 and 2018, defendant entered into multiple construction contracts for the project that it failed to pay, resulting in multiple construction liens on the mortgaged premises, in default of the loan agreement.

In September 2017, plaintiff sent defendant a letter agreeing to an additional modification to extend construction to March 2, 2018 but noting that the loans and modifications otherwise remained the same. The modification letter required defendant to provide proof that the Amertech Engineering Inc. judgment against defendant was "discharge[d]" by September 20 or plaintiff could apply the default interest rate.

On April 9, 2018, plaintiff issued a notice of default to defendant based on defendant's failure to pay real estate taxes, pay off the loan by the maturity

date, satisfy construction liens, keep funds in escrow, and deliver SBA approvals. On October 4, 2018, plaintiff filed a complaint to foreclose the two mortgages based on those defaults. In a subsequent letter to defendant, plaintiff provided the following payoff breakdown as of November 20, 2018, and stated that additional interest accrued thereafter at the rate of $3,203.57 per day:

Outstanding Principal	$8,387,535.36
Accrued Interest	$1,892,386.14
Late Charges	$23,108.25
Escrow	($240.19)
Prepayment Premium	$419,376.77
Less Payments	($975,153.10)
Less Interest Reserve	($528,307.64)
Balance	$9,218,705.59

On November 21, 2018, defendant filed a contesting answer stating that the loan documents and modification agreements speak for themselves, denying some of the defaults alleged, and generally denying the remainder. The answer also asserted various affirmative defenses, including:

> 8. Plaintiff breached the terms of the loan documents, including but not limited to failing to timely fund construction costs in accordance with the terms thereof.
>
> 9. Default interest and/or pre-payment fees which Plaintiff seeks to collect are unenforceable penalties and cannot be retroactively imposed as alleged in the Complaint.

Due to the contested answer, the Office of Foreclosure returned the case to the Chancery Division. On December 3, 2018, the trial court entered a case management order setting a discovery schedule with a discovery end date of March 4, 2019.

On December 19, 2018, plaintiff filed a motion to strike defendant's answer and to remand this matter to the Office of Foreclosure as an uncontested case. The motion was filed prior to providing any discovery to defendant. The motion was supported by tax and title searches that listed the tax liens, construction liens, and junior liens against the mortgaged premises. Plaintiff claimed that defendant was in default due to tax liens and construction liens, providing a prima facie case for foreclosure.

Defendant opposed the motion, arguing the motion was both premature because of the unanswered discovery and inappropriate because there were genuine issues of material facts regarding plaintiff's breach of the loan documents. Defendant provided a counter statement of facts. Plaintiff filed a reply that included exhibits showing payments and advances.

On January 25, 2019, the court heard oral argument on the motion. As to the alleged breaches by plaintiff, the court pressed defense counsel for an explanation of what defendant was contesting. Counsel responded, "the bank

didn't properly fund the construction costs and breached the loan agreements between the parties which resulted in delays on the project, additional costs to my client, construction liens being placed on the properties, and affected . . . the overall cash flow to the project." Defendant's counsel acknowledged that defendant was not contesting the loan documents. Defendant's answer denied that defendant "caused various events of default to occur under the loan documents including failing to keep real estate taxes on the premises current." It further denied defendant was "in default for failure to . . . cover the shortfalls to complete the construction projects." Defendant alleged that plaintiff "failed to properly and timely fund the construction costs." Counsel noted that defendant served discovery in accordance with the management order and had not received plaintiff's responses, which were not yet due.

Plaintiff responded that issues with a contractor were not relevant to the right to foreclose since defendant admitted it was in default of the modification agreement, thereby permitting plaintiff to foreclose.

The court adjourned the motion for fourteen days to allow defendant time to submit additional pleadings and opposition setting forth facts bolstering its denials and allegations that plaintiff was in breach. If defendant did so, the court stated it would allow discovery on those issues.

Defendant filed a supplemental certification, with exhibits, including emails from Modular Steel Systems (MSS), regarding unreasonable delays in payment by plaintiff, causing MSS to stop working. However, the emails do not clearly identify whether payment was due from defendant or directly from plaintiff. The combined submissions acknowledged that defendant did not repay the loans at maturity but blamed plaintiff for failing to timely fund approximately $10,000 in certain general condition requisitions, which plaintiff had refused because of the lack of ongoing construction

In reply, plaintiff submitted proof of loan advances that fully complied with the second loan modification funding requests. Plaintiff denied it was obligated to fund costs that were not earmarked for a single contractor. It noted the $700,000 in liens filed by contractors. Despite the breach, plaintiff provided an additional $2 million in funding for the project, portions of which "went to facade work, roof work, site work, and windows . . . . [Which were] the same lien claims that [defendant was] saying [it] never got paid." As to the amount of default interest, plaintiff argued that the amount of interest owed is for the Office of Foreclosure to determine, and if there was a dispute, there would be a return to court.

The court reasoned that plaintiff's lack of payment was just a failure to fund but not a breach of the loan agreement because: 1) defendant failed to perform its conditional obligations, and 2) the contractor was not a party to the loan agreement. The court granted the motion to strike the answer and referred the matter to the Office of Foreclosure.

Rather than contesting the amount of default interest in court, on July 12, 2019, the parties signed a letter agreement, stating that terms were binding "notwithstanding the fact that the terms will be reduced to a more formal writing in the form of a forbearance agreement." As stated in the letter, the parties agreed to the following terms:

> 1. Crown Bank shall proceed with the foreclosure uncontested;
>
> 2. A consent judgment for the full amount owed ($10,011,024.27 as of June 26, 2019 plus per diem interest at the default rate) will be placed in escrow (held by [Bank counsel]). The parties understand and agree that the bank will commence an action in the Law Division; that [defense counsel] will be authorized to accept service thereof; and the case will be immediately resolved through the entry of the Consent Judgment to be held in escrow as set forth herein;
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> 3. The amount of the foreclosure judgment will be for the full amount authorized under the note ($10,011,024.27 as of June 26, 2019 plus per diem interest at the default rate);

4. Borrower/guarantors will have the option to pay the loan off within 120 days (Friday, November 8, 2019) for the discounted amount of $9,181,400.00 of principal and regular interest on the note in the amount of $257,442 for a total discounted payoff of $9,438,842.00[] (the "Discounted Payoff Amount"), which must be paid on or before 6:00 p.m. Friday November 9, 2019, TIME BEING OF THE ESSENCE). If the Discounted Payoff Amount is tendered prior to the 120th day, the Bank will credit the Borrowers/guarantors for any unearned interest that was to accrue in the 120 days following today;

5. Any protective advances made by Crown Bank after today will be added to the $9,438,842.00 discounted payoff figure and also to the total amount due entered by the Court ($10,011,024.27 as of June 26, 2019 plus per diem interest at the default rate);

6. The Bank will agree not to take the property to Sheriff's Sale or to start collection proceedings on the notes during the 120 day period (through Friday, November 9, 2019) (hereinafter referred to as the "Forbearance Period");

7. Provided Borrowers make payment during the Forbearance Period in an amount no less than the Discounted Payoff Amount less $2,500,000.00 (plus any additional protective advances as set forth in ¶5 above), the Bank will agree to subordinate its mortgage liens to second and third position respectively to allow a first mortgage lien to be placed against the Mortgaged Property in an amount not to exceed $13,000,000.00 provided further that the Borrower agrees to use the funds from such money for the following purpose only (and in the following order): (i) Borrower's reduction of Crown Bank's loan to $2,500,000.00; then (ii) to fund approximately $775,000.00 in an interest reserve

> dedicated to make interest payments to the new lender; and the balance (iii) to be used to finish the project and satisfy any existing construction liens recorded against the mortgaged property. . . . NOTE: to accommodate this provision, the parties will agree to an acceptable means of resolving any final judgment of foreclosure that may be obtained during the Forbearance Period including, but not limited to vacating the final judgment of foreclosure if necessary. . . .
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> . . . .
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> 9. The Bank will allow the Borrowers to bring in an investor who will inject $1,500,000.00 into the project in exchange for an ownership interest (not to exceed 20%) in Hotel Investors, LLC. To the extent the cost to complete construction is less than the anticipated $1,500,000.00 in equity infusion, the investor's percentage equity interest in Hotel Investors, LLC shall be decreased accordingly.

Despite the agreement, defendant raised additional disputes. The Office of Foreclosure declined to enter final judgment "because of the requested interest rates sought."

On November 19, 2019, plaintiff filed an application for final judgment of foreclosure in the amount of $10,011,024.27, which included certifications of amount due, interest calculations, and itemized protective advances. Defendant filed opposing papers that contended 1) plaintiff was not entitled to the default interest retroactive to January 1, 2017, because plaintiff waived the same under the September 13, 2017 letter agreement by letting defendant pay the extension

fee and discharge the Amertech judgment, and 2) plaintiff's calculation of the principal amount due was overstated because it improperly included checks for $142,760.05 that were never negotiated by the contractors, resulting in plaintiff improperly charging Dutch interest. In its reply, plaintiff contended the July 12 agreement was binding, and submitted exhibits evidencing the deteriorated and unsecure status of construction, a new tax lien, and the amounts due.

On December 23, 2020, a different judge heard oral argument and asked plaintiff to address whether the default interest rate is a penalty. Plaintiff asserted it is not because a five-percent default rate is per se reasonable under MetLife[2] and was provided for in the July 12 stipulation and loan documents. Defendant responded that it was "contesting the retroactive default interest." When the court questioned whether the September 2017 letter agreement was conditioned on no other defaults, plaintiff responded that there were two separate agreements and that the second did not replace the first, so plaintiff sought default interest back to 2017 pursuant to the 2016 agreement.

Defense counsel noted there was supposed to be a more formal July 12 agreement, and that plaintiff breached the covenant of good faith by scaring away a potential investor. Plaintiff's counsel replied this issue was resolved in

[2] MetLife Cap. Fin, Corp. v. Wash. Ave. Assocs. L.P., 159 N.J. 484, 501 (1999).

2019, when a Law Division consent judgment was entered for $10,011,024.27 plus per diem interest at the default rate, based on the signed and binding July 12 settlement agreement. Counsel reminded the court that this was an in rem proceeding and that defendant could still explore money judgments in the Law Division.

On March 19, 2021, the court entered a final judgment of foreclosure and writ of execution with an accompanying statement of reasons. As to the first mortgage, the court determined that plaintiff was entitled to $3,982,387.06 plus lawful interest from February 25, 2021. On the second mortgage, plaintiff was entitled to $7,910,750.82 plus lawful interest from February 25, 2021.

The court concluded that the July 12 agreement was binding as to the right to foreclose and the amount, explaining:

> Defendant signed a settlement agreement with the [p]laintiff that stipulated that the [p]laintiff would proceed with the uncontested foreclosure to obtain the agreed upon amount. After filing a motion for final judgment of foreclosure, the [d]efendant opposed the motion. The [d]efendant had the burden to prove that the terms of the agreement were incorrect or unreasonable, however it failed to meet its burden. . . .

On April 8, 2021, defendant filed a motion for reconsideration that raised the same arguments it advanced in opposition to the motion. Defendant asserted that the reasonableness of a retroactive interest rate was not considered in

MetLife or Mony Life Ins. Co. v. Paramus Parkway Bldg., Ltd., 364 N.J. Super. 92, 106 (App. Div. 2003). Defendant contended the court should reconsider the reasonableness of the retroactive interest rate and the inflated principal because the credit shown in the schedule did not account for the interest and default interest accrued on the checks never cashed, resulting in improper Dutch interest.

Plaintiff opposed the motion and cross-moved to amend the final judgment and writ of execution to correct a clerical error. Plaintiff asserted:

> 17. The only other differences in the calculations between the agreed upon $10,011,024.27 stipulated sum set forth in the [July 12] settlement agreement and the Final Judgment entered by the [c]ourt are: (i) the additional per diem interest that had accrued between June 26, 2019 and February 25, 2021; (ii) a downward adjustment (deduction) of a late charge posted after this case commenced; and (iii) the [five percent] prepayment premium on the $81,747.90 increased principal balance attributable to the subsequent protective advance referenced in ¶15 above. See Exhibit E at Schedule A.
>
> 18. Because the [d]efendant . . . stipulated to the total amounts due and owed as of June 26, 2019, which calculated default interest as of January 1, 2017, there is no basis for them to ask that the Court to reconsider that issue.
>
> 19. Similarly, there is no basis for the [d]efendant to challenge the prepayment premium when they

> stipulated to its applicability in the July 12, 2019 settlement agreement.

During oral argument, defendant asserted that it was not challenging the default rate, just the retroactivity to January 2017 when the loan matured in 2018 and the complaint was filed in October 2018, because plaintiff was relying on 2016 construction liens that the Bank failed to fund.[3] Defendant acknowledged the July 12 letter agreement, but contended it was supposed to be formalized, which plaintiff failed to do, and that plaintiff ultimately breached it by failing to approve an investor. Defendant offered "newly discovered evidence for reconsideration . . . that the [B]ank had actually participated its loan . . . under the EB-5 program, and is now being sued by that participant for breaching the participation agreement, including failing to accept the investors . . . ."

Plaintiff maintained that the foreclosure and amounts, including interest, were entirely resolved under the July 12 agreement for $10,011,024.27 plus interest at the default rate through the date judgment was entered, plus a protective advance for insurance that was added to the principal balance.

[3] Defendant added that the September 2017 agreement stated that non-default interest would apply if defendant showed it discharged the Amertech judgment. It claims that condition was satisfied when the judgment "deleted" by another judge. The court questioned whether "deletion" constituted a discharge, but plaintiff has not asserted that defendant failed to satisfy the Amertech condition.

The court granted the unopposed cross-motion to amend the final judgment of foreclosure and writ of execution to reflect the correct amounts. The court stated it considered the evidence submitted in granting final judgment and that the new EB-5 program lawsuit is not a basis for reconsideration.

On May 25, 2021, the court entered orders denying the motions for reconsideration and to vacate the final judgment, and granting plaintiff's unopposed cross-motion to amend the final judgment of foreclosure and writ of execution to reflect the correct identifications of which loan was first and which was second. The court stated it considered the evidence submitted in granting final judgment and that the new EB-5 program lawsuit was not a basis for reconsideration. On June 1, 2021, the court issued an amended final judgment and writ of execution. This appeal followed.

Defendant raises the following points for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED BY GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S ANSWER.
>
> > A. Defendant's Answer Sufficiently Set Forth the Affirmative Defense of Breach of the Loan Documents as to Constitute a Contesting Answer.
> >
> > B. Any Grant of Summary Judgment by the Trial Court Was Premature.

POINT II

THE AMOUNT OF THE FINAL JUDGMENT IS INCORRECT.

A. The Trial Court Improperly Awarded Retroactive Default Interest.

i. Retroactive Default Interest is an Unenforceable Penalty.

ii. Plaintiff Waived Retroactive Default Interest.

B. The Trial Court Improperly Awarded "Dutch" Interest.

C. The July 12th Letter Agreement Should Not Be Enforced.

i. The July 12th Letter Agreement Lacked Essential Terms.

ii. Plaintiff Breached the July 12th Settlement Letter.

A reviewing court should not consider issues not properly presented to the trial court, Zaman v. Felton, 219 N.J. 199, 226-27 (2014). Plaintiff argues defendant did not properly raise the validity of the July 12 letter agreement before the trial court. We disagree. On the contrary, the record reflects that plaintiff's motion for entry of final judgment did not reference the July 12 letter agreement. Defendant opposed the motion, challenging the amounts claimed

due by plaintiff for retroactive default interest and alleged inflated principal. Plaintiff first mentioned the July 12 letter agreement in its reply to defendant's opposition. Defendant argued against the agreement's enforceability during oral argument of the motion, alleging plaintiff breached the agreement and the amounts claimed due were incorrect. However, at that point, defendant had not yet alleged the July 12 letter agreement lacked essential terms.

The general issue of the July 12 letter agreement's enforceability and applicability is properly before us because it was presented to the second judge, who explicitly considered and relied on its enforceability and applicability.

In contrast, the defense that the July 12 letter agreement lacked essential terms was first raised on appeal. We decline to address that issue. See Goldsmith v. Camden Cnty. Surrogate's Office, 408 N.J. Super. 376, 387-88 (App. Div. 2009) (a reviewing court will not consider an issue raised for the first time in a reply brief that does not present a matter of great public interest). Similarly, defendant first raised its argument on appeal that it was entitled to a plenary hearing on the issue of plaintiff's breach of the July 12 letter agreement. We also decline to consider that issue.

We review a decision granting a motion for entry of a final judgment of foreclosure for abuse of discretion. Customer's Bank v. Reitnour Inv. Props.,

LP, 453 N.J. Super. 338, 348 (App. Div. 2018). We likewise review the grant of a motion to amend a final judgment for abuse of discretion. Ibid. "Although the ordinary 'abuse of discretion' standard defies precise definition, it arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Ibid. (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

We will not disturb a trial court's factual findings that are supported by the record. Balducci v. Cige, 240 N.J. 574, 595 (2020). We review legal issues de novo. See Manalapan Realty, LP v. Twp. Comm., 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

"A settlement agreement between parties to a lawsuit is a contract." Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). "The interpretation of a contract is subject to de novo review by an appellate court." Kieffer v. Best Buy, 205 N.J. 213, 222 (2011). "Accordingly, we pay no special deference to the trial court's interpretation and look at the contract with fresh eyes." Id. at 223. "Unless there is 'an agreement to the essential terms' by the parties, however, there is no settlement in the first instance." Cumberland Farms, Inc. v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 438-39 (App. Div. 2016) (quoting Mosley v. Femina

Fashions Inc., 356 N.J. Super. 118, 126 (App. Div. 2002)). "A contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)).

"Where the parties agree upon the essential terms of a settlement, so that the mechanics can be 'fleshed out' in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact the writing does not materialize because a party later reneges." Lahue v. Pio Costa, 263 N.J. Super. 575, 596 (App. Div. 1993) (quoting Bistricer v. Bistricer, 231 N.J. Super. 143, 145 (Ch. Div. 1987)). "The burden of proving that the parties entered into a settlement agreement is upon the party seeking to enforce the settlement." Cumberland Farms, 447 N.J. Super. at 438 (citing Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 475 (App. Div. 1997)). We will not interfere with a trial judge's factual findings and conclusions concerning a settlement agreement that are amply supported by the record. Lahue, 263 N.J. Super. at 597 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 483-84 (1974)).

The clear and unambiguous terms of the July 12 letter agreement expressly allowed plaintiff to "proceed with the foreclosure uncontested;" to place a

"consent judgment for the full amount owed ($10,011,024.27 as of June 26, 2019 plus per diem interest at the default rate)" in escrow; and to "commence an action in the Law Division; . . . [which] will be immediately resolved through the entry of the Consent Judgment to be held in escrow as set forth herein . . . ." By entering into the settlement agreement in exchange for a discounted payoff amount, defendant effectively waived its right to contest striking its answer in the foreclosure action.

"The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of the indebtedness, and the right of the mortgagee to" foreclose on the property. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542, 547 (App. Div. 1994). Non-germane claims against the plaintiff shall not be joined in a foreclosure action. R. 4:64-5. A germane defense is one that affects the validity or invalidity of the mortgage itself. See Family First Fed. Sav. Bank v. DeVincentis, 284 N.J. Super. 503, 512 (App. Div. 1995).

Defendant argues that plaintiff breached the agreement in bad faith by not considering the Exos Commercial Finance, LLC (Exos) investment. Exos was "to provide a bridge loan to [d]efendant in the amount of $18,475,000 to complete construction with $9,705,068 being used to repay the existing" debt.

We recognize that upon "a breach of a material term of an agreement, the non-breaching party is relieved of its obligations under the agreement." Nolan, 120 N.J. at 472; see also Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 341 (1961) ("If the breach is material, i.e., goes to the essence of the contract, the non-breaching party may treat the contract as terminated and refuse to render continued performance."). Defendant has not shown there was a material breach of the settlement agreement. The existence of an additional investor does not go to the essence of a contract to settle this foreclosure action.

The amount due set forth in the amended final judgment is supported by the record. We discern no abuse of discretion. Customer's Bank, 453 N.J. Super. at 348.

Having carefully reviewed defendant's arguments in light of the record and applicable legal principles, we conclude that there is ample evidence supporting the trial court's determination that the mortgage was valid, and that plaintiff had the right to foreclose due to defendant's failure to pay off the loan upon maturity, the construction liens, and the real estate tax liens. The loans matured on March 2, 2018. Plaintiff provided notice of the default on April 9, 2018.

Defendant did not contest the validity of the loan documents and mortgage, its default, or plaintiff's standing to foreclose. Defendant admitted to unpaid taxes and construction liens filed against the property. Given these uncontroverted facts, plaintiff established a prima facie case for foreclosure.

The court considered the default interest rate, applicable law, the reasonability test, and whether the rates were punitive and thereby unenforceable. The court correctly entered final judgment against defendant. The court noted that default rates are commonly accepted as a means for lenders to offset a portion of the damages created by delinquent loans. Here, the default interest rate was five percent higher than the contract rate. The court analyzed the relationship between the parties and determined the default rate was like that in Mony, which was "only part of a complex commercial contract that was negotiated at arms-length between financially experienced and sophisticated parties." (quoting Mony Life Ins., 364 N.J. Super. at 106). The court noted that defendant had the burden of proving the default rate was unreasonable. Because the parties agreed upon the rate it is presumed to be reasonable. Defendant claimed a three percent increase was reasonable. Given the amount of the indebtedness involved, the court found the negotiated default rate was reasonable.

The court rejected defendant's argument that the default rate should not be retroactive, noting defendant cited no case law in support of its argument. The court likewise rejected defendant's claim that plaintiff inflated the principal balance because the non-negotiated checks were not disbursed by plaintiff, because the court found a $142,760.05 credit was applied for "[c]hecks never cashed."

The amended judgment and writ of execution reflected the correct amounts due on the mortgage based on the default rate. The court's findings are supported by the record and its legal conclusions are consonant with applicable law. The amended final judgment is affirmed.

We next address the denial of defendant's motion for reconsideration. "Our [c]ourt [r]ules permit reconsideration of a trial court's decision if the aggrieved party 'states[s] with specificity the basis on which [the motion for reconsideration] is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.'" Kornbleuth v. Westover, 241 N.J. 289, 301 (2020) (third and fourth alterations in original) (quoting R. 4:49-2). "[A] reconsideration motion is primarily an opportunity to seek to convince the court that either 1) it has expressed its decision upon a palpably irrational basis, or 2) it is obvious that

the court either did not consider, or failed to appreciate the significance of probative, competent evidence.'" Ibid. (quoting Guido v. Duane Morris LLP, 202 N.J. 79, 87-88 (2010)). "We will not disturb the trial court's reconsideration decision 'unless it represents a clear abuse of discretion.'" Ibid. (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994)).

Reconsideration is not appropriate where the movant simply repeats the same arguments it made in opposition to the original motion. Rule 4:49-2 does not provide an opportunity for the proverbial second bite of the apple. Nor does it permit reconsideration based on facts or arguments that could have been raised in opposition to the original motion but were not.

Defendant has not demonstrated that the denial of its motion for reconsideration was an abuse of discretion. Defendant's argument for reconsideration does not fall within the narrow corridor for such relief. For the reasons we affirmed the amended final judgment of foreclosure, we affirm the denial of defendant's motion for reconsideration.

Affirmed.