NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

BERNARD MEYERS Appellee v. PETTINARO ENTERPRISES, LLC AND IRON OAK DEVELOPMENT, LLC APPEAL OF: PETTINARO ENTERPRISES, LLC	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1894 EDA 2012

Appeal from the Judgment Entered May 31, 2012
In the Court of Common Pleas of Chester County
Civil Division at No(s): 09-14805-CA

BEFORE: GANTMAN, J., ALLEN, J., and OTT, J.

MEMORANDUM BY GANTMAN, J.: **FILED MAY 30, 2013**

Appellant, Pettinaro Enterprises, LLC, appeals from the summary judgment entered in the Chester County Court of Common Pleas in favor of Appellees, Bernard Meyers and Iron Oak Development, LLC, in this breach of contract action. We affirm.

In its opinion, the trial court correctly sets forth the relevant facts of this case as follows:

> In November of 2005, Iron Oak Development, LLC, (Iron Oak) entered into an agreement of sale (Agreement) for a 32 acre parcel from Sher-Rockee Mushroom Farms, LLC, (Sher-Rockee) located in Upper Oxford Township, Chester County. In April of 2006, Iron Oak assigned to [Appellant] (Assignment) the Agreement for $850,000. [Appellant] assumed Iron Oak's obligations to obtain all land development approvals and construct a commercial shopping center on the property. Iron Oak retained the

> obligation to obtain sewer approvals by October 1, 2009. In September of 2007, Iron Oak used the future payment of $850,000 from [Appellant] as collateral to borrow money from [Meyers] and executed a Collateral Assignment of the Assignment of the agreement of sale (Collateral Assignment) to Meyers, which was acknowledged in writing by [Appellant]. This Collateral Assignment granted Meyers a security interest in Iron Oak's future Assignment payment from [Appellant] as collateral for loans from [Appellee] to Iron Oak.
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> [Appellant] was not able to obtain the necessary zoning law changes, variances, and land development approvals to construct the commercial shopping center by December of 2007. Since [Appellant] was unable to obtain the necessary land development approvals required, it was impossible for Iron Oak to obtain the sewer approvals under its retained obligation. In March of 2008, [Appellant] exercised its right to terminate Assignment from Iron Oak: "…for the reason that in [Appellant's] reasonable determination [Appellant] has determined that Iron Oak will be unable to obtain the sewer approvals on or before October 1, 2009, and that the costs to obtain the sewer approvals and construct the sewer facilities will exceed the sum of $1,000,000 and therefore cannot satisfy the conditions in Section 7.3 of the Agreement." However, Section 7.3 of the Assignment gives [Appellant] the ability to terminate only if it reasonably determines that the sewer costs will exceed $1,000,000 plus the Assignment consideration. [Appellant's] failure to obtain the land development approvals precluded Iron Oak from being able to obtain the sewer permits by October 1, 2009. As such, Iron Oak did not default under the agreement despite [Appellant]. However, [Appellant] did properly terminate the Assignment, but such termination was not because of Iron Oak's default. [Appellant] was permitted to terminate the Assignment because of increased sewer costs since pursuant to paragraph 4.5 of that Assignment, [Appellant] was obligated to fund the project or reimburse Iron Oak for sewer costs in excess of $1,000,000.

(Trial Court Amended Order and Opinion, filed May 31, 2012, n.1 at 1-2).

On December 17, 2009, Meyers sued Appellant for breach of contract.

Appellant filed an answer with new matter denying any breach of contract or liability to Meyers. Appellant filed a joinder complaint against Iron Oak on June 7, 2010. Appellant filed a motion for summary judgment on November 15, 2011. On December 9, 2011, Meyers filed a cross motion for summary judgment; and Iron Oak followed with its own motion for summary judgment on December 12, 2011.

On May 2, 2012, the court denied Appellant's motion for summary judgment and granted summary judgment in favor of Meyers and Iron Oak. Appellant filed a motion for reconsideration on May 15, 2012. The court entered an amended order and opinion on May 31, 2012. On June 27, 2012, Appellant timely filed a notice of appeal. The court ordered Appellant on June 29, 2012, to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant complied.

Appellant raises the following issues for our review:

> DID THE TRIAL COURT COMMIT AN ERROR OF LAW AND ABUSE ITS DISCRETION IN MAKING UNSUPPORTED FACTUAL FINDINGS IN THE CONTEXT OF SUMMARY JUDGMENT PROCEEDINGS?
>
> DID THE TRIAL COURT COMMIT AN ERROR OF LAW IN FAILING TO FIND THAT, AS A RESULT OF IMPOSSIBILITY, THE ASSIGNMENT AGREEMENT WAS DISSOLVED AND ALL CONTRACTUAL OBLIGATIONS ENDED?

(Appellant's Brief at 5).

Our standard of review of an order granting summary judgment requires us to determine whether the trial court abused its discretion or

committed an error of law. ***Mee v. Safeco Ins. Co. of America***, 908 A.2d 344, 347 (Pa.Super. 2006). Whether there are genuine issues as to any material fact is "a question of law, and therefore, on that question our standard of review is *de novo.*" ***Summers v. Certainteed Corp.***, 606 Pa. 294, 307, 997 A.2d 1152, 1159 (2010). Our scope of review is plenary. ***Pappas v. Asbel***, 564 Pa. 407, 418, 768 A.2d 1089, 1095 (2001), *cert. denied*, 536 U.S. 938, 122 S.Ct. 2618, 153 L.Ed.2d 802 (2002).

Summary judgment is appropriate only where the record demonstrates no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. ***Summers***, ***supra*** at 307, 997 A.2d at 1159. The non-moving party, who bears the burden of proof on either the claim or the defense, must adduce sufficient evidence on an issue essential to his case to require the issue to go to a jury and allow a jury to return a verdict in favor of the non-moving party. Pa.R.C.P. 1035.2(2). Failure to adduce this evidence establishes there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. ***InfoSAGE, Inc. v. Mellon Ventures, L.P.***, 896 A.2d 616, 626 (Pa.Super. 2006).

In its first issue, Appellant contends Iron Oak did not proceed with its own obligation to obtain approvals and build sewers as required by the Assignment Agreement. Appellant insists Iron Oak's obligations were not contingent on Appellant's ability to obtain land development approval. Appellant declares Iron Oak failed to take any material steps toward achieving its obligations to sewer the property and by, March 2008, it was apparent to Appellant that Iron Oak would be unable to construct the sewer facilities by October 1, 2009. Appellant argues Iron Oak's lack of conduct amounted to default, which entitled Appellant to terminate the Assignment. Appellant asserts the court improperly granted summary judgment based on a factual finding that Iron Oak was not in default as of March 2008. Appellant concludes we should reverse the summary judgment. We disagree.

Instantly, with respect to Appellant's first issue, the court stated:

> At issue in this matter is [Section] 8.4 of the Assignment which states that if [Appellant] terminates the Assignment for any reason other than Iron Oak's default, and thereafter [Appellant] or any person or entity related to [Appellant], purchases the Sher-Rockee parcel, that subsequent purchase shall be given the same economic effect as if the purchase had been effected by settlement under the Assignment.
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> That language then requires [Appellant] to pay Iron Oak the $850,000 Assignment consideration (less $25,000 deposit that [Appellant] had previously paid to Iron Oak). [Appellant] is therefore obligated to pay the entire $850,000 Assignment consideration because entities entitled Queen Theater, LP, and Queen Theater, LLC, purchased the 32 acre Sher-Rockee parcel pursuant to an

> agreement of sale dated March 31, 2008. Queen Theater, LP, and Queen Theater, LLC, are entities related to [Appellant]. Since Iron Oak did not default under the Assignment, pursuant to Meyers' Collateral Assignment, Meyers can enforce any of the rights of Iron Oak against [Appellant] contained in the Assignment. [Appellant] owes Iron Oak an additional $825,000 pursuant to the Assignment and Meyers has a security interest in that $850,000 payment pursuant to the Collateral Assignment. Despite the fact that Iron Oak did not pursue its Assignment rights against [Appellant], Meyers is not precluded from doing so.
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> [Meyers'] entitlement of relief is brought about solely as a result of [Appellant's] conduct. [Appellant] made it impossible for Iron Oak to either obtain the sewer approvals by October 1, 2009, or attempting to relieve itself of its obligations by terminating the Assignment for a spurious reason before Iron Oak's performance date. Section 7.3 of the Assignment did not provide [Appellant] with the right to reasonably determine when Iron Oak breached its obligations. Iron Oak's performance was dependent upon [Appellant's] ability to get land development approvals. [Appellant] then exposed itself to the damages awarded herein through Section 8.4 of the assignment by entering into a sales agreement with Sher-Rockee for the 32 acre parcel through the Pettinaro-related entities of Queen Theater, LP, and Queen Theater, LLC. [Appellant] knew of these damages because it acknowledged the Collateral Assignment.

(Trial Court Opinion at 2). In its subsequent opinion, the court said:

> [Appellant] wants "to have its cake and eat it too." It created a factual scenario where it unilaterally and without contractual authority determined that [Iron Oak] could not perform under an assignment contract when the date for its performance had not yet come to pass, and never would, because of [Appellant's] inability to get municipal approvals. … [Appellant's] self-declared default by Iron Oak was the only way to relieve itself of the payment obligation of the assigned collateralized payment sought by [Meyers]. [Appellant's] default declaration by Iron Oak, along with [Appellant's] own inability to obtain municipal

> approvals, made it impossible for Iron Oak to perform. There are no material issues concerning these facts. [Appellant's] damages are self-created and its conduct in this transaction is an attempt to anticipatorily and unilaterally fabricate relief from its self-inflicted damages.

(Trial Court Opinion, filed August 16, 2012, n.1 at 1-2). The record supports the court's analysis. Appellant terminated its Assignment with Iron Oak in March 2008, long before Iron Oak's performance due date of October 1, 2009. Iron Oak was not in default when Appellant terminated the Assignment. Shortly after Appellant terminated the Assignment, entities related to Appellant, namely Queen Theater, LP, and Queen Theater, LLC, purchased the Sher-Rockee property. These facts are undisputed. Thus, Appellant's own course of conduct triggered Section 8.4 of the Assignment. Therefore, the court properly determined Appellant is required to pay Appellee the balance of the Assignment consideration due, *i.e.*, $825,000.00. Accordingly, Appellant's first issue merits no relief.

In his second issue, Appellant contends the subject matter of the assignment agreement became impracticable and impossible to perform when the township denied the zoning ordinance amendments necessary to complete the project. As a result, Appellant maintains the agreement was dissolved; and all contractual obligations ended for both parties. Appellant argues Iron Oak's duty to provide sewer service was excused, and Appellant's obligation to render performance in return was likewise discharged. Appellant concludes this Court should reverse the summary

judgment in favor of Iron Oak and Meyers and remand the case for trial. We cannot agree.

Instantly, Appellant did not raise this specific argument on its own behalf before the trial court until Appellant's motion for reconsideration. Therefore, the issue is waived.[1] ***See*** Pa.R.A.P. 302 (stating issues not properly raised in trial court are waived and cannot be raised for first time on appeal); ***Grandelli v. Methodist Hosp.,*** 777 A.2d 1138, 1148 (Pa.Super. 2001) (citing ***Harber Philadelphia Center City Office Ltd. v. LPCI Ltd. Partnership,*** 764 A.2d 1100, 1104 (Pa.Super. 2000), *appeal*

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[1] "Pennsylvania law recognizes the doctrine of frustration of contractual purpose or 'impracticability of performance' as a valid defense to performance under a contract." ***Hart v. Arnold***, 884 A.2d 316, 334 (Pa.Super. 2005), *appeal denied,* 587 Pa. 695, 897 A.2d 458 (2006). A party who seeks to avoid performance based on the doctrine of impracticability must be without fault and have observed the duties of good faith and fair dealing by attempting to resolve the government regulation or order. ***Step Plan Services, Inc. v. Koresko***, 12 A.3d 401, 412 (Pa.Super. 2010). Further, "if the allegedly unforeseeable event was in reality a natural and fairly predictable risk arising in the normal course of business, then a court may not dissolve a settlement agreement." ***Id.***

Instantly, Appellant sought but was unable to obtain land development and zoning approvals for the project on the Sher-Rockee parcel by December 2007. Appellant failed to pursue the approvals further. In March 2008, Appellant unilaterally exercised its right to terminate the Assignment, which made it impossible for Iron Oak to perform. On March 31, 2008, entities related to Appellant purchased the property, which exposed Appellant to the damages payment pursuant to Section 8.4 of the Assignment. Therefore, Appellant cannot raise the defense of impracticability when, by its own conduct, it made performance of Iron Oak's obligations impossible. ***See Step Plan Services, supra***. Accordingly, even if the issue were not waived, it would merit no relief.

denied, 566 Pa. 664, 782 A.2d 546 (2001)) (reiterating waiver principle with respect to arguments not raised initially before trial court in summary judgment proceedings). ***See also Erie Ins. Exchange v. Larrimore***, 987 A.2d 732, 743 (Pa.Super. 2009) (stating issue that was not litigated before trial court on motion for summary judgment, and raised for first time in motion for reconsideration, is waived). Accordingly, we affirm the summary judgment in favor of Meyers and Iron Oak.

Judgment affirmed.

Judgment Entered.

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Date: 5/30/2013