NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

WILLIAM SWART AND SUSAN SWART, HIS WIFE,	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
LANCE BLANKENSHIP, CHRIS PARADISE AND YINGHUI GE	
APPEAL OF: LANCE BLANKENSHIP	
	No. 1 WDA 2014

Appeal from the Order December 17, 2013
in the Court of Common Pleas of Washington County
Civil Division at No.: 2013-2736

BEFORE: BENDER, P.J.E., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.: **FILED JULY 17, 2014**

Appellant, Lance Blankenship, appeals from the order of December 17, 2013, which granted summary judgment to Appellees, William and Susan Swart in this ejectment action.[1] For the reasons discussed below, we affirm.

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* Retired Senior Judge assigned to the Superior Court.

[1] Chris Paradise, who sublet an apartment from Appellant, never answered the complaint and the trial court entered a default judgment against him for possession only on June 26, 2013. Yinghui Ge, who also sublet an apartment from Appellant, did not answer the complaint but filed a *pro se* response to Appellant's answer and new matter on June 28, 2013. Ge did not respond to Appellees' motion for summary judgment, and is not a party to this appeal.

The underlying facts and procedural history in this matter are as follows. On March 25, 2011, Appellant and Appellees entered into an agreement for the sale of property at 35 Victoria Street, Washington, where Appellant was residing as a tenant. (***See*** Agreement of Sale and Purchase (the Agreement), 3/25/11, at unnumbered pages 1, 3 ¶ 9). The Agreement provided that Appellant would purchase the property for $35,000.00, payable in monthly installments of $700.00 per month, on the fifteenth of each month, together with interest at the annual rate of six percent. (***See id.*** at unnumbered page 2 ¶ 4). Unless the parties otherwise agreed, they would close the sale on or before January 31, 2012. (***See id.*** at ¶ 6). The parties agreed that Appellees were selling the property "as is" and that they required Appellant to maintain the property and make all necessary repairs. (***See id.*** at unnumbered page 3 ¶¶ 8 and 9). Lastly, the Agreement provided that it could not be "changed, modified, or amended, in whole or in part, except in writing signed by both parties." (***Id.*** at unnumbered page 6 ¶ 27).

On May 14, 2013, Appellees filed a complaint in ejectment against Appellant, alleging that he was in default of the Agreement because he had ceased making the monthly payments, had not closed the transaction on or before January 31, 2012, and had failed to pay the balance of the purchase price. (***See*** Complaint, 5/14/13, at unnumbered page 4 ¶ 12). Appellant filed an answer, new matter, and counterclaim on June 13, 2013. Appellant

claimed that there was a novation of the Agreement and that the parties had agreed that he would submit three final payments: one for $800.00, followed by one for $4,200.00, and lastly, one for $20,000.00, to satisfy the obligation.[2] (***See*** Answer, New Matter, and Counterclaim, 6/13/13, at 6 ¶¶ 9-12).

Appellees filed a motion for summary judgment on September 4, 2013. The trial court held oral argument on December 17, 2013, after which it granted Appellees' motion for summary judgment. Appellant simultaneously filed the instant, timely appeal and a motion for reconsideration. The trial court denied the motion for reconsideration on January 9, 2014. On January 15, 2014, the trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to

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[2] As the trial court notes, Appellant initially claimed that the parties orally agreed to a novation, and then later claimed, without explanation, that there were text messages that supported the existence of a novation. (***See*** Trial Court Opinion, 2/12/14, at 2; ***see also*** Answer, New Matter, and Counterclaim, at 6 ¶¶ 9-12; N.T. Argument, 12/17/13, at 10). However, in his motion for reconsideration, Appellant raised, for the first time, the claim that there was sufficient writing to support the novation. (***See*** Motion for Reconsideration, 1/09/14, at p. 7). Appellant did not attach actual copies of the text messages as exhibits to his motion but summarized their content in an affidavit. (***See id.***, at Exhibit A p. 2). We note that is settled that issues cannot be raised for the first time in a motion for reconsideration following the grant of summary judgment. ***See Kelly v. Siuma***, 34 A.3d 86, 94 n.8 (Pa. Super. 2011), *appeal denied*, 42 A.3d 294 (Pa. 2012). In any event, the quoted texts do not support the details of the novation claimed by Appellant, but rather show that there was discussion about a final single payment of $25,000.00. (***See*** Motion for Reconsideration, ***supra*** at Exhibit A p. 2).

Pennsylvania Rule of Appellate Procedure 1925(b). ***See*** Pa.R.A.P. 1925(b). Appellant filed his statement on January 27, 2014. On February 12, 2014, the trial court issued an opinion. ***See*** Pa.R.A.P. 1925(a).

On appeal, Appellant raises two questions for our review:

> (1) Whether the [t]rial [c]ourt's entry of summary judgment in favor of the Appellees was appropriate despite the existence of a genuine issue of material fact regarding a novation to the original contract for sale[?]
>
> (2) Whether the [t]rial [c]ourt's entry of summary judgment in favor of the Appellees was appropriate under the [***Borough of*** ***Nanty-Glo*** [***v. Am. Surety Co. of N.Y.***, 163 A. 523 (Pa. 1923)] Rule because summary judgment was based primarily on a testimonial affidavit submitted by the moving party[?]

(Appellant's Brief, at 4).

On appeal, Appellant challenges the trial court's grant of summary judgment. Our scope and standard of review are settled.

> Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. The moving party has the burden of proving that no genuine issues of material fact exist. In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Thus, summary judgment is proper only when the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. In sum, only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment.

> . . . With regard to questions of law, an appellate court's scope of review is plenary. The Superior Court will reverse a grant of summary judgment only if the trial court has committed an error of law or abused its discretion. Judicial discretion requires action in conformity with law based on the facts and circumstances before the trial court after hearing and consideration.

Cresswell v. Pa. Nat'l Mut. Cas. Ins. Co., 820 A.2d 172, 177 (Pa. Super. 2003) (citation and emphasis omitted).

In his first claim, Appellant alleges that the trial court erred in granting summary judgment because there was a genuine issue of material fact regarding the existence of a novation. (***See*** Appellant's Brief, at 10). We disagree.

> The doctrine of novation, or substituted contract, applies where: (i) a prior contract has been displaced, (ii) a new valid contract has been substituted in its place, (iii) there exists sufficient legal consideration for the new contract, and (iv) the parties consented to the extinction of the old and replacement of the new. A novation is accepted by the parties as satisfaction of a pre-existing duty, [which] thus bars the revival of the pre-existing duty following a breach of the substituted contract. However, whether a contract has the effect of a novation primarily depends upon the parties' intent. **The party asserting its existence bears the burden of demonstrating the parties had a meeting of the minds.**

First Lehigh Bank v. Haviland Grille, Inc., 704 A.2d 135, 138-39 (Pa. Super. 1997) (citations and quotation marks omitted, emphasis added). The evidence of a novation must be "clearly demonstrated." ***Id.*** at 139.

In the instant matter, Appellant did not clearly demonstrate that there was a genuine issue of material fact regarding the existence of a novation. ***See Cresswell***, ***supra*** at 177; ***First Lehigh Bank***, ***supra*** at 138-39.

Appellant failed to present any evidence that would show that the parties intended to extinguish the Agreement. The Agreement obligated Appellant to purchase the property he was renting from Appellees. (***See*** the Agreement, at unnumbered pages 1-3). Under the terms of the alleged new agreement, Appellant still was required to buy the property from Appellees, albeit under modified financial terms. (***See*** Answer, New Matter, and Counterclaim, ***supra*** at 6 ¶¶ 9-12).

In discussing whether a novation has displaced a prior contract, this Court has explained, "[a] modification does not displace a prior valid contract; rather, the new contract acts as a substitute for the original contract, but only to the extent that it alters it." ***Melat v. Melat***, 602 A.2d 380, 385 (Pa. Super. 1992) (citation omitted). Under such a modified agreement, one that serves to "supplement" the original contract, the parties' liability "is still established from the original agreement." ***Id.*** at 386 (citations omitted).

Here, even under the purported second agreement, Appellant was required to buy the exact same property from the exact same parties; the only difference was the details of the payment plan. This Court has held that there is insufficient evidence to prove a novation in this type of situation, because the appellant did not show that the crux of the alleged second agreement was different from that of the original agreement. ***See First Lehigh Bank***, ***supra*** at 139 (holding appellant failed to clearly

demonstrate existence of novation where both original agreement and subsequent letter concerned transfer of liquor license from appellant to appellee even though original agreement provided for direct transfer of license while letter required appellant merely to finance transfer of liquor license); ***see also Carlos R. Leffler, Inc. v. Hutter***, 696 A.2d 157, 160-61 (Pa. Super. 1997) (holding there was insufficient evidence to prove novation where parties modified several contract terms but crux of contract, one party's obligation to buy petroleum from another party who had a duty to maintain a service station remained). Therefore, since Appellant remained obligated to buy the same premises from the same people and only demonstrated at most that details of the payment plan changed under the alleged novation, the trial court did not commit an abuse of discretion or error of law in determining that Appellant did not proffer clear evidence of a novation.[3] ***See Cresswell***, ***supra*** at 177; ***First Lehigh Bank***, ***supra*** at 138-39. Appellant's first claim does not merit relief.

In his second claim, Appellant contends that the trial court's grant of summary judgment was inappropriate under the ***Nanty-Glo*** rule. (***See*** Appellant's Brief, at 15). We disagree.

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[3] We note that Appellant specifically alleged below and in this Court the existence of a novation, not an oral modification of the contract. (***See*** Answer, New Matter, and Counterclaim, ***supra*** at 6 ¶ 11; Appellant's Brief, at 4).

"The ***Nanty–Glo*** rule prohibits summary judgment where the moving party relies exclusively on oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact . . . ." ***Lineberger v. Wyeth***, 894 A.2d 141, 149 (Pa. Super. 2006) (citation omitted). Our Courts have applied a three-step process to determine whether the ***Nanty-Glo*** rule applies so as to preclude a grant of summary judgment.

> Initially, it must be determined whether the plaintiff has alleged facts sufficient to establish a *prima facie* case. If so, the second step is to determine whether there is any discrepancy as to any facts material to the case. Finally, it must be determined whether, in granting summary judgment, the trial court has usurped improperly the role of the [fact-finder] by resolving any material issues of fact. It is only when the third stage is reached that ***Nanty-Glo*** comes into play.

DeArmitt v. N.Y. Life Ins. Co., 73 A.3d 578, 594-95 (Pa. Super. 2013) (citation omitted).

Here, Appellees claimed Appellant breached the Agreement by failing to make the required payments and, accordingly, he deprived them of the profits from that rental property. (***See*** Complaint, ***supra*** at unnumbered pages 4 ¶ 12, 5 ¶ 18). These allegations are sufficient to make out a *prima facie* case for breach of contract. ***See Presbyterian Med. Ctr. v. Budd***, 832 A.2d 1066, 1070 (Pa. Super. 2003) (citations and quotation marks omitted).

Appellant did not dispute the existence of the Agreement and did not dispute that he stopped making payments under the Agreement in February

2012. (***See*** Answer, New Matter, and Counterclaim, ***supra*** at 2 ¶ 2, 5 ¶¶ 1-2). Thus, there was no discrepancy as to any underlying facts material to the case. Further, Appellant failed to point to any discrepancy regarding any material facts and our review of the matter has not demonstrated the existence of any such facts. Rather, Appellant raised the defense of a novation. (***See id.*** at 6); ***see also DeArmitt***, ***supra*** at 594-95. The trial court found that Appellant fell "short of establishing an affirmative defense to the breach of contract for sale." (***See*** Trial Ct. Op., at 2). Thus, the trial court did not "usurp[ ] improperly the role of the [fact-finder] by resolving any material issues of fact." ***DeArmitt***, ***supra*** at 59. Under these circumstances, the grant of summary judgment did not offend the ***Nanty–Glo*** rule. ***See Id.*** Further, as the trial court noted, it did not rely solely on Appellees' testimonial affidavit in deciding this matter but also relied on the pleadings and the text of the Agreement. (***See*** Trial Ct. Op., at 3). Thus, Appellant's second claim also does not merit relief.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/17/2014