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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2574-13T1

SAVE THE DINKY, INC., a New Jersey Nonprofit Corporation, ANNE WALDRON NEUMANN, PETER MARKS, RODNEY FISK, WALTER NEUMANN, CHRISTOPHER HEDGES, ZANIFA HOSEIN, RACHEL KOEHN, DOROTHY KOEHN, and all Others Similarly Situated,

Plaintiffs-Appellants/
Cross-Respondents,

v.

TRUSTEES OF PRINCETON UNIVERSITY, PRINCETON UNIVERSITY

Defendants-Respondents/
Cross-Appellants,

and

NEW JERSEY TRANSIT,

Defendant-Respondent.

Argued October 19, 2015 - Decided February 17, 2016

Before Judges Lihotz, Fasciale and Higbee.

On appeal from Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. C-64-11.

Philip Rosenbach argued the cause for appellants/cross-respondents (Berman

Rosenbach, P.C., attorneys; Mr. Rosenbach, on the briefs).

Jonathan I. Epstein argued the cause for respondents/cross-appellants (Drinker Biddle & Reath, LLP, attorneys; Mr. Epstein, Nicole A. Bayman and Karen A. Denys, on the briefs).

Kenneth M. Worton, Deputy Attorney General, argued the cause for respondent New Jersey Transit Corporation (John J. Hoffman, Acting Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Mr. Worton, on the brief).

PER CURIAM

Plaintiffs Save the Dinky, Inc., "a citizen's group organized and composed of persons who use the Princeton Branch" rail line between Princeton and Princeton Junction (the Dinky line) and individual citizen users, Anne Waldron Neumann, Peter Marks, Rodney Fisk, Walter Neumann, Christopher Hodges, Zanifa Hosein, Rachel Koehn, Dorothy Koehn, and others similarly situated (collectively plaintiffs), appeal from two Chancery Division orders filed on June 20, 2013 and December 23, 2013, granting summary judgment and effectively dismissing plaintiffs' amended complaint against defendants Trustees of Princeton University, Princeton University (Princeton) and New Jersey Transit Corporation (NJT). In their complaint, plaintiffs challenged NJT's decision to move the Dinky line branch terminus and station 460 feet south of the current site

in order to allow Princeton to develop an arts and transit center. Generally, plaintiffs' action sought a declaratory judgment regarding the terms of the document between NJT and Princeton selling the real property encompassing the Dinky line station (the 1984 agreement). Plaintiffs also requested Princeton and NJT be enjoined from moving the station.

Princeton cross-appeals from a provision in the same June 20, 2013 order, denying its motion for summary judgment, arguing plaintiffs lack standing to challenge the 1984 agreement. NJT, which has not filed a cross-appeal, concurs with Princeton's position, arguing plaintiffs lack standing, and seeks to affirm the summary judgment orders.

We have reviewed the arguments advanced by plaintiffs and defendants. In light of the record and applicable law, we affirm the orders granting summary judgment dismissal. Our determination obviates review of the defensive cross-appeal concerning standing, which we dismiss as moot, without passing on the trial judge's determination of this issue.

I.

Much litigation has been generated by the decision to relocate the Dinky line terminus and station south of its current location. The following facts are pertinent to our review and are undisputed.

On October 30, 1984, NJT executed the 1984 agreement selling Princeton the realty and improvements, including the passenger building, platform, and freight buildings related to the Dinky line station.[1] The rails, ties, catenary system and "any other fixtures on the property related to the physical operation of the train" were deliberately excluded from the sale. Further, NJT, as grantor, reserved an easement expressed in the 1984 agreement, as well as the related deed, reaffirming NJT's right to control continued passenger rail services on the Dinky line. The easement stated:

> Grantor retains an easement over the property for public transportation purposes, including but not limited to: right-of-way along existing tracks; a station to include a passenger waiting room, a ticket office, storage space, a mechanical area, and a bathroom; crew quarters; a railroad station platform of a minimum of 170 feet in length and a width of twelve feet; and ingress and egress to the above for Grantor's passengers, employees, contractors and agents for any and all purposes related to the use, operation, maintenance, inspection or alteration of passenger services, all in accordance with and as more specifically set forth in ¶15 and ¶17 of the Sales Agreement between the parties dated October 30, 1984. Any alterations to the improvements used for

[1] The Dinky station property consists of land and improvements thereto and is also known as Block 45.01, Lots 4 and 39 on the Princeton Borough tax map and Block 108-1, Lot 27, formerly known as Block 17.01 on the Princeton Township tax map. NJT owned the property from 1976 to 1984.

> the above-described easement shall be subject to approval by Grantor.
>
> Grantee covenants to provide parking as described in ¶15 and services as described in ¶16 of the Sales Agreement between the parties dated October 30, 1984.
>
> The above described easement and covenants shall terminate five (5) years after the abandonment and termination of passenger services to the property, unless passenger services are reinstated during the five year period.

Following the sale, NJT continued to operate the Dinky line and Princeton abides its obligation to permit public access to the property to utilize rail service and parking.

Plaintiffs' complaint focused on the interpretation of paragraph 15 of the 1984 agreement, which we set forth in pertinent part:

> Improvements. Buyer is committed to spend approximately $400,000 to improve the Property, including but without limitation: repairs to the station platform, canopy, and the two existing station buildings; . . .
>
> (a) Station Facilities. Buyer agrees to continue to provide, as part of these general improvements, certain station-related facilities for Seller's use, which may, at Buyer's option, be moved to or the equivalent installed in the existing southern building. . . .
>
> (b) Platform. Buyer agrees to provide and maintain a minimum of one hundred seventy (170) feet of station platform and a minimum width of twelve (12) feet and canopy for the length of the platform.

(c) Commuter Parking Spaces. Buyer will reserve a minimum of one hundred fifty (150) commuter parking spaces within a radius of 1000 feet of the station . . . with no discrimination based on residency as to access so long as passenger service is maintained by the Seller. . . . In the event that passenger service is terminated or substantially reduced, Buyer reserves the right to terminate or reduce the number of reserved commuter parking spaces in proportion to the reduction in ridership.

(d) Terminus of the Rail Line. Buyer has the right to move the existing terminus of the rail line southward coincident with the location of the minimum reservation of platform space. This relocation, which will include moving the bumper block, rail removal, cutting and resecuring the catenary and signal relocation, must be done by Seller, its agents, or its designee, at the sole expense of Buyer.

(e) Consultation of Plans for Improvements. Buyer agrees to consult with Seller on plans for improvements to the station-related facilities for Seller's use prior to submitting application for site plan approval. All plans and specifications for improvements and/or alterations to the property used by Seller, whether related to initial improvements or otherwise, shall be submitted to Seller for approval, which approval shall not be unreasonably withheld. Failure to approve within seventy-five (75) days shall be deemed to be approval. All work on any improvements shall be conducted so as not to unreasonably interfere with passenger service, and in no event shall such construction require any interruption in passenger service. In the event that during any construction any facilities used by Seller's passengers, employees or agents become unusable, Buyer shall, at Buyer's

sole expense, arrange for suitable temporary replacement.

Also relevant are paragraphs 16 and 17, which provide:

> 16. Maintenance of Property. Buyer agrees, at its sole expense, to provide repair and maintenance services to the station and parking areas, said services to include, without limitation, cleaning, snow removal, security, and providing utilities; provided however, that this obligation of the Buyer as it benefits Seller will cease during such time as passenger services are not being provided to the property. Notwithstanding any of the above, Buyer will not provide routine maintenance services within Seller's ticket office.
>
> 17. Operation of Passenger Service. So long as Seller continues to operate passenger service to the Property, Seller will have the sole responsibility to maintain the track, roadbed and all other equipment . . . and shall have the following rights and obligations in connection therewith:
>
> (a) Seller reserves the right of its employees, agents or designees to enter the station area in order to inspect, maintain, operate, install, move or remove railroad or other passenger-related equipment, trackage or other property.
>
> (b) Seller reserves the right, at its sole expense, to maintain and use the existing rail line and any associated catenary lines, signal equipment, poles, wire and cable lines.
>
> (c) Seller reserves the right, subject to prior notification to Buyer, to expand, reduce, terminate or alter the type of passenger-related services within or serving the station parcel, if in its opinion, conditions warrant.

In 1987, the Dinky line terminus was relocated southward in accordance with the provisions of paragraphs 15(a) and (d) of the 1984 agreement. On October 15, 1996, NJT and Princeton agreed to amend paragraph 15(a) of the 1984 agreement and executed a document restating their rights and responsibilities for service facilities. This amendment replaced the original paragraph 15(a).

Specifically, NJT agreed to move station-related operations from the northern building to the southern building, subject to improvements and renovations constructed and paid for by Princeton. The 1996 amendment contained plans approved by NJT for the renovation to the southern facility building, which required construction of "staff restrooms, commuter waiting room, ticket office retail area, and public restrooms." After construction, Princeton, at its expense, was responsible to "keep and repair" the facility for NJT's use and pay for all utilities. The 1996 amendment also required the remaining terms, covenants, and conditions of the 1984 agreement to "remain in full force and effect."

Princeton began planning the development of a neighborhood arts and transit center (the project). On October 21, 2010, Princeton notified NJT it was exercising its right under the 1984 agreement to request NJT relocate the Dinky line terminus

to the newly constructed facilities 460 feet south beyond the station's current location. In a March 25, 2011 letter, NJT Executive Director James Weinstein advised Princeton NJT had no objection to the move, as it was "specifically contemplated" by the terms of the 1984 agreement.

After receiving the requisite approvals, Princeton commenced relocation of the Dinky line terminus to a temporary station-platform. Princeton constructed a new commuter lot and the existing tracks, platform, and canopy north of the temporary station were removed in preparation for construction of a new rail station platform, transit plaza, and related railroad infrastructure improvements.

Plaintiffs filed this complaint, which was amended, generally seeking a declaratory judgment interpreting the 1984 agreement.[2] Plaintiffs maintained paragraph 15(d) prevented additional relocation of the Dinky terminus and the 1984 agreement created a public transportation easement preventing Princeton from relocating the terminus. Plaintiffs further

[2] The complaint as amended contained three counts. Count one was dismissed by order dated December 23, 2013; count two was dismissed by order dated June 20, 2012; and count three was dismissed by order entered on August 10, 2012. Plaintiffs' appeal does not include appeal from the provisions of the August 10, 2012 order.

requested a permanent injunction preventing further relocation of the Dinky line station.

Princeton, joined by NJT, moved for summary judgment, asserting plaintiffs lacked standing to challenge the 1984 agreement. Alternatively, Princeton requested dismissal of count two because "public transportation easements" do not exist under New Jersey law. Plaintiffs cross-moved for summary judgment.

Following oral argument, Judge Paul Innes denied plaintiffs' motion for summary judgment and denied Princeton's motion to dismiss the entire complaint. However, he granted summary judgment on count two, finding plaintiffs' argument unsupported under the easement's terms. The judge stated: "According to the clear, unambiguous language of the easement, there is no express grant to the public" and "public transportation easements do not exist under New Jersey Law."

Princeton filed a second summary judgment motion to dismiss count one, arguing the terms of the 1984 agreement expressly permitted relocation of the Dinky line station. Judge Innes again conducted oral argument and issued a fourteen-page written opinion. Finding the agreement's terms were "facially clear," the judge concluded, "[u]nder the terms of the 1984 Sales Agreement as amended by the 1996 Agreement, Princeton University

is permitted to propose, and NJ Transit is permitted to approve, a plan to relocate the train station and rail terminus 460 feet south within the Dinky Station property."

II.

An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge. Cuiyun Qian v. Toll Bros. Inc., 223 N.J. 124, 134-35 (2015). Our review of a grant of summary judgment is de novo as the "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). In doing so, we, like the trial judge, "must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Bhaqat v. Bhaqat, 217 N.J. 22, 38 (2014). See also R. 4:46-2(c).

The facts must be construed in a light most favorable to the non-moving party, Robinson v. Vivirito, 217 N.J. 199, 203 (2014), keeping in mind "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party,

would require submission of the issue to the trier of fact." R. 4:46-2(c). "The practical effect of this rule is that neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhagat, supra, 217 N.J. at 38.

Questions of contract interpretation are suitable for consideration on summary judgment. Driscoll Const. Co., Inc. v. State, Dep't of Transp., 371 N.J. Super. 304, 313 (App. Div. 2004). When construing a contract's terms, "'unless the meaning is both unclear and dependent on conflicting testimony[,]'" its interpretation is a matter of law. Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (quoting Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001)).

Review is guided by well-established rules of construction. "The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 492 (App. Div.), certif. denied, 127 N.J. 548 (1991). "A 'court should not torture the language of [a contract] to create ambiguity.'" Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (alteration in original)

(quoting Stiefel v. Bayly, Martin & Fay, Inc., 242 N.J. Super. 643, 651 (1990)).

The focus of review is "the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain . . . ." Lederman v. Prudential Life Ins. Co. of Am., 385 N.J. Super. 324, 339 (App. Div.) (internal quotation marks and citation omitted), certif. denied, 188 N.J. 353 (2006). Reviewing courts are to read the contract "as a whole in a fair and common sense manner." Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009). "'[W]ords and phrases are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probable intent and purpose." Republic Bus. Credit Corp. v. Camhe-Marcille, 381 N.J. Super. 563, 569 (App. Div. 2005) (quoting Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 426 (1956)).

If we find "the terms . . . are clear and unambiguous, there is no room for construction and [we] must enforce those terms as written." Watson v. City of E. Orange, 175 N.J. 442, 447 (2003). Finally, we may not re-write the expressed terms of

the agreement. Solondz v. Kornmehl, 317 N.J. Super. 16, 21 (App. Div. 1998).

III.

A.

Plaintiffs raise numerous arguments challenging the dismissal of the first count of their complaint. Agreeing the terms and conditions of the 1984 agreement are plain and unambiguous, plaintiffs assert these terms defeat relocation. In their view, paragraph 15(d) gives Princeton a "specified and limited right to move the terminus of the rail line" to the length of the original station platform, that is, 170 feet. Reading this to "restrict any relocation" and allow only one move, which occurred in 1996, plaintiffs contend the 1984 agreement neither provides nor permits a further relocation. We are not persuaded.

First, we concur with the trial judge's finding that there is no express provision in the 1984 agreement or the 1996 amendment restricting relocation of the Dinky line station, in direct contravention to plaintiffs' proposed interpretation of paragraph 15. Admittedly, the original paragraph 15(a) permitted Princeton the option to move the station facilities to the southern building, subject to the remaining agreement terms.

However, this provision was replaced by the 1996 amendment, a fact plaintiffs' argument overlooks.

When paragraph 15(d) is read with 15(a), as amended in 1996, the agreement gives Princeton the right to seek relocation of the terminus from the "existing" southern location, not the original location, as plaintiffs insist. Were plaintiffs' interpretation accepted, it would render the 1996 amendment meaningless, a result we reject. See State v. Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 195, 169 N.J. 505, 537-38 (2001).

Second, we disagree with the plaintiffs' interpretation of the unambiguous language of paragraph 15(d), which states: "[Princeton] has the right to move the existing terminus of the rail line south-ward coincident with the location of the minimum reservation of platform space." Plaintiffs' suggestion this limits relocation only to the length of the original platform is untenable. Not only does it disregard the 1996 amendment, addressing the platform's first relocation, but also it ignores the plain language of the provision permitting relocation within the property, as approved by NJT, so long as the station platform remains 170 feet.

Third, we reject the notion NJT abrogated its public rail responsibility to a private entity. Pursuant to both the easement and paragraph 17(c) of the 1984 agreement, NJT holds

sole authority "to expand, reduce, terminate or alter the type of passenger-related services within or serving the station parcel, if in its opinion, conditions warrant." Other terms of the 1984 agreement unequivocally state NJT retains complete control over train service and it alone is statutorily authorized to relocate or even close the station. See N.J.S.A. 27:25-5, -8(d), (e) (permitting "abandonment" or "substantial curtailment" of passenger services as long as proper notice and a hearing are provided).

Further, plaintiffs do not dispute Princeton's proposal for relocation was reviewed and approved by NJT. That process was consistent with the requirements of paragraph 15(d) and (e) of the 1984 agreement, as reaffirmed by the 1996 amendment. Prior to commencing alterations or improvements to the property, Princeton sought and received NJT's permission, as mandated by paragraph 15(e). Princeton holds no autonomy to interfere with rail service or even to alter the station without NJT's guidance and approval. Again, the decision to relocate station facilities rested with and solely was made by NJT, which exercised its legal and contractual authority when approving Princeton's proposal.

Plaintiffs also insist we must defer to the course of dealing following the 1984 agreement, which they believe support

their interpretation of its terms. We need not examine the parties' course of dealing, which arguably contradicts plaintiffs' position, because the terms in the 1984 agreement are clear on their face and not subject to alternative meanings. It is only "[w]here ambiguity exists, [may] subsequent conduct of the parties in the performance of the agreement . . . serve to reveal their original understanding." Michaels v. Brookchester, Inc., 26 N.J. 379, 388 (1958); see also Twp. of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 76-77 (App. Div. 2011) (considering course of performance in construing vague or ambiguous contract provisions).

Plaintiffs' remaining contentions, not otherwise addressed, are found to lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

B.

We next consider the challenges to the dismissal of count two. Plaintiffs read the language of the easement and the terms in the 1984 agreement to provide a public transportation easement over the Dinky line station property, enabling them to challenge relocation of the station and its platform. Substantially for the reasons set forth in Judge Innes' oral opinion, we conclude plaintiffs' contentions are factually

unsupported and legally unfounded. R. 2:11-3(e)(1)(A). We add these brief comments.

To determine the scope and "extent of the rights conveyed by an easement[,]" we must determine "the intent of the parties as expressed through the instrument creating the easement, read as a whole and in light of the surrounding circumstances." Rosen v. Keeler, 411 N.J. Super. 439, 451 (App. Div. 2010). When the parties' intent "'is evident from an examination of the instrument, and the language is unambiguous, the terms of the instrument govern.'" Ibid. (quoting Hyland v. Fonda, 44 N.J. Super. 180, 187 (App. Div. 1957)).

Here, the easement states "[NJT] retains an easement over the property for public transportation purposes" and NJT is bound by the New Jersey Public Transportation Act of 1979, N.J.S.A. 27:25-1 to -24, which is "for the benefit of the people of the State," N.J.S.A. 27:25-16. That NJT acts for the benefit of the public does not cast its easement negotiated for the public, coincident the express easement granted to NJT as one on the property. The easement with Princeton allows NJT's "passengers" only "ingress and egress" rights for "purposes related to the use" of the property. Therefore, plaintiffs and other members of the public are business invitees to the Dinky

line station. Train operations and other issues related thereto remain controlled by NJT.

We are satisfied public passenger railway services are not being abandoned. NJT will continue station operations at a spot 460 feet south of the prior station. The relocation of the terminus and station are provided for under the 1984 agreement and are legally permitted, and do not represent an abandonment or "substantial curtailment" of public access to the terminus. N.J.S.A. 27:25-8(d), (e). We find no error in the summary judgment dismissal of the complaint.

Affirmed.