Prepare by the Court

GRANTED IN PART

FILED
MAR 17 2020
YOLANDA CICCONE, A.J.S.C.
CHAMBERS

SUPERIOR COURT OF NEW JERSEY
CIVIL, CIVIL DIVISION
SOMERSET COUNTY

Fellowship Senior Living, Inc.

Plaintiff (s)

vs

George Schenk

Defendant (s)

DOCKET NO. SOM-L-77-19

CIVIL ACTION

O R D E R

THIS MATTER having come before the Court on the Courts its own motion;

IT IS ON THIS 17th DAY OF March, 2020 ORDERED:

Defendant's Motion for Reconsideration is GRANTED in part for the permanent injunction on future disparagement. DENIED in part for all remaining arguments.

That a copy of this Order shall be served by the Clerk upon the parties within 5 days hereof.

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YOLANDA CICCONE, A.J.S.C.
CHAMBERS

HON. YOLANDA CICCONE, A.J.S.C.

Superior Court of New Jersey
Somerset, Hunterdon & Warren Counties
Vicinage 13

YOLANDA CICCONE
ASSIGNMENT JUDGE

SOMERSET COUNTY COURT HOUSE
P.O. BOX 3000
SOMERVILLE, NEW JERSEY
08876
(908) 231-7069

March 17, 2020

Re: Fellowship Senior Living, Inc Vs George Schenk
SOM L-77-19
Motion to Reconsider

This letter consists of the court's opinion for the motion to reconsider returnable on March 13, 2020.

By way of background, this suit arises out of the Schenks' failure to pay for monthly residency and other attendant recurring service charges beginning in June 2017 and continuing through October of this year. On March 18, 2010, the Schenks entered into the Residency Agreement with Fellowship by which Fellowship accepted the Schenks as lifecare residents in the Fellowship Village CCRC and agreed to provide them with, among other things, housing, certain healthcare as needed, and certain meals (the "Services").

Pursuant to the Agreement, the Schenks agreed to pay Fellowship an upfront entrance fee, plus ongoing monthly service fees and other related fees such as for cable television, carport, telephone and internet connectivity. The parties have asserted various claims, counterclaims, and third-party claims which have largely been resolved by the Schenks' tender of $140,501.36 in partial satisfaction of the outstanding sums due as set forth in the Court's November 7, 2019 Order.

On January 31, 2020, the court entered an Order: (i) awarding Fellowship $17,525 in finance charges due on the sums withheld by the Schenks: (ii)dismissing any remaining counterclaims and third-party claims with prejudice; (iii)enjoining the Schenks from future disparagement or derogatory communications against Fellowship; (iv) retaining jurisdiction to resolve any future disputes consistent with its prior November 7, 2019 Order; (v) awarding Fellowship its reasonable attorney's fees and costs incurred in connection with the subject motion.

On February 17, 2020, Defendant submitted a Motion to Reconsider the: (i) judgment in the amount of $17,525; (ii) the enjoinment of the Schenks from any future disparagement of Fellowship, its Officers, Board Members, Employees, or Agents; (iii) retaining the Court's jurisdiction to summarily resolve any violation of this injunction or future breach of the parties' Residency Agreement; (iv) awarding Fellowship its reasonable attorney's fees and costs incurred in connection with the subject motion.

N.J.S.A 4:49-2 sets forth the time period within which a judgment may be altered. It states that, "a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it 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." See N.J.S.A 4:49-2.

The decision to hear a motion for reconsideration is solely within the discretion of the trial court judge. See Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987). However, "[a] litigant should not seek reconsideration merely because of dissatisfaction with a decision of the court." See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Reconsideration should generally only be heard when either, "(1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competence evidence." Id. See also Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

"[R]econsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice." D'Atria, 242 N.J. Super. at 401. Reconsideration is especially appropriate in situations where an issue is not fully evaluated by the Court. See Calcaterra v. Calcaterra, 206 N.J. Super. 398, 403–04 (App. Div. 1986); see also Comment to R. 4:49-2.

Defendant questions whether the court can Grant a permanent injunction in this case, when it was done without a specific demand contained in the complaint, without a trial, and without a written decision. Defendant asserts that this process is violative of the U.S. and State Constitution. This court disagrees and does not find it necessary to address this argument.

Defendant seeks for the court to reconsider the Schenks permanent injunction from making any future disparagement of the Fellowship, its officers, board members, employees, or agents. Plaintiff argues that the purpose of this limitation is to ensure civility and respectful discourse. Plaintiff explains that over the course of the last nine years, the Schenks, have disseminated several hundred letters to Fellowship's residents, Fellowship's Board of Directors, and various public officials that contained false statements intended to destroy the reputation of Fellowship's Chief Executive Officer, members of its Board of Directors. Additionally, Plaintiff asserts that the court's order is not an unconstitutional impingement on the Schenks speech.

The New Jersey Constitution guarantees a broad affirmative right to free speech: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for

the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. art. I, ¶ 6. That guarantee is one of the broadest in the nation, see Mazdabrook, supra, 210 N.J. at 492 (citing Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000)), and it affords greater protection than the First Amendment, see Coalition, supra, 138 N.J. at 352. In Short Hills Associates v. New Jersey Coalition, 516 U.S. 812, 116 S.Ct. 62, 133 L.Ed.2d 25 (1995), the Court, confirmed that "the State right of free speech is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities." Id. at 353, 650 A.2d 757.

New Jersey has repeatedly recognized free speech rights of residents of planned developments which are similarly situated as Fellowship. Dublirer v. 2000 Linwood Avenue Owners, Inc 210 NJ 478 (2012); Mazdabrook Commons Homeowners' Ass'n v Khan, 210 NJ 482 (2012). This court agrees that commenting on management is an integral part of resident life. Being critical of decisions and disseminating information about decisions affecting a resident is critical.

Defendant asserts there is no basis for awarding attorneys' fees in this case. Defendant contends that fees may have been awarded under R. 1:4-8, but does not apply because no Order to Show Cause exist. On July 17, 2019, Fellowship served the Schenks with notice pursuant to N.J.S.A. 1:4-8. Under N.J.S.A. 1:4-8(c), the court has the inherent power to impose sanctions that appear to violate this rule. Furthermore, under this section, the Defendant may show cause why he or she has not violated this rule. Defendant has not provided this court with a legitimate basis to revisit its award of counsel fees.

Next, Defendant argues that the court awarding interest in this case misstates the applicable statute and its purpose. Defendant contends the applicability of N.J.S.A. 31:1-1 because forbearance exist. N.J.S.A. 31:1-1 is not applicable here. The civil usury statute governs lending practices regulated by the Commissioner of Banking. As this is a residency agreement and not a loan of any kind, N.J.S.A. 31:1-1 does not apply. Instead, this matter is one of simple contract law.

It is well settled that, "[t]o prevail on a breach of contract claim, a party must prove a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and the breach caused the claimant to sustain damages." EnviroFinance Grp., LLC v. Envtl. Barrier Co., LLC, 440 N.J. Super. 325, 345 (App. Div. 2015)(internal citations omitted).

Defendants breached the terms of the residency agreement when they failed to make payments for the finance charges incurred between July 2017 and September 30, 2019. As a result of Defendants' breach, Plaintiff suffered $17,525.00 in damages.

For the foregoing reasons, Defendant's Motion for Reconsideration is GRANTED in part for the permanent injunction on future disparagement. DENIED in part for all remaining arguments.

Very Truly Yours,

HON. YOLANDA CICCONE, A.J.S.C.