Not Reported in A.3d, 2013 WL 512348 (N.J.Super.A.D.)
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
COACTIV CAPITAL PARTNERS, INC., Plaintiff–Appellant,
v.
ENGLEWOOD HOUSING AUTHORITY, Defendant–Respondent.

Argued Oct. 24, 2012.
Decided Feb. 13, 2013.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L–7974–10.
Robert J. Krandel argued the cause for appellant (Flamm Walton, P .C., attorneys; Mr. Krandel, on the brief).

Terrence J. Corriston argued the cause for respondent (Breslin and Breslin, P.A., attorneys; Mr. Corriston, on the brief).

Before Judges AXELRAD and SAPP–PETERSON.

PER CURIAM.

***1** Plaintiff, CoActiv Capital Partners, Inc., appeals from the trial court order granting summary judgment to defendant, Englewood Public Housing Authority (EHA), and dismissing plaintiff's complaint seeking to recover damages arising out of defendant's alleged breach of a leasing agreement. We affirm.

CoActiv, a Pennsylvania-based company, finances leased office and business equipment. Prior to the lease agreement at issue here, EHA leased its copiers from a company called Ace Copy Systems (Ace). During the summer of 2009, a representative of Ace, David Erman, contacted EHA's Executive Director, Roselyn Anderson, about the availability of a purportedly new and improved copier. According to Erman, he could provide this upgraded copier at a cost of $1050 per month for sixty months. As part of the lease package, he agreed to take responsibility for returning EHA's existing copier to the lessor and to reimburse EHA for the remaining payments due on the old copier, which payments totaled $9450. On August 4, Anderson signed a sales order form and **equipment lease** agreement (agreement) that required EHA to make sixty monthly payments of $1050 each. Both the sales order form and the agreement were signed by Anderson without notice to EHA's governing body, the Board of Commissioners (Board).

Upon learning about the transaction, EHA's accountant, William Katchen, advised Anderson that the lease violated the Local Public Contracts Law (LPCL), *N.J.S.A.* 40A:11–1 to –51, and the New Jersey Local Unit Pay–to–Play law, *N.J.S.A.* 19:44A–20.4. EHA's attorney contacted CoActiv in October to advise that the agreement had to be terminated because it violated the LPCL. The parties were unable to amicably resolve the matter at that point. Thus, when the first payment became due the following month, EHA made the payment but, on the advice of EHA's attorney, no payments were made over the next three months. In early March 2010, however, EHA made the payments for December, January, February and March "both to ensure a service call which had been scheduled, and in good faith in light of the ongoing discussions." Thereafter, it made no further payments.

CoActiv subsequently filed its complaint against EHA alleging breach of contract and seeking judgment against EHA in its favor for $59,775.00, plus applicable late fees, costs, and attorney's fees. EHA filed an answer and counterclaim denying the validity of the agreement or its enforceability. On October 21, 2011, EHA filed its summary judgment motion asserting that under the LPCL, Anderson was not authorized to enter into the agreement without Board approval, there was a lack of mandatory public bidding, and the contract was unconscionable. CoActiv cross-moved for summary judgment arguing that EHA did not have a valid defense and the LPCL did not apply to the contract at issue.

The court conducted oral argument and, on December 2, 2011, Judge Charles E. Powers, Jr., issued

an order granting summary judgment to EHA and denying CoActiv's cross-motion. Attached to the judge's order was a written opinion in which the judge found that the contract was subject to the LPCL, did "not fall within an enumerated exception to the LCPL's public-bidding requirement," and was therefore "void." Judge Powers reasoned that

> ***2** Setting aside the disputed Lease Agreement is consistent with public policy because it furthers the Legislature's intent that such contracts be subject to competitive public bidding to encourage substantial savings to the municipality where a contract is to be paid out of public funds. CoActiv, a commercial entity, should be aware of the applicable bidding laws, and the law presumes that public contractors operate with knowledge of relevant laws concerning the procedural and substantive discretion and authority of officials with whom they deal. *Saint Barnabas [Med. Ctr.] v. [Cnty. of Essex]*, [1]11 *N.J.* 67, 77 (1988) (citing *Slurzberg v. Bayonne*, 29 *N.J.* 106, 114–15 (1959)). The plain language of *N.J.S.A.* 40A:11–5(1)(b) and the strong public policy in New Jersey favoring competitive public bidding supports the [c]ourt's finding that the disputed Lease Agreement is unenforceable as void *ab initio* and must be set aside.

The present appeal ensued.

When reviewing a grant of summary judgment where, as in this case, the factual issues are not genuinely disputed and the issue under review implicates legal principles, we accord no deference to the motion judge's conclusions on issues of law. *Manalapan Realty, L.P., v. Twp. Comm. of Manalapan*, 140 *N.J.* 366, 378 (1995). Rather, our review is de novo. *Spring Creek Holding Co. v.. Shinnihon U.S.A. Co.*, 399 *N.J.Super.* 158, 180 (App.Div.2008); *Dep't of Envtl. Prot. v. Kafil*, 395 *N.J. Super* . 597, 601 (App.Div.2007).

CoActiv first argues Judge Powers committed reversible error by relying upon inadmissible hearsay and opinion evidence, specifically, the assertion by EHA's general counsel that the copier which was the subject of the lease could have been purchased outright for only $26,432. We reject this argument as a basis for reversal. There is nothing in the record to suggest that Judge Powers relied upon this expressed opinion.

CoActiv next argues the LPCL does not apply to the subject lease. We disagree.

N.J.S.A. 40A:11–4(a) of the LPCL provides:

> Every contract awarded by the contracting agent for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the governing body of the contracting unit to the lowest responsible bidder after public advertising for bids and bidding therefor, except as is provided otherwise in this act or specifically by any other law.

N.J.S.A. 40A:11–5(1)(b) provides:

> Any contract the amount of which exceeds the bid threshold, may be negotiated and awarded by the governing body without public advertising for bids and bidding therefor and shall be awarded by resolution of the governing body if:
>
> (1) The subject matter thereof consists of:
>
> (b) The doing of any work by employees of the contracting unit.

The statutory bid threshold for contracts subject to the LCPL is $17,500. *N.J.S.A.* 40A:11–3(a). It is undisputed that the agreement here exceeds the bid threshold. Thus, the next question before the motion judge was whether the agreement fell within an exception to the bidding requirement.

***3** CoActiv maintains that the copier was for the sole benefit of EHA employees and not for the benefit of the greater public. We need not resolve whether subsection (1)(b) applies because even if we were to agree that the copier was for the sole benefit of the EHA employees using the copier, the exception would still not apply. An award of a contract pursuant to subsection (1)(b) still requires approval by the Board, through resolution, in advance of entering into any such contract, the subject matter of which "consists of ... [t]he doing of any work by employees of the contracting unit ." *N.J.S.A.* 40A:11–5(1)(b). Such approval was not obtained here.

"Bidding statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good. Their objects are to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." *Terminal Constr. Corp. v. Atl. Cnty. Sewerage Auth.*, 67 *N.J.* 403, 409–10 (1975). "The purpose of bidding statutes is to secure the benefits of competition for the public, and they are to be strictly construed to achieve this end...." *Stano v. Soldo Constr. Co.*, 187 *N.J.Super.* 524, 535 (App.Div.1983). Thus, exceptions are to be narrowly construed and should only be employed when bidding would prove meaningless and impractical. *Nat'l Waste Recycling, Inc. v. Middlesex Cty. Improvement Auth.*, 150 *N.J.* 209, 223 (1997). The goal is to limit the discretion of local authorities by forcing them to strictly comply with public bidding guidelines. *Id.* at 220. Finally, the Supreme Court has stated that "the efficacy of our competitive bidding statute depends upon its rigorous enforcement." *Hillside v. Sternin*, 25 *N.J.* 317, 327 (1957).

Nor, may CoActiv be viewed as an innocent party who fell victim to the fraud of a third party. *See Sears Mortg. Corp. v. Rose*, 134 *N.J.* 326, 346 (1993) (holding that "of two innocent parties, a loss caused by the fraud of a third party should fall on the one who enabled the fraud to be committed"). As Judge Powers observed, CoActiv is presumed to have knowledge of the substantive and procedural requirements of competitive public bidding laws.

Finally, CoActiv argues that even if the LPCL applies, EHA may not invoke the LPCL as an affirmative defense to the breach-of-contract action because it made payments under the lease agreement before breaching it. We disagree.

Because of the policy considerations underlying public bidding statutes, our courts have not hesitated to set aside such public contracts that have not furthered the purposes of the public bidding statutes. For example, in *Borough of Princeton v. Board of Chosen Freeholders of Mercer*, 169 *N.J.* 135 (2001), the plaintiffs, Princeton Borough and a company, filed suit in 1997 against Mercer County, alleging that waste disposal contracts entered into by the county were invalid because they were not bid publicly pursuant to the LPCL. Despite the fact that the contract had initially been awarded in 1988 and had been continuously performed for the next nine years, the Supreme Court found the contracts violated the LPCL and ordered re-bidding. *Id.* at 166–67. Additionally, in *L. Pucillo & Sons, Inc. v. New Milford*, 73 *N.J.* 349, 356–57 (1977), multiple garbage collectors placed bids to receive a public contract from the Borough of New Milford. The contract was initially awarded to the defendant garbage collector whose bid failed to comply with a mandatory requirement in the bidding specifications. New Milford attempted to waive the bidding requirement, but the Supreme Court found, as a matter of policy, that New Milford had no authority to waive the bidding requirement, and voided the contract. *Ibid.*

***4** We are also not persuaded that EHA's payments under the agreement between November 2009 and March 2010 constituted a waiver of its right to challenge the enforceability of the contract pursuant to the LPCL or that the Board's conduct establishes special circumstances to except the agreement from the requirements under the LPCL. It is undisputed EHA made the payments with the express understanding that the payments were being made "subject to ongoing negotiations to terminate the lease of the copier." Under these circumstances, we find no merit to CoActiv's contention that EHA may not assert the LPCL as an affirmative defense "after it has entered a contract, made payments under the contract, and then breached that contract." *See* 28 Williston on Contracts § 72:38 at 779–80 (4th ed.2003) (stating "a debtor may make an absolute tender, while nonetheless protesting ... the amount ... thereby indicating that the payment is not voluntary...."). Further, as for CoActiv's assertions to the contrary, there was nothing in the record to suggest that the Board, through Anderson, misled CoActiv into believing Anderson had the actual or apparent authority to bind the Board to the agreement Anderson signed.

Affirmed.

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