

2016 WL 6210969

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Maritza SALAZAR and Sergio Salazar,
Plaintiffs–Appellants/Cross–Respondents,

v.

PALAZZI INTERNATIONAL, INC.,
and Italo Baldassari, Defendants–
Respondents/Cross–Appellants.

DOCKET NO. A–5340–14T1

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Submitted September 29, 2016

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Decided October 25, 2016

On appeal from Superior Court of New Jersey, Law
Division, Mercer County, Docket No. L–2201–12.

Attorneys and Law Firms

J. David Alcantara, attorney for appellants/cross-
respondents.

Maselli Warren, P.C., attorneys for respondents/cross-
appellants (Paul J. Maselli, of counsel and on the brief;
James Kilduff, on the brief).

Before Judges Lihotz, O'Connor, and Whipple.

Opinion

PER CURIAM

*1 Plaintiffs Maritza Salazar and Sergio Salazar appeal from a June 15, 2015 Law Division judgment denying them various relief in this action for breach of contract against defendants Palazzi International, Inc., (Palazzi) and Italo Baldassari. Plaintiffs also appeal from an April 24, 2015 order granting defendants' motion to quash subpoenas ad testificandum and duces tecum plaintiffs had served upon various individuals they intended to call at trial. Defendants cross-appeal from the same Law Division judgment, claiming the court erred when it relieved plaintiffs of paying certain monies owed to them.

Because copies of the motion and trial transcripts were not provided, we dismiss the appeal and cross-appeal. We summarize the issues and the trial court's findings following a bench trial to illustrate how the absence of these transcripts impeded our ability to conduct a meaningful review of the issues on appeal.

I

Our understanding of the controversy between the parties is derived from the briefs and exhibits submitted. We surmise as follows.

Baldassari was the owner of commercial property he had formerly operated as a restaurant and catering business through Regency Restaurant Management, Inc., (Regency). When that business closed, Baldassari listed the property for sale. Interested in acquiring Regency's liquor license and using the property as a nightclub, plaintiffs negotiated with defendants and, ultimately, the parties signed a letter of intent to enter into a lease once the liquor license was transferred to plaintiffs. Consistent with that intention, plaintiffs conveyed a \$20,000 security deposit to defendants.

Nonetheless, defendants continued to list the property for sale. To protect their interests, plaintiffs and defendants entered into an agreement in which plaintiffs agreed to pay defendants \$55,000 to acquire the rights of first refusal. In accordance with that agreement, plaintiffs paid \$30,000 to defendants upon the execution of the agreement; the \$25,000 balance was to be paid in monthly installments thereafter.

Before opening the nightclub, plaintiffs repaired the premises and bought furniture, liquor and other personalty to use in the operation of the nightclub. They then opened the nightclub before the lease started and the license was conveyed to them. Plaintiffs contend the understanding between the parties was that plaintiffs were tenants of defendants.

Plaintiffs claim that, two weeks after the nightclub opened, defendants ousted them from the premises through “intimidation” and took over the operation of the nightclub. During the trial, plaintiffs sought the return of the \$20,000 security deposit, the \$30,000 they paid in accordance with the right of first refusal agreement,

the profits they earned before defendants' took over the operation of the business, and compensation for the improvements they made to and for the personalty they put into the premises.

Defendants contended plaintiffs were deemed to be their employees so plaintiffs could use Regency's liquor license before Regency transferred the license to them. Defendants also alleged that just twelve days after they opened their nightclub, plaintiffs abruptly abandoned their business and the premises. Defendants counterclaimed seeking \$25,000, the balance of the amount owed to them under the right of first refusal agreement.

*2 After a bench trial, the trial court rendered an oral decision. While a copy of the trial transcript was not provided, a copy of the transcript of the court's decision was provided.

The court found defendants' witness more credible than plaintiffs'. As a consequence of this credibility finding, the court concluded plaintiffs were employees and not tenants of defendants, and had voluntarily terminated their employment and left the premises on their own accord. However, because they were employees, defendants were ordered to return the \$20,000 security deposit plaintiffs had conveyed to defendants.

As the right of first refusal agreement explicitly stated the \$30,000 plaintiffs paid to defendants was non-refundable, the court declined to order defendants to return this sum to plaintiffs. However, based upon the terms of the right of first refusal agreement and the testimony of defendants' witness, the court determined the parties intended such agreement to terminate once plaintiffs ceased to be defendants' employees. Accordingly, plaintiffs were relieved from making the remaining installment payments under the agreement.

The court further found there were no profits earned during the period plaintiffs ran the nightclub. Because they failed to secure defendants' permission before making improvements to or purchases for the premises, the court reasoned plaintiffs were not entitled to be reimbursed for any costs they incurred to make those repairs or purchases.

On appeal, plaintiffs contend the court's findings were not supported by the evidence and, before trial, the court erroneously quashed the subpoenas plaintiff had served upon various witnesses who would have provided pivotal evidence in support of plaintiffs' position. Plaintiffs raise for the first time on appeal that the court should have ordered defendants to pay them a salary for the services they provided as employees. In their cross-appeal, defendants argue the court erred when it found plaintiffs did not owe them the \$25,000 under the right of first refusal agreement.

First, we need not address plaintiffs' claim defendants should have paid them a salary, raised for the first time on appeal, as “[g]enerally, an appellate court will not consider issues, even constitutional ones, which were not raised below.” *State v. Galicia*, 210 N.J. 364, 383 (2012) (citing *Deerfield Estates, Inc. v. E. Brunswick*, 60 N.J. 115, 120 (1972)). Even if this issue had been raised, the trial court did address this question in its opinion and, thus, we would not do so in the first instance. *Duddy v. Gov't Emps. Ins. Co.*, 421 N.J. Super. 214, 221 (App. Div. 2011).

Second, the court's findings are predominantly derived from the witnesses who testified at trial. The transcript of the trial was not provided to us by either plaintiffs or defendants. While the transcript would not necessarily reveal why a witness is more credible than another, the court made findings based upon the substance of the testimony. Without the trial transcript, we are precluded from reviewing the merits of the trial court's decision and the arguments raised on the appeal and cross-appeal. R. 2:5–3(a) (requiring verbatim transcripts of proceedings challenged on appeal); *Cipala v. Lincoln Tech. Inst.*, 179 N.J. 45, 55 (2004) (holding the failure to provide the complete transcript permits appeal to be dismissed).

*3 Finally, because plaintiffs failed to provide a copy of the transcript setting forth the court's decision granting defendants' motion to quash plaintiffs' subpoenas, we similarly are unable to evaluate the merits of the court's decision.

Appeal and cross-appeal dismissed.

All Citations

Not Reported in Atl. Rptr., 2016 WL 6210969

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