NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

JOSEPH BEZZONE, JR., et al., Plaintiffs, vs. JOSEPH SUPOR, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MORRIS COUNTY DOCKET NO. MRS-L-1544-21 CIVIL ACTION – CBLP **OPINION**

Argued: February 18, 2022

Decided: February 18, 2022

Andrew E. Anselmi, Esq. and Zachary D. Wellbrock, Esq., of Anselmi & Carvelli, LLP, attorneys for the plaintiffs.

Paul H. Schafhauser, Esq. of Greenberg Traurig, LLP, attorneys for defendants.

I. BACKGROUND INFORMATION

This matter comes before the Court by application of Paul H. Schafhauser, Esq. on behalf of defendants Joseph Supor ("Supor"), Supor Family Grantor Trust ("Family Trust"), Supor Marital Trust ("Marital Trust"), JL Realty Property ("JL Realty"), Supor 136-1 LLC ("Supor 136-1"), J. Supor 136-1 Realty LLC ("Supor 136-1 Realty"), S&B Realty Co. ("S&B"), Supor-172 LLC ("Supor-172"), Supor Properties Enterprises LLC ("Supor Properties"), Subel Inc. ("Subel"), Supor-172 Realty LLC ("Supor-172 Realty"), J. Supor & Son Trucking & Rigging, Co. Inc. ("Supor Trucking and Rigging"), Supor Rigging LLC ("Supor Rigging"), Supor Heavy Haul LLC ("Supor Heavy Haul"), Trucking Brokerage Services LLC ("Trucking Brokerage"), Supor Crane & Rigging LLC ("Supor Crane"), Supor Trucking LLC ("Supor Trucking"), JS Leasing LLC ("JS Leasing"), John Does 1-10, and ABC Corps. 1-10 (collectively, "defendants"), on a motion to

dismiss. There are underlying claims for breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, unjust enrichment, conversion, breach of fiduciary duty, promissory estoppel, fraud, and misappropriation of name.

The Family Trust, the Marital Trust, JL Realty, Supor 136-1, Supor 136- 1 Realty, S&B, Supor-172, Supor Properties, Subel, Supor-172 Realty, Supor Trucking and Rigging, Supor Rigging, Supor Heavy Haul, Trucking Brokerage, Supor Crane, Supor Trucking, and JS Leasing are hereinafter collectively the "corporate/trust defendants."

The Family Trust, the Marital Trust, JL Realty, Subel, Supor Trucking and Rigging, Supor Rigging, Supor Heavy Haul, Trucking Brokerage, Supor Crane, Supor Trucking, and JS Leasing are hereinafter collectively the "non-NOG defendants."

The underlying causes of action stem from an alleged agreement between Bezzone and Supor. Pursuant to the alleged agreement, Bezzone has been engaged in efforts to redevelop real estate owned by Supor in exchange for ten percent of the value created. The complaint alleges that in February of 2016, Bezzone began leading a redevelopment initiative on properties owned by Supor ("NOG property") located in Harrison, New Jersey within the North of Guyon redevelopment district ("NOG"). The complaint alleges that Supor faced the threat of eminent domain from the Town of Harrison and requested Bezzone's assistance in redeveloping the NOG property in an attempt to save his land from being taken by Harrison. Bezzone advised Supor that he could achieve a "Redeveloper" designation of the NOG Property for Supor on a mixed-use basis, would result in a significant increase in the value of the NOG Property. Supor agreed that if Bezzone succeeded in achieving Redeveloper status, Supor would pay Bezzone ten percent of the appraised land value of the NOG Property upon redevelopment approval, along with additional development fees and cash flow bonuses to be paid in the future. Bezzone's efforts resulted in the

achievement of redevelopment designation for a high-density, mixed-use plan with increased value for Supor.

The complaint alleges that on or about February 25, 2016, Bezzone offered an initial Term Sheet that memorialized the terms of a joint venture to be formed with Supor (and Supor's affiliates). After Bezzone prepared the February 2016 Term Sheet and presented it to Supor, Bezzone and Supor continued to negotiate the project and the terms of the agreement. On March 2, 2016, Bezzone and Supor held a meeting in which they accepted the final terms of the agreement. The next day, on March 3, 2016, Supor sent Bezzone a revised document including his accepted terms and conditions. Supor's proposal was transmitted to Bezzone by Frank Mustilli – who was the Director of Finance and Chief Financial Officer of J. Supor & Son Trucking & Rigging Co., Inc. That agreement, which was signed by Bezzone, provided that Supor would retain ninety percent of the value for his "contribution of all agreed upon land parcels." The other ten percent was to be paid to Bezzone and Walsh for their "contribution of 'Sweat Equity'" in creating the increased value of the NOG Property. In addition there were other fees and payouts contemplated.

The complaint further alleges that although the written document was never signed by all parties, its provisions reflected the agreement of the parties, and that all parties agreed upon the development goals for the NOG property, the 90/10 compensation for land value, and the additional fees and payments. Supor requested to renegotiate the terms of their initial agreement. Both parties ultimately agreed that Bezzone would personally lead the redevelopment efforts for the NOG Property and that Bezzone would be compensated in an amount equal to ten percent of each the following elements: (a) the "approved" land value, as determined by a third-party appraisal (payable upon the approval of the Redevelopment Plan by the Town); (b) any developer

fee, as determined by future project cost; and (c) any future cash flow received by Supor, determined by future capital events (such as rental income, refinance capital, or sale proceeds). The complaint further alleges that the formation of this simple 90/10 agreement – which allowed Supor to reap 90% of the benefit on Bezzone's effort and creative expertise – was witnessed by others and was confirmed by Supor multiple times along with repeated promises to expeditiously follow through with a professional contract in writing to memorialize this arrangement.

The redevelopment plan and first redeveloper agreement ("RDA 1") that was approved yielded "as of right" development density of: (a) 894 residential units; (b) 316,000 sq. ft. of office space; (c) 161,000 sq. ft. of retail space; (d) 115,000 sq. ft. of self-storage space; and (e) 3,805 structured parking spaces. According to the appraisal report of an accredited appraiser retained by Supor, the value of the NOG Property under RDA 1 increased to $138,000,000. Bezzone alleges that under the agreement between Supor and Bezzone, the approval of the new redevelopment plan and RDA 1 by itself triggered an obligation by Supor to compensate Bezzone in the amount of $13,800,000 (ten percent of the appraised value).

Supor then asked Bezzone to lead an industry-wide RFP process, using Bezzone's personal and professional contacts to generate qualified development interest from real estate companies in the region. The complaint alleges that Supor was advised by his legal team and professional consultants that he needed to formalize his existing agreement with Bezzone before finalizing any new contract with a new real estate group. Instead of issuing Bezzone a document that reflected their ten percent agreement, Supor proffered an "Non-Binding Term Sheet" in October 2017. The October 2017 Term Sheet purported to reduce Bezzone's right to compensation from the original ten percent to five and a half percent upon the subsequent execution of a Definitive Agreement. The complaint alleges that the October 2017 Term Sheet provided that the payment obligations to

Bezzone were owed not only by Supor himself, but also Defendants Supor 136-1 LLC (and/or J. Supor 136-1 Realty, LLC), S&B Realty Co., and Supor-172 LLC. The complaint further alleges that Supor refused to follow through with executing the corresponding Definitive Agreement resulting in a failure to effectuate the modification of the deal outlined in the Term Sheet.

The complaint alleges that Supor went on to ask Bezzone to lead other unrelated real estate initiatives, which Bezzone agreed to undertake on the same 90/10 basis. In light of Supor's refusal to honor any of his prior obligations, Bezzone accepted an interim compensation of $15,000 per month as a "Consulting Fee" for his work on these additional projects. The complaint alleges that upon receipt of appraisals, Bezzone will be entitled to compensation in the amount of approximately $6.8 million with respect to the approved value of these properties.

In March of 2019, Supor asked Bezzone to lead an important negotiation between Supor and a highly accomplished New Jersey real estate firm with whom Bezzone also had a personal relationship. The goal was to orchestrate a land swap between the parties who had contiguous parcels in the NOG development area. Despite Bezzone's successful efforts over a year-long process, which resulted in a fully negotiated agreement between the parties, the contract for this deal also went unsigned by Supor, who again opted to "go it alone."

Thereafter, Bezzone agreed to extend his commitment to the NOG property redevelopment project. The complaint alleges that Bezzone agreed to do so in order to protect his interests and prior investments, time, and effort. Bezzone was put in charge of restructuring the entire development area, using only Supor-controlled parcels, while minimizing the impact on adjacent properties. This restructuring of the project was to be redesigned and approved in light of a newly expanded road infrastructure requested by the Town's development consultants and in coordination with The Port Authority. In March of 2021, a second redevelopment plan was

approved for the NOG property, resulting in a second redevelopment agreement ("RDA 2") being executed by Supor and Harrison. RDA 2 authorizes: (a) 1,500 market-rate apartments; (b) 1,000,000 sq. ft. of commercial space; (c) 150,000 sq. ft. of retail space; (d) 200 hotel rooms; and (e) more than 5,000 parking spaces. The NOG property's value increased to $200 million. Bezzone alleges that in light of the updated valuation and approval of RDA 2, his efforts entitle him to compensation in the amount of $20 million in connection with the NOG property redevelopment project.

Plaintiffs allege that Bezzone is also owed various amounts with respect to other Supor development projects. As of April 1, 2021, Bezzone is owed $235,000 in outstanding monthly fees related to his work on other Supor projects. Further, the complaint alleges that additional monies will also become due to Bezzone for the NOG Property in the near future, as he successfully led the strategic negotiations for the acquisition of the former Panasonic property located adjacent to the existing NOG Property. Supor and Bezzone both expect that the former Panasonic parcel will be incorporated into an additional amendment to the NOG Property redevelopment plan. The third RDA is expected to add another 600 market-rate apartments, along with additional retail space and parking – resulting in an anticipated increase in value of $40 million. Upon approval, RDA 3 will correspondingly increase the value-generation fee owed to Bezzone by an additional $4 million. The complaint alleges that Supor and Bezzone agreed that Bezzone would receive ten percent of the anticipated development fees and cash flow over the life of all projects, which is anticipated to be 120 months. These future fees and cash flows are estimated to amount to up to $100 million allegedly due to Bezzone over the next ten years provided Supor proceeds according to plan.

In summary, the complaint alleges that a total of $27,032,310 is currently due and owing to Bezzone. It further alleges that additional amounts for RDA 3, development fees, and cash flow

payments – potentially amounting to an additional $100 million – are expected to come due over the next ten years pursuant to the agreement between Supor and Bezzone. Defendants move to dismiss plaintiffs' complaint with prejudice or to dismiss with prejudice plaintiffs' allegations against the corporate/trust defendants.

II. STANDARD OF REVIEW

R. 4:6-2 provides, in relevant part, that the defendant may raise, by motion with accompanying brief, the failure of the plaintiff's pleading to state a claim upon which relief can be granted as a defense to the plaintiff's claim for relief. Such motions should be granted "in only the rarest of instances." Printing Mart v. Sharp Elect. Corp., 116 N.J. 739, 772 (1989). In approaching a motion to dismiss for failure to state a claim upon which relief can be granted, the Court's inquiry is limited to "examining the legal sufficiency of the facts alleged on the face of the complaint." Id. at 746. The court is permitted to consider additional documents, aside from the complaint, when those documents form the basis of plaintiff's claims. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005). The Court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim . . . ." Id. For purposes of analysis, the plaintiff is entitled to "every reasonable inference of fact . . . [and the examination] should be one that is at once painstaking and undertaken with a generous and hospitable approach." Id.

In reviewing the motion, the Court is not concerned with the "ability of plaintiffs to prove the allegations contained in the complaint." Id. The complaint need only allege sufficient facts as to give rise to a cause of action or *prima facie* case. Dismissal of the plaintiff's complaint is only appropriate after the complaint has been "accorded . . . [a] meticulous and indulgent examination. . . ." Printing Mart, 116 N.J. at 772. If dismissal of the plaintiff's complaint is appropriate, the

dismissal "should be without prejudice to a plaintiff's filing of an amended complaint." Id. In circumstances where the plaintiff's pleading is inadequate in part, the Court has the discretion to dismiss only certain counts from the complaint. *See, e.g.*, Jenkins v. Region Nine Housing Corp., 306 N.J. Super. 258 (App. Div. 1997).

III. ANALYSIS

a. Statute of Frauds

Defendants argue that plaintiffs' claims are barred by the New Jersey Statue of Frauds. Defendants contend that the complaint claims that plaintiffs are entitled to an interest in the NOG property, or ten percent of the profits or proceeds from the NOG property. They further contend that the Statute of Frauds defines an "[i]nterest in real estate" to include "any right, title or estate in real estate, and shall include a lease of real estate, a lien on real estate, a profit, an easement, an interest in a trust in real estate and a share in a cooperative apartment." *See* N.J.S.A. 25:1-10. Defendants argue that therefore, plaintiffs' alleged rights to "profits" from the NOG property constitutes an "interest in real estate" within the meaning of the Statute of Frauds. Defendants contend that the Statute of Frauds provides that "[a] transaction intended to transfer an interest in real estate shall not be effective to transfer ownership of the interest unless: (1) a description of the real estate sufficient to identify it, the nature of the interest, the fact of the transfer and the identity of the transferor and the transferee are established in a writing signed by or on behalf of the transferor; or (2) the transferor has placed the transferee in possession of the real estate as a result of the transaction and the transferee has paid all or part of the consideration for the transfer or has reasonably relied on the effectiveness of the transfer to the transferee's detriment." N.J.S.A. 21:1- 11(a). Based on the foregoing, defendants make the argument that neither of the prerequisites set forth in the Statute of Frauds for an interest in real estate have been satisfied by plaintiffs'

allegations, and therefore, plaintiffs' claims regarding the alleged 90/10 agreement are barred by the Statute of Frauds.

Defendants next argue that Statute of Frauds further provides that "[a]n agreement to transfer an interest in real estate or to hold an interest in real estate for the benefit of another shall not be enforceable unless: (a) a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement, and the identity of the transferor and transferee are established in a writing signed by or on behalf of the party against whom enforcement is sought; or (b) a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement and the identity of the transferor and the transferee are proved by clear and convincing evidence." N.J.S.A. 21:1-13. They contend that neither of these prerequisites have been satisfied in this case, and thus plaintiffs' claims against them regarding the NOG property are barred by the Statute of Frauds.

Next, defendants claim that plaintiffs admit that the written document was never signed by all parties. They further claim that the documents that the parties drafted specifically contemplated the negotiation and execution of a definitive agreement. *See* Exhibit B. Defendants argue that where, as here, the parties clearly intended any agreement to include a mutually-executed definitive agreement, the lack of any such mutually executed definitive agreement demonstrates that the parties did not intend to be bound. *See* Morton v. 4 Orchard Land Trust, 180 N.J. 118, 129 (2004).

Plaintiffs contend that the Statute of Frauds does not apply to this dispute because the alleged transactions do not involve a sale or transfer of real estate. Plaintiffs point to the Court's February 7, 2022 Order which states that "Plaintiffs are not asserting a possessory or other property interest in any of the property at issue. Rather, Plaintiffs are asserting that the damages for

Defendants' breach of contract are calculated based on the valuation of the properties at issue." *See* February 7, 2022 Order of the Hon. Frank J. DeAngelis, J.S.C., at 4. In referencing the Court's February 7, 2022 Order, plaintiffs argue that defendants' characterization of the agreement in question has already been rejected by the Court. Plaintiffs contend that defendants' emphasis on the term "profit" for their contention that plaintiffs' alleged rights to profits from the NOG property constitutes an interest in real estate within the meaning of the Statute of Frauds is misplaced. Plaintiffs argue that the term profit, while not defined in the Statute of Frauds is most sensibly read referring to the property interest known as the "right of profit a prendre, namely, a right to take a part of the soil or produce of the land, such as sand, clay, grass, trees and the like, in which there is a supposable value." Hopper v. Herring, 75 N.J.L. 212, 214 (1907). Plaintiffs argue that even if the reference in the Statute to "profit" were read to reflect current colloquial usage, the Statute of Frauds still does not apply. They contend that the complaint contains no references to "profits" at all, except for the shared profits and losses in the count alleging the existence of a joint venture. Plaintiffs maintain that the agreement was premised upon compensation for services rendered, and a key component of that compensation was to be quantified and measured according to the increase in the property's value as a result of plaintiffs' efforts. Plaintiffs contend that the one component of plaintiffs' compensation that is described as concerning a share of proceeds – the cash flow bonus – does not relate to "profits" at all, nor does it relate to proceeds of any particular real property. Rather, plaintiffs argue, this element of compensation consists of a share of cash flows from the income generated by the redevelopment efforts and any future businesses facilitated by the redevelopment efforts.

Plaintiffs further argue that even if the Statute of Frauds did apply, it would not support dismissal here as defendants merely create a factual issue under N.J.S.A. § 25:1-11(b). They assert

that defendants cite no provision stating that the Statute requires early dismissal where a claim is based on a non-written agreement, because that is not how the Statute works. Plaintiffs argue that even if the Statute of Frauds did apply, there is an exception and the existence of the agreement simply becomes a factual issue. They argue that the agreement at issue falls squarely within the exception provided by the Statute. Plaintiffs contend that N.J.S.A. § 25:1-11(b), provides that a transaction intended to transfer an interest in real estate that does not satisfy the writing requirement of § 25:1-11 (a) is nevertheless enforceable "as an agreement to transfer an interest in real estate under section 4 of this act" (i.e., under N.J.S.A. § 25:1-13). In turn, plaintiffs assert, N.J.S.A. § 25:1-13 provides that an "agreement to transfer an interest in real estate" may be enforced if either it is memorialized in a written instrument or "a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement and the identity of the transferor and the transferee are proved by clear and convincing evidence." Plaintiffs argue that to the extent that the Statute of Frauds applies at all, the consequence is not dismissal at the pleading stage, rather, it simply falls to plaintiffs to prove the existence of the agreement and its core terms by clear and convincing evidence. Thus, they argue that while the Statute may affect plaintiffs' ultimate burden at trial, and as a result the scope of discovery, it does nothing at the pleading stage.

In their reply, defendants contend that plaintiffs allege that they "held a joint property interest in the subject matter of the venture." *See* Complaint at ¶ 106. Defendants argue that the alleged oral agreement between Supor and Bezzone is therefore subject to the Statute of Frauds.

Plaintiffs submitted a sur-reply to address arguments that they contend defendants raised for the first time in their reply. Plaintiffs contend that defendants' argument that the Statute of Frauds applies because plaintiffs allege that the parties held a joint property interest in the subject

matter of the joint venture makes no sense because plaintiffs do assert a property interest in the business of the joint venture, however it is not an interest in the underlying real estate. Plaintiffs argue that only the latter would come within the ambit of the Statute of Frauds.

The Statute of Frauds is an affirmative defense to a contract claim that was created "to avoid the hazards attending the use of uncertain, unreliable and perjured oral testimony." Carlsen v. Carlsen, 49 N.J. Super. 130, 135 (App. Div. 1958). The Statute of Frauds, however, has exceptions. See N.J. Rev. Stat. § 25:1 et. seq. N.J.S.A. 25:1-11 provides:

> a. A transaction intended to transfer an interest in real estate shall not be effective to transfer ownership of the interest unless:
>
> > (1) a description of the real estate sufficient to identify it, the nature of the interest, the fact of the transfer and the identity of the transferor and the transferee are established in a writing signed by or on behalf of the transferor; or
> >
> > (2) the transferor has placed the transferee in possession of the real estate as a result of the transaction and the transferee has paid all or part of the consideration for the transfer or has reasonably relied on the effectiveness of the transfer to the transferee's detriment.

Based on the allegations in the complaint and arguments made by the parties, at this time, the Statute of Frauds does not apply to the transaction at issue. The provision of the Statute of Frauds relied on by the parties applies to agreements for the sale or transfer of real estate. Here, the agreement at issue is not for the sale or transfer of real estate. The alleged agreement is for the payment of the redevelopment services provided by plaintiffs to defendants. The complaint's allegation that the parties "held a joint property interest" does not change the basis of the alleged agreement. Further, in the context of property law, the term "profit" is not interpreted to mean that which defendants contend it to mean. A profit is distinct from both a lease and a license, as it conveys a lesser interest than exclusive possession, but still conveys an interest that is "alienable, assignable, and inheritable," which distinguishes it from the mere personal privilege of a

license. Moore v. Schultz, 22 N.J. Super. 24, 28 (App. Div. 1952). A profit is closely analogous to an easement. Moore, 22 N.J. Super. at 28; Restatement (Third) of Property: Servitudes ("Restatement") § 1.2, comment (a). Thus, defendants' argument that the agreement comes within the purview of the Statute of Frauds because plaintiffs hold an interest in the real property owned by Supor in the form of a profit is misplaced. In light of the fact that the alleged agreement at issue does not come within the purview of the Statute of Frauds, the fact that it was not deduced to writing is not itself a sufficient ground for dismissal.

Further, even if the alleged agreement fell within the Statute of Frauds, plaintiffs would be permitted to prove, by clear and convincing evidence, that an enforceable agreement exists. The determination as to whether the Statute of Frauds is applicable or satisfied with other evidence necessitates discovery.

Accordingly, defendants' motion to dismiss the breach of contract count of the complaint based on the Statute of Frauds is denied.

b. Breach of Contract

Defendants argue that plaintiffs' claim for breach of contract is fatally flawed and thus should be dismissed. They contend that no valid or binding contract exists between the plaintiffs and defendants. Defendants argue that plaintiffs' allegations do not demonstrate that there was any meeting of the minds between the parties, nor any mutual assent, nor any terms sufficiently definite to be enforced with respect to defendants and/or the NOG Property. They contend that as a threshold matter, plaintiffs admit that the parties prepared written documentation – but that the written document was never signed by all parties, and that this fact demonstrates that there was no binding agreement between the parties, nor did the parties intend to bind themselves absent a mutually-executed writing. Further, defendants argue that plaintiffs' own conduct, specifically

continued negotiations with Supor, belies any argument that there was a binding agreement. Defendants point to other projects referenced in the complaint as well as the interim compensation of $15,000 per month as evidence of these further negotiations and argue that these renegotiations belie plaintiffs' contention that a simple 90/10 agreement was formed between Supor and Bezzone in February of 2016.

Defendants contend that there are further defects regarding plaintiffs' claims. They argue that the complaint alleges that plaintiffs were entitled to compensation based on the execution of RDA 1, but the fact that plaintiffs never took this position in October of 2017 and instead waited until 2021 to do so demonstrates that plaintiffs did not believe that they had entered into a binding agreement with Supor in February 2016. Defendants argue that plaintiffs' longstanding silence regarding their alleged "contract rights" estops them from now alleging that they entered into a binding agreement with Supor in February 2016 that triggered alleged rights as early as October 2017.

Plaintiffs assert that "whether a valid oral contract was made or whether oral agreements were intended not to bind the parties until a written contract was executed, is solely a matter of intent determined in large part by a credibility evaluation of witnesses." McBarron v. Kipling Woods, LLC, 365 N.J. Super. 114, 117 (App. Div. 2004). They further contend that case law illustrates that these factual issues are often not even suitable for summary judgment, much less dismissal at the pleadings stage. McBarron, 365 N.J. Super. at 119. Plaintiffs contends that they are confident that the evidence will establish the existence and terms of the agreement between the parties. The evidence they will rely on includes conversations between the parties detailed in the complaint, communications between the parties and third parties, as well as documents, testimony of witnesses, and the course of performance between the parties described in the complaint.

Plaintiffs argue that the fact that the 2017 Term Sheet states that it is not binding is not a defect in plaintiffs' case because plaintiffs do not point to it as the contract at issue. They contend that the complaint explains that defendants failed to consummate the transaction at issue and that the term sheet itself is of no binding effect. Plaintiffs maintain that their claims are based on a prior 2016 agreement between the parties, and had defendants executed the 2017 Term Sheet, their obligations under the 2016 agreement would have been modified and reduced accordingly. Plaintiffs contend that defendants failed to do so, so they remain subject to the original 90/10 compensation structure agreed upon in 2016.

Plaintiffs also argue that their breach of contract claim should not be dismissed because defendants' arguments amount to nothing more than factual disputes that should have been asserted in an answer. Plaintiffs contend that instead of focusing on whether the complaint sufficiently alleges the formation of a contract, the only issue that presently matters, defendants argue that the allegations are not credible. Plaintiffs contend that they are not estopped from asserting their contract claims, as defendants argue, since the six year statute of limitations has not run.

In their reply, defendants maintain that plaintiffs cannot support their causes of action against defendants as legally required, specifically, that a simple 90/10 agreement was formed between Supor and Bezzone in February 2016. They argue that plaintiffs' allegations do not adequately specify the terms of said agreement nor do plaintiffs demonstrate a meeting of the minds or an intention by Supor to be bound by the alleged terms. Defendants claim that the fact that the parties contemplated written documentation, but never executed it, demonstrates that there was no binding agreement between the parties, nor did the parties intend to bind themselves absent a mutually-executed writing.

Plaintiffs submit that defendants argued for the first time that dismissal is warranted because clear and convincing evidence of an oral agreement does not appear in the complaint itself. Plaintiffs contend that this argument is premature at the motion to dismiss stage.

To establish a breach of contract claim, a plaintiff has the burden to demonstrate that: 1) the parties entered into a valid contract; 2) the defendant failed to perform his obligations under the contract; 3) that the plaintiff sustained damages as a result. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). A contract arises from an offer and acceptance, and must be "sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). A contract requires an unqualified acceptance to conclude the manifestation of assent. Id. "An offeree may manifest assent to the terms of an offer through words, creating an express contract, or by conduct, creating a contract implied-in-fact." Id. at 436. Although generally does not manifest assent, the relationships between the parties or other circumstances may justify the offeror's expecting a reply and, therefore, assuming that silence indicates assent to the proposal. Id. Therefore, a contracting party is bound by the apparent intention he or she outwardly manifests to the other party and it is immaterial that he or she has a different, secret intention from that outwardly manifested. Brawer v. Brawer, 329 N.J. Super. 273, 283 (App. Div. 2000).

"The interpretation of a contract is ordinarily a legal question for the court and may be decided on summary judgment unless 'there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation . . . .'" Celanese Ltd. v. Essex Cty. Imp. Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (quoting Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000)); *see also* Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001) (The interpretation of the terms of a contract are decided by the court as a matter

of law unless the meaning is both unclear and dependent on conflicting testimony). If "the terms . . . are clear and unambiguous, there is no room for construction and the court must enforce those terms as written." Watson v. City of E. Orange, 175 N.J. 442, 447 (2003); *accord* Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 560 (App. Div. 2007). "Consistent with established case law, [the court] cannot make for sellers a better or more sensible contract than the one they made for themselves." Kotkin v. Aronson, 175 N.J. 453, 455 (2003)(holding that the seller did not qualify for the radon clause and that the presence of radon gas was an insufficient basis to cancel the contract).

Based on the complaint as well as the exhibits accompanying the papers, the Court concludes that plaintiffs have sufficiently stated a cause of action for breach of contract. The complaint alleges that the parties entered into an agreement for plaintiffs to be paid ten percent of the value of the NOG property for their contribution in creating its increased value. The term sheet relied on by the defendants evidences that the parties contemplated an agreement for a different value of contribution, but an agreement, nonetheless. Accordingly, defendants' motion to dismiss the breach of contract count of the complaint is denied.

c. Plaintiffs' Claims against Corporate/Trust Defendants and the Non-NOG Defendants

Defendants also argue that plaintiffs allege, at very most, only that Supor was a party to an agreement with Bezzone, and that none of the corporate/trust defendants are alleged to have been parties to any purported agreement between Supor and Bezzone. They contend that here, plaintiffs do not allege the existence of any contract between plaintiffs and the corporate/trust defendants, and therefore, even if the Court were to conclude that plaintiffs' claims against Supor should not be dismissed at this time, the Court in all events should dismiss plaintiffs' claims against the corporate/trust defendants.

Defendants contend that plaintiffs allege that only Supor and Bezzone were the parties to the alleged agreement, not all defendants named in the complaint. They argue that even if plaintiffs were to argue that the Supor-related entities who executed RDA 1 should somehow be held liable, those entities included only Supor 136, S&B, Supor-172, Supor 136-1, Supor Properties, and Supor-172 – not the Non-NOG Defendants. Defendants argue that plaintiffs also allege that they are entitled to increased compensation based on the execution of RDA 2, but under RDA 2, only Supor 136-1 Realty, Supor Properties and Supor-172 Realty are identified as "Redeveloper" with respect to the NOG property. Defendants contend that as with RDA 1, none of the Non-NOG Defendants were parties to RDA 2. They argue that nowhere in the complaint do plaintiffs even allege that the Non-NOG defendants contracted with plaintiffs to do any work. They argue that the Court should dismiss plaintiffs' claims against the non-NOG defendants.

Plaintiffs argue that the claims against the corporate defendants should not be dismissed because this is a premature factual dispute. They argue that defendants' mere disagreement as to ultimate factual issues including the conduct of the parties or the existence and terms of an agreement between them does not require dismissal. Plaintiffs contend that they request piercing the corporate veil between defendant Supor and the various entities under his control in the prayer for relief, and that in support of this, the complaint expressly alleges that corporate formalities are not observed and that the distinction between Supor and his entities is disregarded.

In their reply, defendants maintain that none of the corporate/trust defendants are alleged to have been parties to any purported agreement between Supor and Bezzone, and therefore, plaintiffs' claims against the corporate/trust defendants are fatally flawed. Defendants argue that if plaintiffs' claims against the corporate/trust defendants were sustained, plaintiffs would be allowed to subvert the entire basis for the establishment of separate legal entities merely by making

vague assertions unsupported by all of the elements necessary to sustain a request to pierce the corporate veil. Defendants argue that plaintiffs cannot demonstrate that the corporate/trust defendants abused the privilege of incorporation to perpetuate a fraud or injustice, and that they refer to recent facts regarding Supor's refinancing efforts, but without any basis and without citing any allegation to any such effect in the complaint. They further argue that none of the corporate/trust defendants are alleged to have been parties to any purported "agreement" between Supor and Bezzone, and that plaintiffs do not allege that Supor would not have sufficient means to satisfy a judgment. They contend that therefore, even if the Court were to conclude that plaintiffs' claims against Supor should not be dismissed at this time, the Court should dismiss plaintiffs' claims against the corporate/trust defendants.

Plaintiffs contend that defendants seek an early merits judgment as to all of the corporate/trust and non-NOG defendants. They argue that the central allegation as to veil-piercing is clearly and sufficiently articulated in the complaint.

The New Jersey Supreme Court described the standard for piercing a corporation's veil in State Dep't of Environ. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983). A corporation is a separate entity from its shareholders. Id. One of the primary reasons for incorporation is to insulate shareholders from the liabilities of the corporate enterprise. Id. Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil. Id. Courts may pierce a corporate veil if the plaintiff shows that corporation was a "mere instrumentality" of the parent by showing that "the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent." Id. at 500-501. "Even in the presence of corporate dominance, liability generally is imposed only when the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law." Id. at 501.

A party seeking to pierce the corporate veil must establish: (1) that the entity was "dominated" by the individual owner, and (2) "that adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law." Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199-200 (App. Div. 2006) (*citing* State Dep't of Environ. Prot., 94 N.J. at 500-01).

At this time, defendants' motion to dismiss the corporate/trust defendants is premature. Further discovery is needed to determine whether the entities named in the complaint were dominated by Supor, and whether adherence to any corporations present would perpetuate a fraud or injustice in the present case, as alleged in the complaint. Accordingly, defendants' motion to dismiss the corporate/trust defendants from the action is denied.

d. Breach of Good Faith and Fair Dealing

Defendants also argue that plaintiffs' claim for breach of good faith and fair dealing is fatally flawed and thus should be dismissed. The contend that there is no enforceable contract between the parties and thus there is no valid claim for breach of the covenant of good faith and fair dealing.

Plaintiffs maintain that the only basis defendants provide for dismissing the claim for breach of the covenant of good faith and fair dealing is that such a claim cannot stand in the event that the breach of contract claim is dismissed. They argue that defendants' arguments on this point must fail for the same reasons as set forth above with respect to the breach of contract claim.

A breach of covenant of good faith and fair dealing may be found "even though the conduct failed to violate any of the express terms of the contract agreed to by the parties." Sons of Thunder v. Borden, Inc., 148 N.J. 396, 423 (1997). Accordingly, a party "may breach the implied covenant of good faith and fair dealing in performing its obligations," even when complying with the

contract's agreed upon terms. Id. at 422. However, this implied covenant cannot supersede a contract's express terms. Id. at 419; Wade v. Kessler Inst., 172 N.J. 327, 341 (2002). Under New Jersey law, the covenant of good faith and fair dealing is "applied in three general ways." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 257 (App. Div. 2002):

> First, the covenant permits the inclusion of terms and conditions which have not been expressly set forth in the written contract . . . Second, the covenant has been utilized to allow redress for the bad faith performance of an agreement even when the defendant has not breached any express term . . . And third, the covenant has been held, in more recent cases, to permit inquiry into a party's exercise of discretion expressly granted by a contract's terms.

Id.

The complaint states a *prima facie* cause of action for breach of the covenant of good faith and fair dealing. As demonstrated by plaintiffs, as long as the breach of contract action is viable, then so is their claim for breach of the covenant of good faith and fair dealing. Accordingly, defendants' motion to dismiss this count of the complaint is denied.

e. Quantum Meruit

Defendants also seek to dismiss plaintiffs' quantum meruit claim. Defendants contend that since plaintiffs claim to have an enforceable contract, they cannot recover based on quantum meruit. They further contend that plaintiffs admittedly already were paid $15,000 per month over several years for any alleged services and have thus already been compensated.

Plaintiffs allege that it is well settled that plaintiffs are permitted to plead alternative bases for relief, which includes alleging both claims based on an express contract and claims based upon quasi-contract or an implied agreement. They argue that it is only double recovery that is prohibited. Plaintiffs contend that both types of claims may even be pursued all the way through trial and submitted to the jury. Cty. of Essex v. First Union Nat. Bank, 373 N.J. Super. 543, 556 (App. Div. 2004).

Quantum meruit is a form of quasi-contractual recovery and is "wholly unlike an express or implied-in-fact contract in that it is 'imposed by the law for the purpose of bringing about justice without reference to the intention of the parties.'" St. Barnabas Med. Ctr. v. Cnty. of Essex, 111 N.J. 67, 79 (1988) (citations omitted). The equitable remedy is applicable only "when one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 437 (1992). It has long been recognized, however, that the existence of an express contract excludes the awarding of relief regarding the same subject matter based on quantum meruit. Kas Oriental Rugs v. Ellman, 394 N.J. Super. 278, 286 (App. Div. 2007).

At this time, dismissal of plaintiffs' quantum meruit claim would be premature. It has not been determined whether there was an agreement between the parties or whether any alleged agreement was subsequently breached. In addition, plaintiffs are permitted to plead in the alternative such that if there is a finding of no binding contract between the parties, plaintiffs may then seek relief under the theory of quantum meruit. To the extent defendants maintain that the monthly payments to plaintiffs satisfied their obligations under a quantum meruit situation, defendants would be asking the Court to make factual determinations at the motion to dismiss stage. Discovery is necessary for a jury to make the ultimate determination on the reasonableness of compensation under a quantum meruit theory. Therefore, defendants' motion to dismiss the quantum meruit count of the complaint is denied.

f. Unjust Enrichment

Defendants argue that plaintiffs have not alleged that any benefit was conferred upon defendants that was separate and distinct from any contract benefit, and plaintiffs instead admit that they were paid for consulting services over a period of years. Defendants assert that there has been no unjust enrichment since plaintiffs have already been paid.

Plaintiffs maintain that while it is true that the complaint alleges that plaintiffs received some compensation, it also alleges that the meager compensation received was both separate and apart from the sums due for plaintiffs' work on the NOG redevelopment project and also inadequate. Plaintiffs also argue that the claims for unjust enrichment and quantum meruit would survive even if the Court determined that the contractual claims were barred by the Statute of Frauds, as these claims are separate and distinct from the contract between the parties.

Unjust enrichment is based on the equitable principle that "a person shall not be allowed to enrich himself unjustly at the expense of another." Goldsmith v. Camden Cnty. Surrogate's Office, 408 N.J. Super. 376, 382 (App. Div. 2009). "The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." VRG Corp. v. GKN Realty Corp., 135 N.J. 539 (1994). To establish unjust enrichment, "... in addition to the expectation of a plaintiff for payment of services rendered from a defendant, the counterpart of the rule requires that there must be an objective expectation by defendant to pay plaintiff." Insulation Contracting & Supply v. Kravco, Inc., 209 N.J. Super. 367, 377 (App. Div. 1986). As stated in Avery v. Sielcken-Schwarz, 5 N.J. Super. 195, 200 (App. Div. 1949), "[a] defendant is obliged to pay for services rendered to him by the plaintiff if the circumstances are such that plaintiff reasonably expected defendant to compensate him and if a

reasonable man, in the defendant's position, would know that the plaintiff was doing the work in confidence that defendant would pay him. The absence of these factors brings an opposite result".

The complaint alleges that the value of the NOG property has increased under three separate redevelopment agreements. It further alleges that these increases are the result of plaintiffs' efforts, for which plaintiffs have not been adequately compensated. The term sheet evidences that there was a payment agreement contemplated, but never executed, further evidencing plaintiffs' claim that they are owed compensation for their services. Similar to the quantum meruit claim, plaintiff is permitted to plead in the alternative to the extent there is a finding that there is no binding contract between the parties. Accordingly, defendants' motion to dismiss the unjust enrichment count of the complaint is denied.

g. Conversion

Defendants also argue that plaintiffs' claim for conversion should be dismissed because plaintiffs cannot demonstrate that defendants exercised any dominion or control over any goods or other property belonging to plaintiffs.

Plaintiffs contend that their conversion claim should not be dismissed because defendants raise factual disagreements, not legal arguments. They further contend that the complaint alleges that defendants did exercise dominion and control over the property, the redevelopment entity, and money belonging to plaintiffs in a way consistent with plaintiffs' rights.

"Conversion [is] defined as 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.'" LaPlace v. Briere, 404 N.J. Super. 585, 595 (App. Div.) (*quoting* Barco Auto Leasing Corp. v. Holt, 228 N.J. Super. 77, 83 (App. Div. 1988)), certif. denied 199 N.J. 133 (2009). "Conversion is an intentional tort in that the defendant must have intended to

exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights." LaPlace, 404 N.J. Super. at 595 (quotations omitted).

The complaint alleges that plaintiffs possessed property interests and the right of immediate possession and enjoyment thereof, and that defendants have wrongfully interfered with plaintiffs' rights and interests. It further alleges that as a result of defendants' actions, plaintiffs were damaged. Accordingly, the complaint states a cause of action for conversion, and defendants' motion to dismiss is denied.

h. Breach of Fiduciary Duty

Defendants argue that plaintiffs allege at very most that Supor was a party to a contract with Bezzone, and that contracting parties do not owe each other a general duty of care or fiduciary duty unless that duty is independently imposed by law. *See* Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 309 (2002). Defendants contend that plaintiffs have alleged no independent duty that might support an allegation that defendants were their fiduciaries. Accordingly, defendants argue, there is no basis for plaintiffs to allege any claim for breach of fiduciary duty.

Plaintiffs set forth that the complaint alleges in count six that defendants owed fiduciary duties to plaintiffs as joint venturers, and as joint venturers, defendants owed a fiduciary duty to plaintiffs.

"The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position." McKelvey v. Pierce, 173 N.J. 26, 57 (2002). "A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matter within the scope of their relationship." Id. The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. F.G. v. MacDonell, 150 N.J. 550 (1997).

Traditional fiduciary relationships include those between trustee and beneficiary, insurer and insured, guardian and ward, agent and principal, attorney and client, corporate director and shareholder, and the members of a partnership. Pickett v. Lloyd's (A Syndicate of Underwriting Members), 131 N.J. 457, 467 (1993). R. 4:5-8(a) requires allegations of misrepresentation and breach of trust to be pleaded with particulars of the wrong, with dates and items if necessary. However, malice, intent, knowledge, and other conditions of the mind may be alleged generally. R. 4:5-8(a).

The complaint alleges that the parties agreed to pursue the redevelopment of the NOG property as joint venturers, and that the parties held a joint property interest in the subject matter of the venture. The complaint further alleges that as joint venturers with plaintiffs, defendants are bound by the fiduciary duties of care and loyalty, which they violated. While defendants contend that the 2017 term sheet, that was not agreed to by the parties, makes clear that there is no joint venture, plaintiffs allege that there was a joint venture among the parties. At the motion to dismiss stage, accepting all of plaintiffs' allegations as true, the complaint sets forth a cause of action for breach of fiduciary duty. Accordingly, defendants' motion to dismiss the breach of the fiduciary duty count of the complaint is denied.

i. Promissory Estoppel

Defendants argue that plaintiffs' claim for promissory estoppel fails, because there was no clear and definite promise upon which Plaintiffs reasonably relied to their detriment. Defendants contend that plaintiffs knew that there would be no binding agreement between the parties absent the execution of a definitive agreement – and no such definitive agreement ever was executed. Further, defendants argue that plaintiffs assert that the parties repeatedly renegotiated their alleged

agreement – throughout more than four years – thereby belying any allegation that plaintiffs relied on any clear and definite promise in 2016.

Plaintiffs maintain that their promissory estoppel claim should not be dismissed because defendants base their arguments on factual disputes and the 2017 Term Sheet. They contend that whether there was a promise that plaintiffs relied on to their detriment is a dispute as to a factual issue. Plaintiffs argue that the claim for promissory estoppel would survive even if the Court determined that the contractual claims were barred by the Statute of Frauds. *See* Mazza v. Scoleri, 304 N.J. Super. 555, 560 (App. Div. 1997).

The prima facie elements for promissory estoppel are: (1) a clear and definite promise by the promisor; (2) the promise must be made with the expectation that the promisee will rely thereon; (3) the promisee must in fact reasonably rely on the promise, and (4) detriment of definite and substantial nature must be incurred in reliance on the promise. *See* Ballard v. Schoenberg, 224 N.J. Super. 661, 666 (App. Div. 1988).

The complaint alleges that defendants made clear and definite promises to plaintiffs, including the promises of compensation, which they expected plaintiffs to rely upon. It is further alleged that plaintiffs did rely upon these promises, which caused them to suffer damages. The complaint therefore gleans a cause of action for promissory estoppel, and defendants' motion to dismiss the promissory estoppel count is denied.

j. Fraud

Defendants next contend that plaintiffs have failed to specifically plead fraudulent conduct with respect to any defendant – and certainly none as to all defendants. They argue that plaintiffs' generalized allegations fail as a matter of law as plaintiffs have not specified any acts of fraud. Defendants contend that plaintiffs' fraud claim must be dismissed.

Plaintiffs assert that their fraud count should not be dismissed because they have made factual allegations sufficient to establish that defendants intended not to perform their contractual obligations at the time that the agreement was made.

A plaintiff asserting a claim for fraud or misrepresentation must plead: (1) a material misrepresentation by the defendant of a presently existing fact or past fact, (2) knowledge or belief by the defendant of its falsity, (3) an intent that the plaintiff rely on the statement, (4) reasonable reliance by the plaintiff, and (5) resulting damages to the plaintiff. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 175 (2006). Fraud is not presumed and must be proven through clear and convincing evidence. Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989). Fraud based on concealment of information may be actionable if the defendant was under a duty to disclose the information withheld. United Jersey Bank v. Kensey, 306 N.J. Super. 540, 551 (App. Div. 1997). Fraud of course is never presumed; it must be clearly and convincingly proven. Albright v. Burns, 206 N.J. Super. 625, 636 (Super. Ct. App. Div. 1986)

R. 4:5-8(a) requires that plaintiffs, when pleading fraud or misrepresentation, plead with particularity. If a fraud pleading does not include the required specificity, the pleader is ordinarily afforded an opportunity to amend the complaint in lieu of dismissal. *See* Rebish v. Great Gorge, 224 N.J. Super. 619 (App. Div. 1988). While the complaint is searched in depth and with great liberality a pleading cannot be devoid of the essential elements of the cause of action. Id. at 627.

It is error to permit an amendment to a complaint that fails to state a cause of action on which relief can be granted. *See* Howard v. University of Medicine, 172 N.J. 537, 559-60 (2002).

The complaint alleges that Supor had no intention of performing the obligations he undertook through his agreement with Bezzone. It further alleges that defendants made false representations to plaintiffs, which they knew or believed to be false at the time they made them. The complaint alleges that these misrepresentations include the representation that defendants intended to fulfill their contractual allegations, and that they made these with the intent to deceive plaintiffs. The complaint, therefore, gleans a cause of action for fraud, and defendants' motion to dismiss this count is denied.[1]

k. Economic Loss Doctrine

Defendants also argue that in addition to suffering from the defects outlined above, plaintiffs' tort claims also are barred by the economic loss doctrine.

Plaintiffs dispute that the economic loss doctrine bars their claims. Plaintiffs contend that under New Jersey law, the economic loss doctrine provides merely that "a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2002). Plaintiffs contend that this limitation on remedies evolved "as an effort to establish the boundary line between contract and tort remedies" (Dean v. Barrett Homes, Inc., 204 N.J. 286, 295 (2010)) and serves to prevent double recoveries. They further argue that the doctrine does not operate to leave a party without any remedy. *See* People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 254 (1985). Plaintiffs argue that defendants are saying both that plaintiffs have no contractual claims and that

[1] According to plaintiffs, defendants have not made any argument with respect to plaintiffs' claims for misappropriation of plaintiffs' names, and thus this count must survive dismissal. As defendants have not sought to dismiss this count in their motion, the Court finds that plaintiffs' arguments do not merit discussion.

their tort claims are barred by those contract claims. Plaintiffs contend that defendants thus twist this rule designed to prevent double recovery into a weapon to preclude any recovery whatsoever. Plaintiffs contend that defendants argue that there was no contract between the parties, and that plaintiffs are precluded from recovering in tort because of the contractual relationship they had with defendants.

When a party's entitlement to damages arises from a breach of contract, it is barred from recovering economic losses in tort as well. Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 581-82 (1985). "The Economic Loss Doctrine is designed to place a check on limitless liability ... and establish clear boundaries between contract and tort law." Werwinski v. Ford Motor Co., 286 F.3d 661, 680 (3d Cir. 2002). Furthermore, "whether a tort claim can be asserted alongside a breach of contract claim depends on whether the tortious conduct is extrinsic to the contract between the parties." State Capital Title & Abstract Co. v. Business Serv., LLC, et al., 646 F. Supp. 2d 668, 676 (D.N.J. 2009)(citation omitted).

Here, dismissal of plaintiffs' claims pursuant to the economic loss doctrine would be premature as it has not yet been adjudicated whether plaintiffs are entitled to damages from a breach of contract or whether there is an election of remedies issue. Accordingly, defendants' motion to dismiss plaintiffs' claims based on the economic loss doctrine is denied.

l. Leave to Amend

Plaintiffs assert that if the Court grants defendants' motion, plaintiffs should be granted leave to amend their pleadings to cure any pleading defects.

Defendants argue that the Court should deny plaintiffs' request for leave to amend and/or replead. They contend that plaintiffs' case falls squarely within the futility exception to Courts granting leave to amend.

R. 4:9-1 permits a party to file a motion to leave to amend a pleading and such leave should be freely given in the interests of justice. Motions are to be granted without consideration of the ultimate merits of the amendment. Comment 2.1 to R. 4:9-1. The broad power of amendment should be liberally exercised at any stage of the proceedings. Id. This is especially true when the failure to join necessary parties may preclude a subsequent lawsuit because of the entire controversy doctrine and where no undue delay or prejudice will result from the amendment. Tomaszewski v. McKeon Ford, 240 N.J. Super. 404, 411 (App. Div. 1990).

However, the factual situation in each case must guide the court's discretion, particularly where the motion is to add new claims or new parties late in the litigation. Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593, 602 (App. Div. 1997). Because the achievement of substantial justice is the fundamental consideration, the denial of such a motion in the "interests of justice" is appropriate only when there would be undue prejudice to another party. Franklin Medical Associates v. Newark Public Schools, 362 N.J. Super. 494, 506 (App. Div. 2003). Thus, "courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law… There is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." Robinson v. Zorn, 430 N.J. Super. 312, 316 (App. Div. 2013) (*citing* Prime Accounting Dep't v. Twp. of Carney's Point, 212 N.J. 493, 511 (2013)).

The Court has not dismissed any counts of in plaintiffs' complaint. Therefore, leave to amend the pleadings is not necessary at this time.