

HAIM YOSEF MINZBERG <i>Plaintiff,</i> -against- SHIMON GRINBERGER, SIMCHA KLOHR, MIREL KLOHR, and NEWPORT ESTATES, LLC <i>Defendants.</i>	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-000099-24-T4 On Appeal from Summary Judgment Order of Disposition LAW DIVISION: OCEAN COUNTY DOCKET NO.: OCN-L-001971-22 CIVIL ACTION Sat Below: Hon. Valter H. Must, J.S.C.
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BRIEF OF PLAINTIFF-APPELLANT HAIM YOSEF MINZBERG

Date Submitted: March 27, 2025

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Order Granting Summary Judgment and Dismissing Claims	Pa-591; 6T pp. 24-29
Denial of Motion to Amend Complaint	6T – pp. 24-29

PRELIMINARY STATEMENT

This appeal arises from a trial in which the trial court committed multiple reversible errors, chief among them the sua sponte grant of summary judgment on claims that had not even been briefed or argued by the parties. In doing so, the court improperly overstepped its role and deprived the Plaintiff of his due process right to be heard. The trial court's action of granting summary judgment without notice or an opportunity for Plaintiff to present his positions is a fundamental violation of procedural fairness and due process.

Moreover, regarding the claims and issues that were briefed, the court committed multiple reversible errors, including various explicit and implicit determinations that no genuine issues of material fact existed. In fact, the record is replete with factual disputes that could only be properly evaluated by a jury, including conflicting testimony and differing inferences that could reasonably be drawn from the evidence. By disregarding these genuine issues of material fact and deciding the case, the court improperly substituted its own judgment for that of a jury. The record reflects the trial court's frustration at the duration of the case — a reality created by Defendants' decision to arbitrate their cross-claims against each other and repeated requests to stay the litigation. But the desire for an expeditious outcome does not sanction sua sponte determination and denial of due process rights. Nor does it sanction usurping the role of fact-finder.

The trial court’s ruling should be reversed, and the case should be remanded for full adjudication by a trier of fact.

PROCEDURAL HISTORY¹

Plaintiff commenced this action on September 6, 2022, asserting claims of fraud, fraud under the Consumer Fraud Act (“CFA”), breach of contract against Grinberger, and a claim of promissory estoppel against Simcha Klor. (Pa-001). Plaintiff sought the remedy of specific performance. *Id.* The Complaint was amended on November 21, 2022, to include Mirel Klor. All Defendants answered the Complaint (Simcha Klor at Pa-10 and Amended answer at Pa-042; Grinberger at Pa-027; Mirel Klor at Pa-035). After extensive negotiation and motion practice, on June 9, 2023, the Court permitted Newport Estates LLC to intervene. (Pa-049). On June 20, 2023, Defendants Newport and Grinberger asserted cross-claims against Defendants Simcha and Mirel Klor for breach of contract due to the Klohrs’ refusal

¹ The following is a chronology of the transcripts in the case below:

Hearing – Newport Motion to Intervene	June 9, 2023	1T
Newport Motion to Compel Transfer of Property	August 3, 2023	2T
Minzberg Motion to Place Case Back on Active Trial List	March 1, 2024	3T
Simcha Klor Motion to Dismiss Cross-claims	April 12, 2024	4T
Newport and Grinberger Motion for Summary Judgment (and Plaintiff’s motion to amend complaint) Part I	June 20, 2024	5T
Newport and Grinberger Motion for Summary Judgment (and Plaintiff’s motion to amend complaint) Part II	July 19, 2024	6T

to reconvey the subdivided lot per their agreement, and requesting an order demanding they reconvey title back to Newport, and other relief and damages. (Pa-051) On July 11 and 12, 2024, Simcha and Mirel Klohr independently asserted cross-claims against Newport and Grinberger, asserting claims of fraud, based on the purported fact that the septic field extended over the property line and requesting the Court extinguish the deed requiring reconveyance to Newport on that basis. (Pa-056 and Pa-066). All Defendants answered each other's cross-claims. (Pa-056, Pa-066, Pa-075, Pa-081).

On July 10, 2024, Newport and Grinberger filed a motion to compel transfer of the real property from Simcha and Mirel Klohr to Newport Estates, citing the deed which required the Klohrs to transfer the subdivided lot back to Newport. The Klohrs opposed this motion. The Court held a hearing on August 3, 2023, denying the motion without prejudice, as it was premature prior to discovery. (T1)

The case was significantly delayed due to the Defendants' decision to arbitrate the cross claims between them in Rabbinic Court ("Beis Din"). Defendants moved to stay on September 13, 2023. Plaintiff initially opposed the stay and cross-moved to stay the arbitration pending the outcome in litigation on September 28, 2023. Plaintiff ultimately agreed to 45-day stay, memorialized in a Consent Order entered on October 19, 2023. Pa-087. This stay was extended again to January 31, 2024, by consent order on December 18, 2023. Pa-091. Despite holding two hearings, the Beis

Din had not issued any ruling for months, (Pa-095; Pa-242), and until this date has still not ruled on the cross-claims which were moved to arbitration. On February 2, 2022, Grinberger and Newport moved to request an order placing the case back on the active trial list. Mirel Klohr filed a motion to stay pending arbitration. On March 1, 2024, the trial court held a hearing, denied the motion to continue the stay, and put the case back on the active trial calendar. (3T, p 11-16, Pa-200).

On March 13, 2024, Simcha Klohr moved the court to dismiss the claims and cross-claims between Defendants in favor of the pending arbitration. Plaintiff opposed the motion to dismiss cross-claims on the grounds that the claims were intertwined with Plaintiffs' claims against Defendants. (Pa-170). Also, on March, 13, 2024, and before discovery was complete, Mirel Klohr moved for Summary Judgment against Plaintiff. (Pa-097). Plaintiff opposed Mirel Klohr's motion for summary judgment. (Pa-177). On April 4, 2024, the Court held a hearing on these two motions, (4T) and issued orders on April 12, 2024, denying Mirel Klohr's motion for summary judgment and not dismissing, but staying the cross-claims pending arbitration. (Pa-234; Pa-236).

On May 16, 2024, prior to the Klohrs' depositions, Newport and Grinberger moved for summary judgment on Plaintiffs claims (Pa-237). The Klohr's had refused to schedule and then delayed scheduling depositions until the depositions were finally held on May 21 and May 31, 2024. (See 4T, p. 13). In light of new

information revealed during the Klohrs' depositions, on June 5, 2024, Plaintiff moved to amend the complaint to assert additional claims of tortious interference with contract and tortious interference with prospective contract against the Klohrs. (Pa-550). On June 10, 2024, Plaintiff opposed Grinberger's motion for summary judgment. (Pa-276). On June 11, 2024, Simcha Kloth filed a brief in support of Grinberger's motion for summary judgment (Pa-547). On June 12 and June 14, 2024, Mirel Kloth and Simcha Kloth, respectively, opposed Plaintiff's motion to amend. On June 15, 2024, Grinberger and Newport replied in support of summary judgment. On June 17, 2024, Plaintiff replied in support of his motion to amend.

On June 20, 2024, the Court held a hearing, but did not decide the two pending motions because discovery was not yet complete. (5T).

Pursuant to the Court's order, the parties filed supplemental briefing on the motion for summary judgment. Plaintiff's supplemental brief, filed on July 5, 2024, included additional exhibits and certifications. (Pa-477). Defendants filed supplemental briefs on July 11 and July 15, 2024.

At an oral hearing on July 19, 2024, Judge Must granted summary judgment in favor of Defendants on all of Minzberg's claims and denied Plaintiff's motion to amend the complaint asserting additional causes of action against the Klohrs'. (6T). This was followed by a written order granting summary judgment on all of the

Plaintiff's claims and dismissing the Amended Complaint in its entirety, for the reasons stated on the record on July 19, 2024. (Pa-571).

Plaintiff timely filed a Notice of Appeal on September 11, 2024 (Pa-593) and an amended Notice of Appeal on September 19, 2024 (Pa-594).

STATEMENT OF FACTS

On March 3, 2021, Plaintiff Minzberg contracted with Defendant Shimon Grinberger ("Grinberger"), to purchase a property lot in Lakewood, NJ ("the Property"). (Pa-19). Grinberger is an experienced and professional seller of real estate, whose entire career has been real estate investing and construction. (Pa-21; Pa-141; Pa-303 at 46:15-47:2).

The Property is Block 501, Lot 1.12 on the tax map of the Township of Lakewood. (Pa-19). The Property had been listed on the open market for several months prior to Minzberg's offer of purchase. (Pa-285; Pa-293 at 7:3-15). The contract for purchase of the Property was prepared by attorneys for both parties to the transaction. Because the lot was a product of a subdivision, the real estate agent recommended using an attorney, Noah Burton, who was familiar with the subdivision. (Pa-178). Michael Cohn represented Grinberger. (Pa-285, Pa-266)

Minzberg was not aware at the time that the neighbors of the adjacent lot, Simcha and Mirel Klohr (the "Klohrs"), actually owned title to the Property due to

a previous understanding with Grinberger, and that Grinberger did not own title. (Pa-177; Pa-366 at 59:1-4; Pa-370 at 76:15-20). In advance of entering the purchase contract, Minzberg sent his son to speak to owners of the neighboring lot, the Klohrs, to ensure there would be no issues with his residential development of the lot. (Pa-160; Pa-177-178; Pa-357 at 25:10-13; Pa-366-367 at 61:24-62:3). Although Minzberg was not aware that the Klohrs were in possession of title to the Property, he understood that a neighbor might have some concerns about the development of the Property by its eventual buyer, (Pa-160), and sought to resolve any issues prior to his purchase.

At that meeting, Simcha Klohr raised an issue about the privacy of his swimming pool and about the septic field, but otherwise promised no issues with the transaction and proposed construction so long as Minzberg would retain the position of the current fence (for privacy) and as desired by the Klohrs' and ensure the septic tank was not an issue. (Pa-177-178; Pa-19; Pa-365 at 54:13-22). Relying on these promises, Minzberg entered into a purchase contract with Grinberger. (Pa-178). Minzberg gave a deposit on March 22, 2021, and obtained a survey of the land on April 22, 2021. (Pa-19).

There were two material misrepresentations made in the purchase contract. First, Grinberger, who held himself out as the owner of the property, was not in fact the formal owner of the property. Instead, Newport Estates, LLC, ("Newport") a

company jointly owned by Grinberger and his partner Bandman (“Bandman”) owned the Property. Second, Grinberger never disclosed that neither he, nor Newport, in fact possessed title to the Property at the time of contracting. (Pa-360 at 35:1-3). Grinberger knew the truth about both of these facts at the time of contracting. (Pa-20; Pa-293-294 at 9:9-10:2). Minzberg did not know that Newport, and not Grinberger was the party in interest to the Property. (Pa-360 at 34:10-12). Minzberg also did not know that a third party (Klohr) actually owned title to the Property. Indeed, Minzberg understood from Grinberger’s representations that Grinberger, as seller, owned title to the Property. (Pa-159; Pa-366 at 58:20-25; Pa-360 at 34:2-12; Pa-370 at 76:15-20).

Newport was originally owned solely by Grinberger. (Pa-248). In 2019, Shimon Bandman (“Bandman”) was added as a 50% member. (Pa-251). Bandman initially certified that Grinberger did “not have the right to sell” the subject property without his permission or approval, (Pa-275), he later testified that Grinberger had the authority to list it with a realtor and to enter into a contract of sale without Bandman’s approval. (Pa-491-492 at 21:13-22:23). Grinberger likewise testified that he had authority to sell the Property, (Pa-294 at 11:5-7), and that Bandman approved the plan to sell the lot. (Pa-294 at 13:11-15). Grinberger certified and testified that he executed the contract individually “by mistake” (Pa-244; Pa-293 – Pa294 at 9:9-10:2.) Bandman too testified that he was aware of the contract with

Minzberg and that the fact that the contract was in Grinberger's personal name was simply a mistake by the realtor and that he had been aware of this for several years. (Pa-492 at 22:24-23:24)

The Property was the product of the subdivision of a single lot. In 2019, Newport, who owned the undivided lot, sold a portion of that lot to the Klohrs'. (Pa-105; Pa-110). Because the lot had not yet been subdivided, the parties agreed in writing that the deed would be for the entire lot, but upon Newport filing the minor subdivision, Klothr would deed back the proposed lot which was not part of the contemplated purchase (the Property). (Pa-229). Newport thus conveyed the entire lot, including the portion actually purchased by the Klohrs' as well as the adjoining portion (the Property, not contemplated by the purchase), by deed dated Oct. 31, 2019. (*Id.*; Pa-131). The deed contained a restriction whereby upon Newport filing the subdivision map, the Klohrs' would transfer back to Newport the portion of the lot which they never purchased, *proposed* Lot 1.12 — the Property at issue in this case. (Pa-132). Newport timely obtained the minor subdivision, but the Klohrs' unjustifiably refused to transfer the deed back to Newport. At the time of contracting with Plaintiff, Grinberger concealed the fact that a third party — the Klohrs — possessed title to the Property and that they were refusing to deed it back.

Until today, the Klohrs' refuse to transfer the deed back, despite their hollow excuses being refuted and rejected. At various points, the Klohrs represented that

they would deed the Property back (as they were required to do) if their concerns about the fence and septic system were addressed. (Pa-20, Pa-578-579 at 39:21-41:21; Pa-422 at 89:6-15; Pa-300 at 36:2-21; Pa-302 at 44:10-45:1) The Klohrs claimed the septic field servicing their property crossed over the property line and could potentially be an encumbrance on the Property. This has been adequately refuted by evidence that the septic tank does not in fact cross over the common boundary line and that the septic tank and leach fields are totally on the “house lot” in which the Klohrs reside. (Pa-241; 6T, 5:24-25). The Klohrs have also testified that they have privacy concerns about their pool, (Pa-578-579 at:40:1-41:24), which of course, was never a condition or consideration of their obligation to deed back the portion of the lot they never purchased. Those issues were also addressed when Minzberg agreed to keep the current position of the privacy fence that the Klohrs erected, (Pa-160; Pa-539-540) and not to build windows on the side of the house facing the pool, (Pa-434 at 135:17-135:6; Pa-358 at 28:2-19), so that the Klohrs’ alleged privacy concerns were addressed. But the Klohrs continued to refuse to reconvey the deed, reneging on promises to give the deed back if these issues were resolved. (Pa-300 at 36:3-32; Pa-302 at 44:10-45:1). Mirel Klohr testified that if the pool and septic issue were resolved, she still wasn’t sure she’d be willing to give the deed back; instead she would “have to think about it.” (Pa-580 at 49:23-20).

Since the Klohrs moved into the home, they renovated the home, adding three

new bedrooms in the basement. This converted the house from a 5-bedroom house to an 8-bedroom house. In addition, the Klohers operate a synagogue with daily prayer and learning group for up to 20 adults in the home. (Pa-300 at 37:3-18; Pa-424 at 95:23-96:23; Pa-425 at 98:7-12; Pa-430 at 118:9-119:5; Pa-402 at 12:9-24; Pa-577 at 35:16-36:14) These changes necessarily changed the septic needs of the property. (Pa-300 at 37:3-18; Pa-308 at 67:12-68:2).

Because the Klohers have unjustifiably refused to transfer back the deed, Grinberger/Newport could not transfer title to Minzberg. While Grinberger continued to lead Minzberg to believe that he was working on a resolution with the Klohers, (Pa-533-543; Pa-545), Grinberger was secretly engaging in discussions initiated by the Klohers to purchase the Property. (Pa-580 at 46:8-47:1; Pa-408 at 32:2-22; Pa-409 at 35:2-36:7). On June 23, 2021, Grinberger's attorney sent an email to Plaintiff's attorney purportedly terminating the contract pursuant to Paragraph 21 of the attorney review letter executed with the purchase contract, explaining that he could not provide clear title due to the Klohers' refusal to deed back the Property. (Pa-269). That paragraph reads:

Title. If title is unmarketable or uninsurable, Seller will have 30 days to dispose of the title defect. If Seller cannot do so absent litigation, either party may terminate the Contract, although buyer has the final right to accept title as-is before Buyer may terminate the Contract.

Minzberg did not accept the termination, and pursuant to Para. 21 exercised

its right to refuse Seller's termination, by offering to obtain title, via litigation or otherwise from Klohr, who was wrongfully withholding conveyance of title. (Pa-20; Pa-163). The parties continued discussion regarding how to resolve the Klohr impasse so that title could be conveyed to Minzberg.

From September 2021 through January 2022, Minzberg and Grinberger exchanged text messages regarding how to proceed to closing. (Pa-534-538). In or about February 2022, Minzberg contacted the surveyor of the land to determine where the property fence was located and forwarded the same to Grinberger upon Grinberger's request. (Pa-538-539). In response, Grinberger asked on March 3, 2022, if Minzberg was ready to close. (Pa-539). Minzberg responded in the affirmative, agreeing to where Klohr wanted the privacy fence even though it was over the property line for the Property, and Grinberger wrote that he would set the closing for four weeks from that date. (Pa-540; Pa-361 at 41:8-25; Pa-363 at 47:1-20). Minzberg followed up several times and Grinberger wrote that he would "finish this" (the closing) after the Jewish holiday of Passover (Pesach), which was in April, 2022. (Pa-541). On April 24 and April 26, 2022, Minzberg followed up again, and Grinberger responded that he is addressing the septic issue (Pa-541). When Minzberg followed up again in June 2022, Grinberger responded that Klohr was "not giving up the lot," and that Grinberger had no strength to fight Klohr. (Pa-542). Minzberg and Grinberger further discussed how to resolve the issue and on June 30,

2022, Grinberger wrote that their respective lawyers were working on it. (Pa-543-543).

When it became clear that the Klohrs were remaining uncooperative even after Minzberg waived rights regarding the position of the fence, Minzberg again sent his son to speak to Simcha Klohr about his earlier promise not to interfere with Minzberg's purchase. (Pa-371 at 79:7-16). This meeting, which was recorded, occurred on or about June 15, 2022, (Pa-364 at 51:19; Pa-178; Pa-185²). Mirel Klohr's voice is also heard in the recording, indicating she was present. (Pa-164; Pa-233). In that conversation, Klohr acknowledged that he had made a commitment to deed back the property, (Pa-193-194 [8:23-9:2]), but claimed that his commitment was based on erroneous information that he was given. (Pa-197 [12:1-3]). Despite Minzberg's offer to address the septic system, Klohr claimed it was impossible and refused to engage, claiming that "I have to want to give it and at this point I don't wat to give it." (Pa-194 [9:20-21]). Klohr insisted the septic issue could not be resolved and refused to permit Minzberg to bring a surveyor to address the septic issue, threatening to treat him as a trespasser if he did. (Pa-212 [27:1-15]). It has since been determined that the septic system does not, in fact, encroach on the Property, and does not create an encumbrance. (6T, 5:24-25; Pa-304-305; Pa-241).

² The actual recording was submitted to the trial court. The appendix includes a certified transcript of the recording.

Unbeknownst to Minzberg, Grinberger continued negotiations initiated by Klohr to purchase the Property, (Pa-580 at 46:8-47:1), and even made arrangements to pay the realtor who listed the Property. (Pa-419 at 75:6-76:10). Grinberger committed to Klohr that Grinberger would continue to fight Minzberg in this litigation so that Grinberger could sell the Property to Klohr. (Pa-417-418 at 69:23-70:11.)

The fact of Klohr's ownership of title and refusal to deed it back was known to Grinberger at the time of contract. (Pa-20; Pa-295 at 14:2-12). Grinberger induced Minzberg to spend money and pursue the property over an extended period of time with numerous promises to get the transaction closed. (Pa-21; Pa-545). Costs expended included attorney's fees, other transactional fees, including survey and research on the septic system. (Pa-164). In the interim, real estate prices rose dramatically. (Pa-179; Pa-18; Pa-164). This litigation ensued.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY STAYED DEFENDANTS' CROSS CLAIMS PENDING THE OUTCOME OF ARBITRATION WHERE THE CROSSCLAIMS HAD SIGNIFICANT OVERLAP AND WERE INTERRELATED TO PLAINTIFF'S CLAIMS. (Pa-229; 4T pp. 9-11))

Almost eight months after Plaintiff filed this lawsuit, Defendants Klohr and Grinberger were in discussions about Grinberger giving the Property to Klohr. On April 30, 2023, Grinberger wrote to Simcha Klohr via e-mail, "My commitment to

him [Minzberg] was before I had the conversation with you, how can I give it to you if im [sic] in a contract with mr minsberg [sic] YOU [K]NEW I HAVE A CONTRACT WITH MR MINSBERG...I cannot do anything without getting out of the contract.” (Pa-525). In response, Mr. Klohr persuaded Defendant Grinberger to adjudicate the issue of the reconveyance of the deed in Beis Din (religious court). (Pa-52). Thereafter, Defendants (the Klohrs, Grinberger and Newport) entered into an arbitration agreement applicable to the cross-claims in this litigation.

On September 13, 2023, Mirel Klohr moved to stay pending the outcome of arbitration. Plaintiff initially opposed that motion to stay this litigation pending the outcome of arbitration between the two Defendants in Beis Din and filed a cross-motion to stay the arbitration pending the outcome of this litigation. Before the Court decided those motions, the parties agreed on October 4, 2023 (entered by the Court as a Consent Order on October 19, 2023) to a *45-day stay* of the litigation pending the outcome of arbitration. (Pa-087-Pa-090.) The consent order indicated that the prior motions were withdrawn without prejudice. (*Id.*) Upon the expiration of that 45-day stay, the parties agreed on December 14, 2023 (entered by the court as a Consent Order on December 18, 2023) to an additional stay until January 31, 2024. (Pa-091 – Pa-94). The Order indicated that upon expiration of the stay, each party has the right to re-file their motions to stay litigation (Klohr) and to stay arbitration (Plaintiff).

The Beis Din had held two hearings wherein Grinberger, Newport and the Klohrs presented testimony and exhibits, but the Beis Din did not render any decision. (Pa-96). Counsel for Grinberger and Newport wrote to the Beis din requesting a status report and urging the Beis Din to render a decision but received no response. (Pa-96 - Pa-98). Grinberger was told by the Beis Din that it was not ready to enter any decision and would like the parties (Grinberger, Newport and the Klohrs) to settle the matter between themselves. (Pa-96).

Upon expiration of the period set forth in the second Consent Order, on February 2, 2024, Grinberger and Newport filed a motion to reinstate the case to the active trial calendar, which the Klohrs opposed. Mirel Klohr also filed a cross-motion on February 14, 2024, to stay the litigation pending the outcome of the arbitration. At an oral hearing addressing both motions, the Court granted Plaintiffs' motion and put the case back on the active trial list, taking judicial notice of the length of the trial and delay in Beis Din³ (3T at 12: 3-11), and reasoning, "if I stay part of the case, I may as well stay it all....I am going to place the whole matter before me back on the trial list...I'm granting the motion to put it back and denying any ongoing stay." (3T at 13:24 – 14:14). This was followed by a Court order on March 1, 2024, instructing, "This matter will be placed back onto the active trial

³ In this transcript, the Rabbinical arbitration panel, Beis Din, is incorrectly typed as "Best Inn."

list.” (Pa-095).

On April 13, 2024, in an effort to further thwart complete adjudication, Simcha Klohr moved to dismiss all cross claims between the Klohrs and Grinberger and Newport. Plaintiff opposed this motion on several grounds.

The trial court did not dismiss the cross-claims, it stayed them. (Pa-234). This ruling was erroneous for several reasons. The subject of the cross-claims which were pending arbitration completely overlapped with the claims to be adjudicated in Court. Furthermore, the arbitration agreement was entered into close to a year after the commencement of this litigation. Courts in New Jersey have the power to enjoin arbitration when a properly filed litigation has already commenced, when equity so requires. *See Kimm v. Cha*, 335 N.J. Super. 262, 267 (App. Div. 2000). This is particularly true in this case, where the arbitration agreement between some, but not all parties to the litigation, was a clear attempt to forum shop and interfere with the court’s jurisdiction. N.J.S.A. § 2A:23B-7 also contemplates an application to stay arbitration, or to limit the items referred to arbitration to any aspect of the matter that is severable. Finally, “a stay [in favor of arbitration] should not be granted as to any of the parties where the litigation cannot be severed without unduly increasing the cost of justice, or causing other hardship to the parties.” *Elizabethtown Water Co. v. Watchung Square Associates, LLC*, 376 N.J. Super. 571, 578 (App. Div. 2005), citing *Rosenthal v. Berman*, 14 N.J. Super. 348, 82 A.2d 455 (App.Div.1951),

The stay of cross-claims unquestionably prejudiced Plaintiff because the cross-claims were completely interrelated and overlapping with the Plaintiff's claims against Defendants. Had the Court denied the stay and adjudicated all claims in the same proceeding, it would have had to determine the issue of whether the Klohrs were obligated to transfer title to Newport, and whether the Klohrs wrongfully withheld reconveyance of the deed. This, in turn, would have easily enabled an order of specific performance so that the Grinberger-Minzberg contract could proceed to closing, as the Court had contemplated.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIM BECAUSE (a) THERE WAS A MATERIAL FACTUAL DISPUTE ABOUT WHETHER GRINBERGER TERMINATED THE CONTRACT IN LIGHT OF ONGOING DISCUSSIONS BETWEEN MINZBERG AND GRINBERGER AND GRINBERGER'S EXERCISE OF HIS CONTRACTUAL RIGHT TO ACCEPT THE PROPERTY AS IS, AND (b) WHETHER ANY DELAY IN MINZBERG'S EXERCISE OF HIS CONTRACTUAL OPTION WAS REASONABLE UNDER THE CIRCUMSTANCES WAS A JURY QUESTION. (Pa-591, 6T: 24-29)

Summary Judgment Standard

Rule 4:46-2 provides that a summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue

for trial.” *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 523, 666 A.2d 146, 147 (1995), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Credibility determinations are to be made by a jury and not the judge. *Id.* An appellate court considers the evidence in the light most favorable to the parties opposing summary judgment. *Brill*, 142 N.J. at 523.

Argument

The basis of Judge Must’s ruling on the breach of contract claim contained two components. Each one of them was erroneous and addresses matters that were required to be submitted to a jury:

1. Finding that “there is no factual dispute that Mr. Grinberger through his counsel terminated...this contract” (6T-24:24 –25:2). Implicit in this determination is the erroneous conclusion that there was no dispute as to Minzberg’s exercise of his contractual right to accept the property with title as is (and pursue Klohr to return title), rendering the “termination” ineffective (6T-6, 6T:24-25); and
2. Finding, as a matter of law, that Minzberg’s later unequivocal election to accept the property as-is was unreasonable due to the time that elapsed.

Paragraph 21 of the Attorney Review Letter read:

Title. If title is unmarketable or uninsurable, Seller will have 30 days to dispose of the title defect. If Seller cannot do so absent litigation, either party may terminate the Contract, although buyer has the final right to accept title as-is before Buyer may terminate the Contract.

Pa-267.

Grinberg's attorney e-mailed Minzberg's attorney on June 23, 2021, purportedly terminating the contract due to the fact that the Klohrs were in title. (Pa-269). However, Minzberg did not accept the termination (or the return check) and instead offered to pursue the Klohrs for the title they were wrongfully withholding. These negotiations and discussions regarding how to best wrestle the wrongfully held title from Kloth continued for about a year. (Pa-533-543; Pa-544-545). For example, in a text exchange between Grinberger and Minzberg on December 9, 2021, Grinberger asked Minzberg "where are you holding" and the response from Plaintiff was "Im calling Enny every single day and leave massages and no one is calling back." (sic) (Pa-537). This correspondence related to a survey and determining the location of Kloth's fence and reaching a solution. This discussion continued into 2022. (Pa-537-538).

On March 3, 2022, Grinberger asked Minzberg if he was ready to close. Mr. Minzberg replied "Yes, I have no choice." (Pa-539-540). On or about April 2022, Grinberger stated that he would finish this after Pesach [Passover]. (Pa-541). Ultimately, Mr. Grinberger stated in June 2022 that he had no energy to fight (using the Hebrew word for strength, "koach"). (Pa-542). None of these messages ever

indicate that the contract was in fact canceled by Mr. Grinberger, and the messages stretch a whole year from the date of the purported termination. This discussion continued until Minzberg determined that litigation was the only option.

Significantly, throughout the litigation, Grinberger understood that the contract was still active and enforceable. On April 30, 2023, Grinberger wrote to Simcha Klohr, “My commitment to him [Minzberg] was before I had the conversation with you, how can I give it to you if im [sic] in a contract with mr minsberg [sic] YOU [K]NEW I HAVE A CONTRACT WITH MR MINSBERG...I cannot do anything without getting out of the contract.” (Pa-525). This alone shows that there was no termination.

Plaintiff’s position, articulated in briefing and at the oral hearing on July 20, 2024, was that he *did* exercise his final right to accept title as-is, and fight the Klohrs for legal title. *See* 6T, 8:2-9:916:10 – 17:3 (evidencing factual dispute on this matter). *See also* Pa-301 at 38:23-39:19 (testimony detailing how Minzberg offered to take the Property and fight Klohr for title).

It was reversible error for the court to grant summary judgment when there was a disputed factual issue about whether Grinberger’s termination was effective and whether Minzberg exercised his right to accept title as-is pursuant to Paragraph 21.

Once Judge Must erroneously made the factual finding that Minzberg did not, at the time of the purported termination letter, exercise his right to accept title as-is, he

then addressed whether the unequivocal election to accept title as-is, in the context of the summary judgment briefing and hearing, was a proper election pursuant to Paragraph 21. (6T, 10:17 – 13:7, referring to the as-is election made at the hearing and in Minzberg’s certification at Pa-545).

Judge Must correctly concluded that when no time frame is recited in contract language, the time frame is a “reasonable” one. 6T, 16:10-16. See *Perth Amboy Dry Dock Co. v. Crawford*, 103 N.J.L. 440, 445 (1927) (where no time for the performance of a contract is specified the law implies that it shall be performed within a reasonable time); *Becker v. Sunrise at Elkridge*, 226 N.J. Super. 119, 129, 543 A.2d 977, 983 (Super. Ct. App. Div. 1988) (“It is well-settled that where no time is fixed for the performance of a contract, by implication a reasonable time was intended.”)

However, it was error to determine as a matter of law that any delay was not reasonable under the circumstances. (6T, 25:3-10). “Generally, the question of reasonable time is one of fact for the jury and is always so when the facts are in dispute or it rests upon conflicting inferences as to the material effect of the conduct of the parties to the transaction.” *Lastowski v. Lawnicki*, 115 N.J.L. 230, 234 (1935). See also *Wemple v. B. F. Goodrich Co.*, 126 N.J.L. 465, 468 (1941) (“When facts are in dispute and when the evidence would support inconsistent inferences, the question of reasonable time is one of fact.”); *Dixie Mill Supply Co. v. H. B. Smith*

Mach. Co., 128 N.J. L 242 (1942) (reversing trial court's decision because when no time was fixed by contract, whether a specific interval of time was reasonable "was a fact question which, in the absence of uncontroverted proof on this element, the trial court was powerless to determine.")

The facts in this case were certainly in dispute, with Grinberger maintaining that there was no offer to accept title as-is until July 2024, (6T, 16:18- 22), and Minzberg maintaining that there was immediate and ongoing discussion regarding his offer to accept the title as-is and proceed against Klohr. (6T, 8:2-9:9; 6T, 16:18- 17:3; Pa-533-543). Furthermore, the inferences to be drawn from the facts were in dispute. Specifically, the reasonableness of Minzberg's purportedly delayed exercise of his contractual option years after the purported termination was disputed. As counsel for Plaintiff argued below:

MR. FRISCH: In -- one of the reasons why the inference is reasonable is they spent a year continuing -- this is what we demonstrated. They spent a year texting back and forth with each other about trying to close and negotiate with Klohr. Right, so it wasn't necessary for him to reach his final decision -- would have been reasonable. And then we engaged in this litigation which has been unduly delayed by the actions of the defendants primarily -- Beis Din -- and whatnot. So it is reasonable and I think that you can make the inference that it's reasonable to exercise it now. Because he was always willing to, but as long as they were working to try to get without him having to buy it you know and proceed as is, and if the parties are 8 working together then it's reasonable to say that he did -- he wasn't obligated to exercise this option earlier.

Case law supports the reasonable delay of a purchaser in light of seller-side delays when set times were absent from the contract. In *Becker*, the Appellate

Division found that purchasers who were willing to wait out the seller-side delay were within their contractual rights, where no set time was set. *Becker*, 266 N.J. Super at 130-131. The court ruled that because buyers “were willing to wait out the delay,” it would be “inequitable to allow seller to ‘benefit’ from the delay by canceling the contracts, returning the deposit money and then reselling the same unit at a higher price.” *Id.* at 131. Indeed, “specific performance [was] required in order to afford plaintiffs a just and complete remedy.” *Id.* The same is true in the instant case.

At the very least, the question of whether Minzberg’s purported delay in exercising of his contractual option to accept the property as-is was reasonable under the circumstances, was a question for the jury. The ongoing negotiations between Grinberger and Minzberg from the time of purported termination, Minzberg’s offer to fight Klohr for the deed during those negotiations, and Minzberg’s efforts to wrestle the deed from Klohr via this litigation are facts which could lead a jury to conclude that any delay in formally exercising the as-is option was reasonable. Like in other cases appealed to this court, the trial judge “went wide off the mark” in deciding what was a reasonable amount of time as a matter of law, when contrary evidence was presented, and where such “evidence, with all fair inferences to which it was entitled,” could have sustained a judgment in Plaintiffs’ favor. *Mazzeo v. Kartman*, 234 N.J. Super. 223, 231 (Super. Ct. App. Div. 1989). As cautioned by the

New Jersey Supreme Court, in the absence of “uncontroverted proof,” the reasonableness of a delay is a “fact question which... the trial court was powerless to determine.” *Dixie Mill*, 128 N.J.L at 246. The trial court certainly did not view the facts in light most favorable to the party opposing summary judgment, as is required. *Brill*, 142 N.J. at 523.

For these reasons, summary judgment on the breach of contract claims should be reversed.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE CFA CLAIM AGAINST GRINBERGER BECAUSE (a) THERE WERE MATERIAL FACTS IN DISPUTE INCLUDING WHAT MINZBERG KNEW AT THE TIME OF CONTRACT, (b) IT WAS ERROR TO CONCLUDE THAT GRINGERGER’S MISREPRESENTATION OF AUTHORITY TO ACT WAS NOT A “MATERIAL MISREPRESENTATION”, AND (c) IT WAS ERROR TO CONCLUDE THAT CONCEALMENT OF THE FACT THAT NEITHER GRINBERGER NOR NEWPORT HAD TITLE TO THE PROPERTY WAS NOT A “MATERIAL MISREPRESENTATION.” (Pa-591, 6T, 25:17-26:2)

The New Jersey Consumer Fraud Act (CFA), codified at N.J. Stat. § 56:8-1 *et seq.*, establishes liability for any person who engages in any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression, or omission in connection with the sale of real estate N.J. Stat §58:8-2. To establish a claim under the CFA, Plaintiff must prove three elements: (1) unlawful conduct; (2)

an ascertainable loss; and (3) a causal relationship between the unlawful conduct and plaintiffs' ascertainable loss. *International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 192 N.J. 372, 390 (2006). Intent is not a required element when the CFA violation is an affirmative act. *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 556, 964 A.2d 741, 748 (2009).⁴

Plaintiff's CFA claim was grounded in two misrepresentations made by Grinberger at the time of contract: (1) Grinberger's misrepresentation as himself (and not Newport) as seller, and (2) Grinberger's misrepresentation that he (and/or Newport) had title to the property, when he knew that the Klohers had title and were refusing to return it.

Misrepresentation of Grinberger as Seller

It is undisputed that Grinberger entered into the contract individually, when in fact Newport was the party-in-interest. Grinberger misrepresented himself as seller and proceeded with the contract as if he had the legal right to sell Newport's interest. Grinberger and his partner Mr. Shimon Bandman later claimed that Grinberger did

⁴ Plaintiff also submitted proof that Grinberger was a professional seller of real estate, subject to the CFA under *Strawn v. Canuso*, 140 N.J. 43, 657 A.2d 420 (1995). Although this was not the basis of the Court's ruling below, Plaintiff notes evidence of record that Grinberger is an experienced and professional seller of real estate, whose entire career has been real estate investing and construction. (Pa-21; Pa-141; Pa-303 at 46:15-47:2).

not, in fact, have authority. (Pa-275). Through deposition testimony, it was ultimately established as undisputed that Grinberger had authority to bind Newport (Pa-294 at 11:5-7; Pa-294 at 13:11-15; Pa-491-492 at 21:13-22:23), but the fact that Grinberger and Bandman attempted to refute this fact makes the representation material, and one that caused ascertainable damage to Plaintiff. Causation is evident because, in the July 19, 2024, oral hearing before the court, Grinberger's counsel made clear that Grinberger would only agree to Minzberg's election of title "as-is" if it were a worthless quitclaim deed from *Grinberger* (the individual with no claim to interest in the Property) to Minzberg but not if it would be considered a conveyance from Newport (who did have an interest in the Property) to Minzberg. (6T at 10:31 – 12:9). Furthermore, the court itself contemplated permitting Minzberg to exercise the "as-is" option at the hearing, but then retracted, agreeing that the quitclaim deed could only be a worthless deed from Grinberger, who represented himself as seller but had no personal interest in the Property, to Minzberg, since that is what the contract said. (6T at 20:13-21:24).

Nevertheless, Judge Must bafflingly determined that representing Grinberger as the owner instead of Newport was not a "material representation" to support the CFA claim. (6T 25:17-25). Minzberg's claim that this affirmative misrepresentation was a "[unfortunately]...by mistake" (Pa-243) does not negate CFA liability, which

does not require intent. In any event, execution of a contract by a party who doesn't own it cannot possibly be a "mistake."

Grinberger's Misrepresentation That He Possessed Title.

The second material representation was that Grinberger had legal title to the property he claimed to be selling. There was no discussion or disclosure of the fact that the Klohrs were in possession of the deed.

The parties disputed whether Minzberg had constructive knowledge of this fact. Plaintiff testified that he had no knowledge of this fact, and learned of it only well into this litigation. (Pa-159; Pa-366 at 58:20-25; Pa-360 at 34:2-12; Pa-370 at 76:15-20). Defendants claimed that constructive knowledge is established because the attorney who represented Minzberg in the purchase contract, Noah Burton, was the same attorney who had years earlier represented the Klohrs. Thus, Defendants claimed that Burton must have known that the deed was still in the Klohrs' possession. (6T at 9-10). As an initial matter, the assertion that Burton is assumed to have known that the Klohrs, whom he represented years earlier in a real estate transaction, continued to wrongfully withhold a deed is highly speculative. Moreover, Defendants offered no evidence as to what Mr. Burton knew or did not know (5T pp 13-15), and did not seek to depose Mr. Burton (noted by Judge Must at 6T, p 44-45). Speculative argument about what an individual may have known

does not amount to evidence of a disputed fact. Thus, it is undisputed that Minzberg did not know that the individual representing himself as seller did not actually own the deed. It is also undisputed that Minzberg knew that Klohr, who held the deed, was unjustifiably refusing to return it. (Pa-295 at 14:2-12). At the *very least*, this issue was disputed and could not have been disposed of via summary judgment on the CFA claim.

Although not explicitly stated, Judge Must appears to have considered the concealment, even if undisputed, non-material. See 5T at pp. 36-37 (comparing the situation to a seller who hopes to flip a property he does not yet own and declining to call it fraud); 6T at p. 22 (“I dealt with that before, I can attempt to sell you the Brooklyn Bridge....if I can’t deliver title to the Brooklyn Bridge to you, I terminate. Where’s the fraud?”). However, this misrepresentation is highly material, and has been the cause of significant damage. Had this fact been properly disclosed, Minzberg never would have entered into the contract. He relied on the representations made at the time of sale, that the seller had title to the property, and expended significant costs in pursuing the contract. Moreover, as Minzberg continued to pursue consummation of the deal based on this misrepresentation, Lakewood real estate prices spiked. This caused Minzberg to suffer the loss of significant opportunities to use his funds to purchase real property in Lakewood.

Furthermore, considering the remedial nature and liberal construction of the CFA to protect consumers, *Int'l Union*, 192 N.N at 376 n1., it is highly doubtful that a seller who falsely represents himself as the owner of the Brooklyn Bridge would not be liable under the CFA. Offering to sell the Brooklyn Bridge under those circumstances would surely be deemed “deceptive,” “fraudulent,” selling under “false presentences” or a “misrepresentation,” that could be the basis of a CFA claim. N.J. Stat. § 56:8-2. To hold otherwise makes a mockery of the CFA. Courts have found CFA violations where quality of title was misrepresented. *ABJ Sprinkler Co. v. Paxton Constr.*, 2010 N.J. Super. Unpub. LEXIS 2341, at *7 (Super. Ct. App. Div. Sep. 23, 2010) (reversing lower court and determining that misrepresentation that there was no legal obligation enforceable against the property was a CFA violation).

This case does not resemble a transaction where two parties entered into a contract *knowing* that the seller did not yet have title, and hoped to be able to obtain title, as improperly contemplated by Judge Must. Of course, parties are permitted to assume the risks of any transaction, as long as there is honesty and transparency. In this case, Grinberger knew that neither he nor Newport had title, and that the Klohrs were refusing to reconvey title. But because Grinberger represented otherwise, and never disclosed that the Klohrs were in possession of title, the contract was deceptive, fraudulent, and entered into under false pretenses. It was unlawful conduct under the CFA which resulted in ascertainable damage to Minzberg.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE PROMISSORY ESTOPPEL CLAIM AGAINST SIMCHA AND MIREL KLOHR BECAUSE (a) THERE WAS NO SUMMARY JUDGMENT MOTION ON THIS CLAIM BEFORE THE COURT AND PLAINTIFF HAD NO OPPORTUNITY TO BE HEARD, (b) THERE WERE DISPUTED MATERIAL FACTS, AND (c) IT WAS LEGAL ERROR TO CONCLUDE THAT THE PROMISSORY ESTOPPEL CLAIM FELL WITH THE BREACH OF CONTRACT CLAIM. (Pa-591, 6T, 26:26:9 – 27:5)

Another glaring error was the Court’s dismissal of “all” of Minzberg’s claims, including the claim against the Klohrs for promissory estoppel. (6T; Pa-591).

A. Court Erred by Sua Sponte Granting Summary Judgment

In New Jersey, a judge cannot grant summary judgment *sua sponte* without providing notice and an opportunity to be heard to the parties involved. “The minimum requirements of due process of law are notice and an opportunity to be heard.” *Klier v. Sordoni Skanska Constr. Co.*, 337 N.J. Super. 76, 84 (App. Div. 2001). “The opportunity to be heard contemplated by the concept of due process means an opportunity to be heard at a meaningful time and in a meaningful manner” with all parties having sufficient notice of the scope of motions pursuant to the Rules of Court, which require written motions. *Id.*, citing *Doe v. Poritz*, 142 N.J. 1, 106, 662 (1995). Rule 4:36-1 and 4-46(2)(a) require a party seeking summary judgment to file a brief with a statement of material facts. “The purpose of these rules is obvious, that is, to afford the party against whom relief is sought notice of the application, together with a meaningful opportunity to respond.” *Klier*, 337 N.J.

Super. at 84. When judges take procedural shortcuts, they “defeat[] those purposes.”

Id.

There was no summary judgment motion on the promissory estoppel claim against the Klohrs pending before the Court. Mirel Klohr, but not Simcha Klohr, moved for summary judgment on the promissory estoppel claim on March 13, 2013, way before discovery was complete. The Court denied that motion on April 12, 2024, (Pa-236), among other reasons, because discovery had not yet been completed, and neither Mirel Klohr nor Simcha Klohr had yet been deposed, due to deliberate delays on their part:

MR. FRISCH: Discovery is not even remotely complete. They refuse to schedule depositions.

THE COURT: Okay. Okay. I’m – I’m going to deny the motion without prejudice. I think discovery could show that there is a cause of action against her.

(4T aa 14:3-7).

The above was the last mention of the promissory estoppel claim until the trial court *sua sponte* dismissed all of Minzberg’s claims, including promissory estoppel against Mirel and Simcha Klohr on July 19, 2024. Mirel Klohr’s motion was never renewed.

Simcha Klohr never filed a motion for summary judgment. Even if Mirel Klohr’s premature summary judgment motion briefed prior to her deposition could have put

some issues before the Court regarding her husband's purported lack of authority to speak on her behalf when making promises to Minzberg, it certainly did not place the issue of Simcha Klohr's own promises to Minzberg before the Court. There was complete and utter lack of due process. Because there was no pending motion for summary judgment on the promissory estoppel claim, the briefing and oral argument on Newport and Grinberger's summary judgment motion, which was the basis of the trial court's ruling, did not address the promissory estoppel claim.

Klier is routinely followed by appellate courts when trial courts *sua sponte* summarily dismiss claims. In a case similar to the one at bar, *Shurkin v. Elar Realty Co.*, No. A-0727-22, 2023 N.J. Super. Unpub. LEXIS 2015, at *8 (Super. Ct. App. Div. Nov. 13, 2023), the Appellate Division followed *Klier* and reversed the trial court's grant of summary judgment dismissing plaintiff's claims because there was no motion pending before the Court. In that case, Plaintiff Shurkin's own motion for summary judgment on his claims was before the court, but the defendants had not filed a cross-motion for summary judgment seeking dismissal of the claims. The Appellate Division determined that briefing on Plaintiff's motion for summary judgment on his claims was not sufficient notice and opportunity to be heard to defend against dismissal of those same claims. *Id.* Dismissal of the claims could only be ordered on motion seeking dismissal of the claim. *Id.*

This Court has already declared, it will not “condone a procedure whereby a judge sua sponte, without notice to a party, resorts to a ‘shortcut’ for the purposes of ‘good administration’ and circumvents the basic requirements of notice and opportunity to be heard. *Klier*, 337 N.J Super. at 85.

Reversal of the trial court’s *sua sponte* dismissal order is required because Minzberg did not have an opportunity to address the merits of the promissory estoppel claim.

B. Even if the Promissory Estoppel Claim Were Properly Before the Court, the Grant of Summary Judgment was in Error

To succeed on a claim for promissory estoppel, a plaintiff must prove four elements: (1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment. *Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington*, 194 N.J. 223 (2008).

Every one of these elements are factual issues which are hotly contested and disputed, rendering summary judgment impossible and improper. While these issues were not briefed below (as the promissory estoppel claim was not the subject of any pending motion for summary judgment), Plaintiff nevertheless notes several genuine

and material disputes on the record regarding each of these elements, as applied to both Mirel and Simcha Klohr.

(1) Clear and Definite Promise. It is undisputed that Plaintiff sent his son to speak to the Klohrs to ensure there would be no issues with his residential development of the lot. (Pa-160; Pa-177-178; Pa-35 at 25:10-13; Pa-366-367 at 61:24-62:3). Simcha Klohr raised an issue about the privacy of his swimming pool, but otherwise promised no issues with the transaction and proposed construction so long as Minzberg would retain the position of the current fence (for privacy) and deal with the septic tank as desired by the Klohrs. (Pa-177-178; Pa-19; Pa-365 at 54:13-22). Minzberg agreed not to install windows facing the pool at that meeting. (Pa-434 at 135:17-135:6; Pa-358 at 28:2-19). Simcha Klohr communicated that otherwise, he had no problem with the purchase. (Pa-371 at 81:4-15). Simcha Klohr admitted that Minzberg's son came to speak with him and that they discussed his issues with the lot next door, specifically the privacy of the swimming pool. (Pa-406-407 at 24:10 – 27:5). Minzberg certified and testified that the promise was clear and definite. Pa-365 at 54:13-22, “there was 100 percent understanding, was said very clearly that it [sic] doesn't have any – other problem.”) Only a trier of fact can determine what exact promises were made

in that regard, weighing the credibility of Minzberg, Minzberg's son (who may be called as a witness) against the credibility of Simcha Klohr.

The issue of whether Mrs. Klohr is bound by her husband's promise is also in dispute. Specifically, whether Simchah Klohr had apparent authority to bind his wife, and whether Minzberg reasonably relied on that apparent authority, and whether Simcha Klohr had actual authority to bind his wife Mirel are all in dispute. For example, Mirel Klohr had mixed testimony about whether her husband spoke for her. When asked directly, she answered that she would have to give him explicit instruction to speak on her behalf (Pa-575 at 25:7-15), but when she didn't know details of what the issue was with reconveying the deed, she acknowledged that she relied on her husband "on all the issues, multiple issues... [she] relied on him completely." (Pa-579 at 43:5-12). She "didn't know" whether her husband spoke on her behalf when discussing those issues with Minzberg or Miznberg's son, (Pa-579 at 43:21-25), but acknowledged that her husband was in charge of dealing with the lot at issue and was authorized to speak on her behalf (Pa-579 at 48:17-23). Furthermore, there is a genuine issue of fact regarding apparent authority and whether Simcha Klohr reasonably led Minzberg to believe that he had authority to act on his wife's behalf, either through his own conduct in handling the discussion, although his wife was present in the home, or because communal

norms in the Lakewood Jewish religious community,⁵ absent any indication to the contrary, reasonably lead a third party to that belief.

- (2) Expectation of Reliance. The circumstances surrounding the meeting in which the promise was made is evidence of an expectation of reliance. Mr. Minzberg's son met with Simcha Klohr prior to entering into the contract, to "ensure [he] would have not trouble with [his] new neighbors." (Pa-178). Furthermore, when Minzberg's son confronted Simcha Klohr on July 15, 2022, about Klohr's prior promises, it is apparent that Simcha Klohr understood Minzberg entered the contract in reliance on Klohr's promise. (Pa-193 at 8:23-9:2, "MR. MINZBERG: Back – you said that if we figure out the septic tank then you'll – you'll give it. MR. KLOHR: That was – that was before I knew what was going on.")
- (3) Reasonable Reliance. Evidence shows that Minzberg's reliance was reasonable under the circumstances. See Pa-160; Pa-177-178; Pa-35 at 25:10-13; Pa-365 at 54:13-22; Pa-367 at 61:24-62:3). This promise reasonably induced Minzberg to enter into the contract, and then to subsequently remain in the contract while he pursued remedies to Klohr's purported concerns.
- (4) Definite and Substantial Detriment. The purported termination letter explicitly stated the reason for termination was the inability to get the deed

⁵ All parties in this case are members of the Jewish Orthodox religious community.

back from Klohr. (Pa-269). Indeed, this entire litigation is the product of reliance on the promise. Had Simcha Klohr been truthful up front regarding his intent to interfere with any third party's purchase of the lot, Minzberg would have entered into a contract with another seller, prior to the meteoric rise in prices in that neighborhood, (Pa-179), and prior to the significant rise in construction costs. (Pa-365 at 56:7-11).

The Trial Court's Confusing Reasoning was Erroneous

The trial court did not address any of the elements of the promissory estoppel claim, and instead confusingly and erroneously held that the dismissal of the breach of contract claim was determinative of the promissory estoppel claim:

COURT: Yeah, I'm dismissing all of that [Grinberger claims against Klohrs]. Because any claims that they have against the Klohrs are derivative of this contract. And if the contract was properly terminated, your argument that somehow they intentionally interfered with this contract – that goes by the wayside also. There was no contract to interfere with after it was terminated.

MR FRISCH [attorney for Plaintiff]: Well, they – but they interfered with it before it was terminated --

THE COURT: I -- I hear you. And – and – and I understand the argument. And frankly, counsel, all of you have done a good job for clients in laying out your arguments to the Court. And I – and I read all of your papers with great interest and you did a great job. But I've got to make the decision...And despite those arguments I do not find any consumer fraud or any liability on – on -- on the part of the Klohrs for – I'm dismissing all claims by Minzberg.

6T, 26:13 -27:5

This was clear error because promissory estoppel does not rise or fall with the breach of contract claim.

As stated *supra*, prior to entering into the contract, Plaintiff sent his son to speak to the Klohrs to ensure there would be no issues with his residential development of the lot. (Pa-160; Pa-177-178; Pa-35 at 25:10-13; Pa-366-367 at 61:24-62:3). Simcha Klohr raised an issue about the privacy of his swimming pool, but otherwise promised no issues with the transaction and proposed construction so long as Minzberg would retain the position of the current fence (for privacy) and deal with the septic tank as desired by the Klohrs. (Pa-177-178; Pa-19; Pa-365 at 54:13-22). Relying on these promises by Klohr, Minzberg entered into the purchase contract with Grinberger. (Pa-178). Simcha Klohr admitted that Minzberg's son came to speak with him and that they discussed his issues with the lot next door, specifically the privacy of the swimming pool. (Pa-406-407 at 24:10 – 27:5). Furthermore, when Minzberg's son confronted Simcha Klohr on July 15, 2022, about his prior promises, it is apparent that Simcha Klohr understood Minzberg entered the contract in reliance on his promises, but made it clear that he simply had no intention of returning the property. Pa-193 at 8:23-9:2 (“MR. MINZBERG: Back – you said that if we figure out the septic tank then you’ll – you’ll give it. MR. KLOHR: That was – that was before I knew what was going on.”); Pa-194 at 9:18-21 (“MR. MINZBERG: Why – why wouldn’t there be a commitment from you [to deed back the property if the

septic is resolved]”? MR. KLOHR: Because I have to want to give it and at this point I don’t want to give it.”).

Simcha Klohr’s promise to not interfere with the purchase and development of the land formed the basis of the promissory estoppel claim. The Klohrs’ unjustified refusal to deed back the property, in contravention of this promise, is a basis to hold the Klohrs liable for the termination of the contract. The purported termination letter explicitly stated the reason for termination was the inability to get the deed back from Klohr. (Pa-269). Thus, it is undisputed that the contract would have proceeded to closing without Simcha Klohr’s interference, and that such interference occurred prior to the purported termination.

Even if there was a proper termination of the contract — a fact which is hotly disputed and should prevent summary judgment on the contract claim — the promissory estoppel claim remains unaffected. It was thus error to dismiss this claim on this basis, separate and apart from the fatal procedural due process error in adjudicating this claim without providing Plaintiff-Appellee Minzberg an opportunity to be heard.

V. THE TRIAL COURT ERRED BY DENYING PLAINTIFF’S MOTION TO AMEND THE COMPLAINT IN LIGHT OF INFORMATION LEARNED AT THE DEPOSITIONS OF SIMCHA AND MIREL KLOHR WHICH SUPPORTED THE NEW ALLEGATIONS AND CLAIMS. (Pa-591; 6T, 26:2-3)

Without any discussion, the court denied Plaintiff's motion to amend the complaint. This unsupported ruling was in error.

Following serious and deliberate delays on the part of the Klohrs, the depositions of Mirel and Simcha Klohr were finally held on May 21 and May 31, 2024. Plaintiffs immediately thereafter moved to amend the complaint to allege a count of tortious interference with contract and tortious interference with prospective contractual relations. (Pa-550; Pa-561). Plaintiffs motion was filed on June 4, 2024, *four days* after the May 31, 2024, deposition of Mirel Klohr.

The new information learned during the depositions mainly involved the Klohrs' malicious motives and incentives in refusing to deed back the Property as they were required. They gave various reasons for their conduct, largely related to the privacy of their pool, attempts to leverage the lot for the replacement of their septic field, and the location of a fence they installed over the property line. In addition, they claimed that Jewish law gave them some right to demand a purchase option. (Pa-407 at 28:21-29:25). Yet, Simcha Klohr testified at length that he only wanted to pay \$175,000 for the lot initially (Pa-407 at 28:6-20, and that he offered to pay the same price he paid for the lot "to the right" which was \$175,000), and took no efforts to negotiate in earnest until after the Plaintiff entered into a contract. (Pa-408 at 32:2-15). Simcha Klohr knew of the Minzberg contract when trying to pressure Grinberger to sell Klohr the Property, (Pa-401 at 39:20-40:14), and his deposition

testimony confirmed extensive efforts to persuade Grinberger, including getting Grinberger to commit to fighting Minzberg in litigation so that the Property could be sold to Klohr. (Pa-414 at 55:15-24; Pa-419 at 75:6-76:10; Pa-408 at 32:2-22; Pa-409 at 35:2-36:7).

“Rule 4:9-1 requires that motions for leave to amend be granted liberally,” *Kernan v. One Wash. Park Urban Renewal Assocs.*, 154 N.J. 437, 456 (1998), and the “granting of a motion to file an amended complaint always rests in the court’s sound discretion.” *Notte v. Merchs. Mut. Ins. Co.*, 185 N.J. 490, 501 (2006). “That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile.” *Ibid.*

The court erred in denying the motion to amend because both prongs were met. First, although the court never reached the issue of prejudice, it is clear that Plaintiff was prejudiced by his inability to amend and assert these claims against the Klohrs. This prejudice is compounded when considering the Court’s grant of summary judgment on the breach of contract claim. There is severe prejudice in Plaintiffs’ inability to pursue a remedy from the party who interfered with the contractual relationship, and prevented its consummation. By denying Plaintiff’s motion to amend, the Plaintiff is left damaged and wronged, without any remedy.

Second, the amendment was not futile. Although it is not entirely clear what the basis of the Court's denial was, it appears that the Court thought these claims were not viable after it determined there was no breach of contract. As explained above, that determination was not proper on summary judgment and so any ruling based upon same must also be reversed. Even if the breach of contract claim was rejected, the proposed claims against the Klohrs are not futile because neither one depends on breach of contract.

The tort of interference with a business relation or contract contains four elements: (1) a protected interest; (2) malice — that is, defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages." *DiMaria Const., Inc. v. Interarch*, 351 N.J. Super. 558, 567, 799 A.2d 555 (App.Div.2001), *aff'd o.b.*, 172 N.J. 182, 797 A.2d 137 (2002), *citing MacDougall v. Weichert*, 144 N.J. 380, 404, 677 A.2d 162 (1996); *accord Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 751, 563 A.2d 31, 37 (1989).

All elements are alleged in the Amended Complaint, including the allegations supporting the malice element, which were learned only during the depositions of Mirel and Simcha Klohr. *Even if the breach of contract claim is disposed of on summary judgment*, these causes of actions are viable. Even if there was no breach, it is clear that the Klohr's unjustified and malicious refusal to return the deed is the

proximate cause of Grinberger's inability to bring the deal to closing. (Pa-269; Pa-542). There is simply no basis to deny amendment.

Noted this several times in comments at oral hearing was the Court's concern over the pendency of the case:

- "But the problem I have which – which makes it your problem is there's someone above me at the AOC who hates it when cases get old and they're just hanging around..." (4T, 7:9-12).
- "I don't see a legitimate reason to continue to stay it because I get heat from upstairs." (4T 8:8-9).
- "I understand the argument. And frankly, counsel, all of you have done a good job... But I've got to make the decision." (6T, 26:22 – 27:2)

The frustrating nature of a long-pending case is not a reason to deny Plaintiff's motion to amend. Particularly where the Klohr Defendants initiated the Beis Din proceeding (arbitration), injecting long delays and complexity to adjudication in court, and especially where the new information forming the basis of the proposed amended claims was belatedly learned because the Klohrs initially refused and delayed their depositions, this is no reason to penalize Plaintiff. These claims must go forward independent of any ruling on the breach of contract claim.

VI. THE TRIAL COURT ERRED BY NOT ORDERING TRANSFER OF TITLE FROM THE KLOHRS TO NEWPORT AND SPECIFIC PERFORMANCE OF THE GRINBERGER-MINZBERG CONTRACT. (Pa-591; 6T: 10-11)

Plaintiff sought specific performance as a remedy. (Pa-23). This equitable remedy should have been ordered, as explicitly contemplated by Judge Must in the July 19, 2024, hearing. Having found it undisputed that the septic field did not encroach upon the Property, (6T, 5:24-25, “The septic system does not encroach on 1.12. I don’t see there’s a factual issue as to that.”) the court could have ordered the Klohers to reconvey the deed to Newport:

THE COURT: I could enter an order today granting title in the lot 1.12 to Newport Estates free and clear of any claims of the Klohers, and thereafter transferring that title to the Minzberg’s free and clear of any claim of Newport conditioned upon the payment of the \$300,000....and that would end this case.”

This equitable remedy should have been accomplished exactly as Judge Must contemplated. Alternatively, the same outcome could be reached by an alternative theory, which Plaintiff advocated for in briefing before the Court, namely that Plaintiff stood in the shoes of Grinberger/Newport as a contract vendee. (Pa-282-283).

Specifically, “equity regards as done that which ought to be done” *Mihranian, Inc. v. Padula*, 134 N.J. Super. 557, 563 (App. Div. 1975). “[I]n the eyes of equity the contract is regarded for most purposes as though specifically executed and the original estate of each of the parties is regarded as ‘converted.’” *Ibid*. This “means that where an obligation rests upon a person to perform an act, equity will treat the person in whose favor the act should be performed as clothed with the same interest

and entitled to the same rights as if the act were actually performed.” *Goodell v. Monroe*, 87 N.J. Eq. 328, 335 (1917). New Jersey courts have long recognized “the power of a court of equity to undo a completed conveyance to a party who does not qualify as a bona fide purchaser.” *Marioni v. 94 Broadway, Inc.*, 374 N.J. Super. 588, 611 (App. Div. 2005).

There is no doubt that Grinberger breached his contract to convey the land to Plaintiff, as he entered into the contract and accepted funds but failed to place the Plaintiff on notice of the issues with title, and wrongly assured Plaintiff it would not be an issue once discovered. Grinberger also failed to notify Plaintiff that he was not pursuing the return of the Property in a timely manner. Equity here demands that Plaintiff be entitled to pursue his claims against the party that truly is acting improperly, the Klohrs, who have outrageously refused to return the Property without any cause whatsoever.

This outcome is the only equitable resolution of the case. Grinberger/Newport would get exactly what they bargained for — \$300,000. Minzberg would get exactly what he contracted for — the Property. And the Klohrs’ obfuscation and unjustifiable refusal to reconvey the deed to a Property they never purchased, and which they were required to return, would be rightfully ignored as they finally are forced to relinquish the wrongfully held deed.

CONCLUSION

For the reasons set forth above, this Court should reverse the Final Judgment of the trial court insofar as the trial court erred as outlined above. Furthermore, the trial court should be disqualified under Rule 1:12-1(d) because it “has given an opinion upon a matter in question in the action.” Moreover, remanding to a different trial court avoids the potential taint or concerns due to the initial court’s prior determination that Minzberg’s complaint should be dismissed. *See Luedtke v. Shobert*, 342 N.J. Super. 202, 219, 776 A.2d 233 (App. Div. 2001) (recognizing the “time and effort the court put into the case” but expressing concern that the original court would be in “untenable position” on remand). Fees and costs should be awarded to Plaintiff.

Dated: March 27, 2025

Respectfully submitted,

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YOSEF HAIM MINZBERG

Plaintiff-Appellant

vs.

SHIMON GRINBERGER, SIMCHA
KLOHR, and MIREL KLOHR

Defendant-Respondents

and

NEWPORT ESTATES LLC

Intervenor-Defendant-Respondent

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-000099-24T4

CIVIL ACTION

ON APPEAL FROM:
LAW DIVISION, OCEAN COUNTY
DOCKET NO.: OCN-L-1971-22

SAT BELOW:
Hon. Valter H. Must, J.S.C.

**BRIEF OF DEFENDANT-RESPONDENT
SHIMON GRINBERGER AND INTERVENOR-DEFENDANT-
RESPONDENT NEWPORT ESTATES LLC**

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We will reply upon the information provided in the Appellant's brief.

PRELIMINARY STATEMENT

Appellant has alleged that the Respondent, Grinberger violated the New Jersey Consumer Fraud Act (“CFA”) and demands specific performance. Appellant also alleges the Respondent had breached the contract which is the subject of the Complaint.

We have proven that Appellant’s Complaint does not allege a legitimate cause of action under the circumstances in this litigation, and that Respondent Shimon Grinberger did not have authority to, individually, execute a contract of sale with the Appellant.

The entire Complaint and Amended Complaint against the Respondent was correctly and properly dismissed. The counts lack merit, and the Appellant’s attorney recognized the possibility during the real estate transaction that the Respondent, Grinberger might not be able to provide clear title, addressing this issue during the attorney review process. According to paragraph 21 of the attorney review letter (Pa267), it is noted that:

If the title is unmarketable or uninsurable, the Seller [Respondent] will have 30 days to rectify the title defect. Should the Seller fail to resolve the defect without resorting to litigation, either party may terminate the contract, though the Buyer [Appellant] retains the ultimate right to accept the title as-is before terminating the contract.

As indicated in his Certification (Pa177-231), Appellant retained the services of Noah Burton, Esq. of Lakewood, New Jersey. He did so because he was advised by the real estate agent Mr. Burton had represented Rabbi and Mrs. Klohr when the property was sold by Newport Estates to Rabbi and Mrs. Klohr. Therefore, Mr. Burton was aware of the title issues. Hence Mr. Burton carefully included the aforementioned provision in order to protect his new client, the Appellant herein.

As indicated by the Appellant in his Certification (Pa178):

Because of this lot being a subdivision, the real estate agent who represented us both recommended that I use the same attorney who had represented the Klohers, Noah Burton, as he knew all of the details of the lot and subdivision...

This document evidences that the Appellant was fully aware of the potential title defects. Additionally, it was known during the negotiation period that the Respondent did not possess title to the property, and would not, individually, ever obtain title to the property. (Pa178).

Furthermore, Respondent Grinberger could not have transferred the subject property independently as it was never his to sell. The agreement between Newport Estates and Klohr specifies that upon subdivision, the Subject Property was to be "promptly" transferred to the LLC, not to Grinberger individually. Thus, any proposed contract to transfer the Property would need to originate through the LLC.

PROCEDURAL HISTORY

Other than the argumentative portions of the Appellant's Procedural History in its brief, we will rely upon the Procedural History set forth therein.

STATEMENT OF FACTS

Respondent Grinberger, individually, never had equitable title to the property which is the subject of this litigation. This was explained to the Appellant on numerous occasions, both before and after the contract was entered into, including the contract as amended in accordance with the attorney review letter from Mr. Burton. (See paragraph 21 of the attorney review letter Pa267).

Respondent Newport Estates, LLC attempted on numerous occasions to have the property owners, Rabbi and Mrs. Klohr, ordered to convey the subject property in accordance with the prior agreement reached between them. Notwithstanding the efforts of Respondent Newport Estates, an Order was never entered compelling Rabbi and Mrs. Klohr to convey the subject property to Newport Estates.

There has never been privity of contract between Respondent Grinberger and the Klohrs. At most, Newport Estates, LLC, an entity owned by Mr. Grinberger and by Mr. Bandman, had an equitable interest and right to the subject property, if and when it was conveyed by the Klohrs to Newport Estates, LLC.

Unfortunately, this never occurred.

Based in part upon the fact that Appellant and Respondent's Grinberger and Newport Estates, LLC were well aware that when the contract was entered into by Appellant and Respondent Grinberger, Grinberger did not own the property, and additional steps would need to be taken before the property could properly be conveyed to Appellant.

Despite the good faith efforts of the Respondents Newport Estates, LLC and Grinberger, clear title was never able to be conveyed by Grinberger and/or Newport Estates, LLC to the Appellant.

Hence, the Order entered by Judge Must, thereby dismissing Plaintiff's Complaint, was appropriate and proper and must be affirmed.

LEGAL ARGUMENT

POINT I

**APPELLANT’S COMPLAINT FAILED TO STATE
A CLAIM FOR WHICH RELIEF CAN BE
GRANTED.**

The principle established in New Jersey law mandates that a complaint must present factual allegations sufficient to raise a right to relief above the speculative level, as per Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). The Complaint against the Respondents does not meet this standard due to several substantive legal defenses. The Appellant was aware, as evidenced in the attorney review letter, of the potential for title issues and had agreed to accept title as-is or allow the seller a period to rectify defects. This knowledge and agreement preclude any claim of deceit regarding the title status. Furthermore, citing Zaman v. Felton, 219 N.J. 199, the Appellant cannot impose CFA remedies on a non-professional, casual seller of real estate, which applies to the current case as the Respondent Greenberger was not regularly engaged in selling real estate.

POINT II

APPELLANT FAILED TO PROVIDE EVIDENCE THAT THE RESPONDENTS VIOLATED THE NEW JERSEY CONSUMER FRAUD ACT (“CFA”).

The CFA was enacted to “protect against fraudulent and unconscionable practices in the sale of goods and services.” Marascio v. Campanella, 298 N.J. Super. 491, 500, (App. Div. 1997). The purposes of the CFA are: (1) to compensate the victim for his or her actual loss; (2) to punish the wrongdoer through the award of treble damages; and (3) to attract competent counsel to counteract the “community scourge” of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual. Lettenmaier v. Lube Connection. Inc., 162 N.J. 134, 139 (1999). The CFA is “remedial legislation and should be liberally construed to accomplish its dual objectives of deterrence and protection.” Joe D'Egidio Landscaping v. Apicella, 337 N.J. Super. 252, 258 (App. Div. 2001) (citing Lettenmaier, supra, 162 N.J. at 139) [emphasis added].

To establish a claim for consumer fraud under the CFA, an Appellant bears the burden of proving three (3) elements: ““(1) unlawful conduct by defendant; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss.”” D'Agostino v. Maldonado, 216 N.J. 168, 184 (2013) (quoting Bosland v. Warnock Dodge. Inc., 197 N.J. 543, 557 (2009)). See also, Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 113 (App. Div. 2009)

(to succeed on a claim for treble damages under the CFA, “a private litigant must allege specific facts that ... establish the following: (1) unlawful conduct by the defendant []; (2) an ascertainable loss ...; and (3) a causal relationship between the defendant's unlawful conduct and the [] ascertainable loss”).

A violation of the CFA can arise in three different settings: (1) affirmative acts, (2) knowing omissions, and (3) regulation violations. See Gennari v. Weichert Co. Realtors, 148 N.J. 582, 605 (1997). The Appellant bears the burden of showing a person committed an unlawful act within the meaning of the CFA. The CFA defines an unlawful act as:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise. An affirmative misrepresentation, even if unaccompanied by “knowledge of its falsity” or an intention to deceive, is sufficient to constitute a CFA violation. Strawn v. Canuso, 140 N.J. 43, 60 (1995). Also, an omission or failure to disclose a material fact, if accompanied by knowledge and intent, is a sufficient violation of the CFA. Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994). “The third category of unlawful acts consists of violations of specific regulations promulgated under the [CFA]. In those instances, intent is not an element of the unlawful practice, and the regulations impose strict liability for such violations.” Cox, supra, 138 N.J. at 18. The applicable regulations for the instant matter are outlined in the Contractor Regulation Act, N.J.S.A. 56:8-136 (CRA), the Contractor Registration Regulations, N.J.A.C. 13:45A-

17.1 (HICR) and the Home Improvement Practices
Regulations N.J.A.C. 13:45A-16 (HIP)

N.J.S.A. 56:8-2.

When these regulations are at play, the CFA “makes no distinction between ‘technical’ violations and more ‘substantive’ ones.” BJM Insulation & Constr., Inc. v. Evans, 287 N.J. Super. 513, 518 (App.Div.1996). However, as mentioned above, the burden is on the Appellant to establish liability.

The Consumer Fraud Act (CFA) does not extend its remedies to non-professional, casual real estate sales. The New Jersey Supreme Court in Zaman v. Felton, 219 N.J. 199, 223 (2014), “Despite these broad definitions, New Jersey Appellate Courts have implemented a restrictive interpretation of the Act’s reach in real estate transactions.” Zaman v. Felton, supra, citing 539 Absecon Blvd v. Shan Enterprises, 406 N.J. Super. 242, 274 (App. Div. 2009); See also D’Agostino v. Maldonado, 216 N.J. 168, 188 n.3 (2013).

The Supreme Court has articulated that the policies of New Jersey’s Consumer Fraud Act are intended for commercial real estate sellers and brokers involved in such dealings (Strawn v. Canuso, 140 N.J. 43, 60 (1995)), noting also that the Act’s remedies are generally not applied to non-professional, casual sellers of real estate (Zaman, 219 N.J. at 223). Regrettably, the definitions of “professional seller of real estate” and “non-professional casual seller of real estate” remain unspecified by the court. It is established that homeowners who sell their own

residences do not qualify as professional real estate sellers and, therefore, are not liable under the NJCFA (DiBernardo v. Mosley, 206 N.J. Super. 371, 376 (App. Div. 1986)). Similarly, case law indicates that the NJCFA does not cover businesses that sell a single piece of property they own and operate from, as illustrated in 48 Horsehill v. Kenro Corp., 2006 WL 349739 (N.J. Super. App. Div. 2006).

The Appellant's allegations under the Consumer Fraud Act fail to meet the required elements for such a claim—unlawful conduct by the Respondent, an ascertainable loss by the Appellant, and a causal relationship between the conduct and the loss. The complaint does not adequately allege any specific unlawful acts under the CFA that could be attributed to the Respondent. The exemption of casual real estate transactions from the CFA's scope, following precedents set by Zaman and DiBernardo v. Mosley, 206 N.J. Super. 371 (App. Div. 1986), confirms that the Respondent, as a non-professional seller, does not fall under the purview of the CFA regarding the sale of the real estate in question.

POINT III

APPELLANT HAS FAILED TO ALLEGE AND CANNOT PROVE AN ALLEGATION OF FRAUD BEING COMMITTED BY ANY OF THE RESPONDENTS.

To establish fraud, an Appellant must prove the following five elements by clear and convincing evidence: “(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.” Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997).

The authority to rescind a contract for the sale of real estate is based on equitable principles. Feighner v. Sauter, 259 N.J. Super. 583 (App. Div. 1992). Constructive notice of existing encumbrance, that is, chargeable notice beyond actual knowledge and record notice, will defeat claimant's right to rely on protections otherwise afforded by race notice statute. N.J.S.A. 46:21–1, 46:22–1.

Appellant was aware that the title was not in the vendor's name, and knew that Respondent Grinberger did not hold title. This knowledge undermines the claim of fraud. Furthermore, the Appellant was in communication with the true title holder, Respondent Klohr. In fact, the record is complete with email correspondence, even tape recordings between representatives of the Appellant and Rabbi Klohr

concerning the fact that Rabbi Klohr needed to honor the prior agreement with Newport Estates, LLC so that clear title could be conveyed by Newport Estates, LLC to the Appellant. Respondent Grinberger had depended on an agreement with Klohr for the property to be transferred back to the LLC, an agreement that Klohr ultimately did not honor, resulting in harm to Grinberger and Newport. Therefore, allegations of fraud against Grinberger are unfounded since there were no misrepresentations of fact made to the Appellant; the Appellant was fully aware of the title circumstances prior to proceeding with the property transaction.

The enforceability of the contract was always questionable given the known title issues and the conditional nature of the promises made. Furthermore, no fraudulent misrepresentation occurred as the Appellant was aware of all pertinent facts related to the title and property conditions prior to the contract signing, negating any claim of fraudulent misrepresentation or concealment.

POINT IV

**APPELLANT'S COMPLAINT ALLEGING A
BREACH OF CONTRACT MUST FAIL.**

The Appellant contends that a binding and enforceable agreement was in place for the purchase of the property, claiming that they have fulfilled all terms of the contract and are ready to complete the transaction.

The contract in question cannot be deemed enforceable due to the legal impossibility for Respondent Grinberger to transfer property that he never owned. The arrangement between Defendant Klohr and the parties intended for the property to be transferred to Newport Estates LLC, not to Grinberger individually.

Under principles of contract law, an agreement to perform an impossible act is void ab initio. Since Grinberger would not have owned the property individually even if Klohr had performed according to their agreement, Grinberger was legally incapable of fulfilling the contract to sell the property to the Appellant.

Given these facts and legal principles, the contract was not enforceable from the outset. This impossibility absolves Respondent Grinberger from any liability for breach of contract as alleged by the Appellant.

POINT V

**APPELLANT'S REQUEST FOR RELIEF
DEMANDING SPECIFIC PERFORMANCE MUST
BE DISMISSED. IT IS IMPOSSIBLE TO PERFORM
THE CONTRACT AND PROVIDE CLEAR TITLE
TO THE APPELLANT.**

Specific performance is not an independent cause of action but rather an equitable remedy. It requires the existence of a valid, enforceable contract and is typically sought when monetary damages are insufficient to address a breach. Moreover, specific performance is unwarranted when there is such ambiguity in contract terms and conditions.

The Appellant's count for specific performance should be dismissed because it does not state a separate cause of action but only seeks an equitable remedy. In the absence of a valid claim demonstrating an enforceable contract, this count cannot stand independently. The courts have consistently required plaintiffs to plead a legitimate cause of action before requesting specific performance. Without the foundation of a valid claim, there is no basis for the court to consider this equitable remedy.

Given that specific performance as plead does not constitute a cause of action and the Appellant has not adequately pleaded a valid cause of action, this count should be dismissed.

POINT VI

APPELLANT'S ALLEGATIONS OF PROMISSORY ESTOPPEL MUST BE DISREGARDED AND DECLARED OF NO LEGAL VALUE.

There are four elements to the doctrine of promissory estoppel: 1) a clear and definite promise, 2) made with the expectation that the promisee will rely upon it, 3) reasonable reliance upon the promise, 4) which results in definite and substantial detriment. Malaker Corp. Stockholders Protective Committee v. First Jersey Nat'l Bank, 163 N.J. Super. 463, 479, 395 A.2d 222 (App.Div.1978)

The count for promissory estoppel was correctly dismissed as it has not been explicitly pleaded against Respondent Grinberger. The failure to name Grinberger in this count precludes the Appellant from seeking relief against him on this basis.

Promissory estoppel requires that a defendant make a clear and definite promise upon which the plaintiff reasonably relies. If the plaintiff has not clearly attributed the promise to a specific defendant in their pleading, courts cannot impose liability on that defendant. As the Appellant has not pleaded the promissory estoppel count against Respondent Grinberger, this count must be dismissed in relation to him.

CONCLUSION

When Respondent Grinberger signed the contract with Appellant he was not the owner of the property. The property was to be transferred by the Third-Party Respondent's Klohr to Newport Estates, LLC, not Shimon Grinberger. That has never occurred, despite the repeated demands by my clients, as well as numerous applications to Bais Din.

In addition, Newport Estates, LLC is not solely owned by Mr. Grinberger. As can be seen by reviewing the Certification of Mr. Grinberger's partner, Shimshon Bandman (Pa274), Mr. Bandman owns an equitable one half (1/2) interest in Newport Estates, LLC and never consented to or agreed to a contract to eventually sell the property to Appellant.

For the reasons stated above, including the lack of substantiated claims, awareness of the Appellant regarding potential issues, and legal precedents supporting dismissal, Respondent respectfully requests that This Honorable Court affirm the Decision and Order of Judge Must which dismissed the Complaint, with prejudice.

The Appellant alleges that he was induced into signing the contract and spending money on due diligence due to false statements and omissions by Respondent Grinberger regarding the title status of the real estate and his relationship with other parties involved.

Contrary to the Appellant's claims, evidence including the attorney review letter and communications between the Appellant and third parties clearly indicates that the Appellant was aware of the title issues at the time the contract became binding. This is further corroborated by email correspondence from the attorney for the Respondent Michael Cohn to the attorney for the Appellant. (Pa126). Certainly, the attorney review letter (Paragraph 2), the due diligence paragraph in the contract (Pa110), and the email correspondence (Pa123) prove that Appellant was aware Grinberger did not hold title to the subject property, from the outside of the transaction.

The evidence demonstrates that the Appellant was fully informed about the title issues and the status of the property, negating any claim of deceit or fraudulent misrepresentations by my clients. The Appellant's continued pursuit of the property purchase, despite this knowledge, further undermines the credibility of the fraud allegations.

We therefore respectfully request that This Honorable Court affirm Judge Must's Order which dismissed Appellant's Complaint and Amended Complaint.

Respectfully Submitted,
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SIMCHA KLOR

YOSEF HAIM MINZBERG

Plaintiff-Appellant,

- against -

SHIMON GRINBERGER AND
SIMCHA KLOR,

Defendants-Respondents.

-and-

NEWPORT ESTATES, LLC

Intervenor Defendant-Respondent

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION

Docket No.:
A-000099-24-T4
OCN-L-001971-22

Civil Action

Sat Below:
Hon. Valter H. Must, J.S.C.

**BRIEF OF DEFENDANT-RESPONDENT
SIMCHA KLOR**

Mark F. Heinze, Esq.
On the brief

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PRELIMINARY STATEMENT

The trial Court correctly determined that: (a) defendant Grinberger permissibly cancelled his contract with plaintiff Minzberg, (b) plaintiff's promissory estoppel claim against defendant Simcha Klor was derivative of the contract claim and therefore failed as a matter of law, and (c) the plaintiff's proposed amendment to add tortious interference claims was without merit.

The cancellation provision allowed Grinberger to get out of the deal if title defects could not be resolved within 30 days or "absent litigation." (Pa267.) After Grinberger exercised that right, plaintiff had to announce his unqualified and unconditional exercise of the option to "accept title as-is" and proceed to a closing. (Point I.) Otherwise, the deal was cancelled.

The summary judgment record inescapably showed that plaintiff did not announce his unconditional acceptance of title as-is, and in fact repudiated that opportunity. Plaintiff instead engaged in "negotiations and discussions regarding how to best wrestle the wrongfully held title from Klor..." (Pb20.) Then he filed this lawsuit, insisting Grinberger should have corrected the title. (Pa1.) This was the very opposite of accepting title as-is, because plaintiff sought to change the status quo before he would close. (Point I.)

Plaintiff now says there is a jury question about the "reasonable time" for him to "accept title as-is." But he ignores his actions and inactions that contradict

any acceptance and in fact confirm his repudiation of his option. Plaintiff also strips the cancellation provision of meaning by changing “as-is” into “as-might-become”, which would defeat its express litigation-avoidance purpose. (Point I.)

Plaintiff attempted to introduce emails between Grinberger and Klor (Pa521) to establish that Grinberger admitted the continued existence of the contract. Those emails (2+ years into this action) were inadmissible settlement discussions barred by Rule 408. In any event, they did not actually admit anything helpful to the plaintiff. (Point II.)

Because plaintiff’s contract claim failed, his promissory estoppel claim against Simcha Klor also failed. He alleged that Simcha induced him to enter into the contract with Grinberger (Pa19), but the contract itself presupposed there might be a cancellation for title reasons (Pa267). Plaintiff got everything he bargained for. In any event, the estoppel claim not negate Grinberger’s cancellation of the contract, or confer third-party beneficiary standing on the plaintiff. (Point III.)

Plaintiff’s proposed amendment to add tortious interference claims against the Klors was properly denied. (6T-24 to 29.) The discovery and summary judgment record revealed that Simcha merely engaged in permitted speech in furtherance of his own interest. The proposed amendment was futile and without merit. (Point IV.)

The judgment below should be affirmed.

PROCEDURAL HISTORY

Plaintiff's procedural history (Pb2) is largely correct. We have two observations about plaintiff's general procedural objections.

First, plaintiff complains the trial Court initially stayed the action as between Grinberger, Newport and the Klors pending rabbinical arbitration. (Pb, Pt. I.) This was a proper exercise of discretion, consistent with settled law.

Later, the stay was lifted (Pa100) and discovery continued in parallel with the arbitration. Plaintiff fully developed his case, including depositions and document production from the arbitrating parties. There was no prejudice to plaintiff, since the arbitration did not constrain or impair plaintiff's ability to prosecute his own case.

Plaintiff's real grievance is the arbitration did not decide the title issues for his benefit. And this reveals the essential flaw in plaintiff's argument: he never "accept[ed] title as-is", yet he claims the contract remained alive while he waited for a change to the status quo. (Point I.)

Plaintiff did not join the arbitration, which was his right. But he cannot expect the arbitration (or this action) to deliver better title than existed when Grinberger exercised his right of termination. The plain meaning and effect of the cancellation provision did not allow this wait-and-see approach. (Id.)

Second, plaintiff tries to make it seem as though the trial Court surprised him by granting summary judgment on his estoppel claims against the Klors, or something else was irregular about the dispositive motion proceedings. (Pb, Pt. IV.) This finds no support in the record.

Discovery was complete, including of the arbitrating parties. The Court adjourned summary judgment for supplemental discovery and filings. (Pa477-549.) Plaintiff was not prevented from making any arguments or presenting any proof on the motion.

The outcome here centered on a routine construction of the meaning and effect of the cancellation provision in light of plaintiff's own decisions and choices. (Point I.) The estoppel claim had no independent existence. When the main contract claim failed, the estoppel claim necessarily failed as a matter of law. (Point III.)

The judgment below should be affirmed.

STATEMENT OF FACTS

The subject property is a subdivision lot which is part of a larger property titled in the name of Simcha and Mirel Klor, husband and wife. (Pa132.) The Klors acquired the property from intervenor-defendant Newport Estate LLC on October 31, 2019. (Id.) The deed states that after the subdivision lot was created the Klors would convey it back to Newport. (Id.)

On March 3, 2021 plaintiff Mizberg and defendant Grinberger (i.e. not Newport) entered into a contract of sale for the subject property. As part of attorney review, the parties agreed to give Grinberger an “out” if there were title defects he could not cure “absent litigation.” (Rider ¶ 21, Pa267.)

Paragraph 21 says:

If title is unmarketable or uninsurable, Seller will have 30 days to dispose of the title defect. If seller cannot do so absent litigation, either party may terminate the Contract, although Buyer has the final right to accept title as-is before Buyer may terminate the Contract.

On June 23, 2021 Grinberger cancelled the contract because the title was in the Klors’ name. (Pa270.) Grinberger could not deliver good title “absent litigation”, due to issues raised by the Klors (see below). This action, and the related arbitration, are the very proof that Grinberger had a valid reason to exercise his right of cancellation.

Paragraph 21 did not speak to the merits, validity or ultimate outcome of any title defect encountered by Grinberger. It is merely required the existence of a

“title defect” that could not be disposed “absent litigation.” (Id.) Both things are inescapably true.

Paragraph 21 was also indifferent to why there are title defects, or who caused them. It is therefore no answer to say Grinberger created the defects or could have resolved them through a successful lawsuit. The whole point of Paragraph 21 was to allow the seller to extract himself from the transaction if he could not deliver good title without going to court.

Grinberger could also decide not to cancel, and try and clear up the title issues so he could close with the plaintiff. But he did not have to go this route. Hence, Minzberg did not retain any lingering right to buy the property, even if Grinberger later cleared up the title for his own account.

The same is true even accepting plaintiff’s proposition that Newport was his actual counterparty to the contract. There was no claim in the amended complaint (Pa18) or proposed second amended complaint (Pa555) for equitable reformation to make Newport the “true” seller. But if there were, Newport would have the same right of cancellation as Grinberger. Plaintiff therefore had no right to insert himself into Grinberger’s (or Newport’s) litigation, much less muck it up with his own claims. Given this, the plaintiff’s assertion that Grinberger and Newport are interchangeable or indistinct is no help to him.

After notice of cancellation was given (Pa270), plaintiff had to “accept title as-is” (Pa267) and close the deal. Only then could he sue Newport or the Klors to clear up the title. Plaintiff did not exercise his only option to carry the transaction forward. Instead, brought this action as though the cancellation provision did not exist, or had not been exercised by Grinberger.

Title Defects that Could not be Resolved “Absent Litigation”

The summary judgment record revealed the undisputed existence of “title defects” that could not be resolved “absent litigation.” Grinberger was therefore entitled to cancel the contract, which he did. (Pa270.)

- The property was (and is) not titled in Grinberger’s name. (Pa131.) He did not own it, so he could not deliver marketable and insurable title to it. Nor did Grinberger have any right to get the property back from the Klors. That right belonged to Newport (Id.), which was not a party to the Minzberg contract.
- The title belongs to the Klors. (Id.) This was the stated reason for the Grinberger’s cancellation on June 23, 2021. (Pa270.) The rabbinical arbitration was the forum to decide the title issues between the Klors and Newport. But it is beyond dispute that – at the time of Grinberger’s cancellation – the Klors’ ownership was a “title defect” that could not be resolved “absent litigation.”

- In the 2019 transaction between Newport and the Klors, Newport represented that the septic field located at the front of their home did not encroach on the subdivision lot (i.e. the subject property). Simcha stated that the field did in fact encroach in a substantial and material way. (549a.)
- The Klors claimed a prior right to purchase the lot under certain doctrines of Jewish law, which was a question submitted to the rabbinical arbitration. (Id.) The secular courts cannot judge the validity of this claim, since they cannot decide questions of religious doctrine. Elmora Hebrew Ctr. v. Fishman, 125 N.J. 404, 413 (1991). But a court may properly determine – under neutral principles and without touching the doctrinal merits – that there *existed* a title dispute *arising* from religious principles that could not be resolved “absent litigation.”

The undisputed record therefore established, as a matter of law, that there were “title defects” that could not be cured “absent litigation.” On that basis, defendant Grinberger properly availed himself of the bargained-for right of cancellation under Paragraph 21. (Pa270.)

Minzberg Never Accepted Title “As-Is”

After Grinberger gave notice of cancellation, Minzberg had two options: “accept title as-is” or walk away. The motion record inescapably revealed that

plaintiff did not make an “unqualified and unconditional” exercise of the first option. (See Point I.) Accordingly, the contract was properly cancelled.

Plaintiff now claims that he did accept title as-is. His actions and inactions in the motion record only prove the opposite.

With respect to his actions, plaintiff brought this lawsuit making various allegations about what Grinberger supposedly should have done to clear up the title: (a) he should have enforced (presumably through Newport) the agreement with the Klors to re-convey the property (Am. Cmplt. ¶ 19, Pa20), (b) he should have assigned his interest (really, Newport’s interest) to plaintiff (¶ 20), and (c) he failed “to take even minor steps to reclaim the property from Klor and to close title” (¶ 8, Pa22).

This last allegation – to “reclaim the property from Klor and to close title” – is especially telling. Plaintiff insisted that Grinberger *first* recover the property from the Klors and *then* close with him. This is the polar opposite of “accept[ing] title as-is.” It is an express repudiation of the option that was actually available to him, since (by definition) plaintiff was demanding a change to the status quo before he would close.

With respect to plaintiff’s inactions, it is obvious what plaintiff would have done next if (as he now argues) he had unequivocally accepted title as-is. Plaintiff would have scheduled the closing and appeared ready, willing and able to accept

the title Grinberger was able to give him. (The same is true even if we are to assume that Newport had to convey the title.) No closing was ever scheduled.

If Grinberger refused to close, plaintiff would have had the right to declare “time of the essence” and, if necessary, bring an action for specific performance. See, generally, Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 594 (App. Div. 2005), cert den. 183 N.J. 591 (2005). But any judgment for specific performance would have been for “title as-is”, which is the very thing plaintiff refused to accept.

The summary judgment record thus revealed that: (a) the title was defective, (b) the defects could not be cured within 30 days or “absent litigation”, (c) Grinberger gave proper notice of cancellation, (d) plaintiff did not announce an unqualified or unconditional exercise of his option to “accept title as-is”, and (e) plaintiff’s actions and inactions uniformly confirm that he expressly refused to accept title as-is and, indeed, repudiated that option.

The trial Court correctly determined that the contract had been cancelled. The judgment below should be affirmed.

LEGAL ARGUMENT

POINT I

GRINBERGER PROPERLY CANCELLED THE CONTRACT AND MINZBERG DID NOT CLEARLY AND UNEQUIVOCALLY EXERCISE HIS OPTION TO “ACCEPT TITLE AS-IS”

This appeal presents a straightforward question about the meaning and effect of the cancellation provision of the Minzberg-Grinberger contract, which says:

If title is unmarketable or uninsurable, Seller will have 30 days to dispose of the title defect. If Seller cannot do so absent litigation, either party may terminate the Contract, although Buyer has the final right to accept title as-is before buyer may terminate the Contract.

(Pa267a.)

There was no dispute that “title is unmarketable or uninsurable”, since: (a) the property was titled in the Klors (Pa131), who had various issues and claims they wanted resolved before returning it to Newport (Pa550), and (b) Grinberger had no interest in the title at all, since any right to re-conveyance from the Klors belonged to Newport, not him. (Pa131.)

There was also no dispute that: (a) Grinberger could not dispose of the title defects within 30 days or “absent litigation”, and (b) he gave clear and unequivocal notice of his exercise of the right of cancellation to Minzberg according to the contract (Pa270).

Lastly, there was no real dispute that Minzberg did not exercise his “final right” to “accept title as-is.” He had to either: (a) buy the property and take on the risk and responsibility for the inevitable title litigation, or (b) abandon the deal. He did neither. Instead, he brought this lawsuit to change the status quo, which is the precise opposite of accepting title as-is.

The exercise of an option must be “unqualified and unconditional.” Robert & Richard Assocs. v. State, Div. of Purchase & Prop., 202 N.J. Super. 352, 366 (App. Div. 1985), cert. den. 102 N.J. 382 (1985); Marjer v. Layfmen, 140 N.J. Eq. 68, 71 (Chan. 1947). There was no unequivocal exercise (or even an equivocal one) by plaintiff here.

This is not a situation where an option was exercised late and the plaintiff seeks equitable relief from their delay or oversight. See, e.g., Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 228 (2005); Brick Plaza v. Humble Oil & Ref. Co., 218 N.J. Super. 101, 104 (App. Div. 1987). Here, there was no exercise at all.

Plaintiff also did not *act* as though he had exercised his right. See Robert & Richard Assocs., *supra*, 202 N.J. Super. at 367 (Determining that the conduct of the parties showed neither believed the subject option had been exercised.) If plaintiff had exercised, his next step was simply to proceed to a closing. He did not need a court’s help to do that.

Plaintiff brought this case for the very reason he wouldn't "accept title as-is." He now points to his own hemming and hawing, and his "discussing" and "negotiating", as if this proves his option was still alive. But this only really shows the reverse, since plaintiff's efforts were entirely directed to changing the status quo before he would close.

Plaintiff also points to emails between Simcha and Grinberger, purportedly to show Grinberger admitted the contract was still alive. As detailed in Point II, those emails were inadmissible settlement discussions and, in any event, they do nothing to show the continued existence of the contract, much less plaintiff's unqualified and unconditional acceptance of title as-is.

Plaintiff also urges that the cancellation provision stated no particular time for him to exercise the right. (Pb, Pt. II.) Thus, his argument goes, the law implies a "reasonable time" and that presented a jury question.

This argument is without merit: (a) Minzberg never exercised the right, which was all he needed to do to negate Grinberger's cancellation, and (b) everything plaintiff did afterwards was designed to changing the status quo, i.e. the very opposite of "accept[ing] title as-is."

No reasonable jury could conclude plaintiff "accept[ed] title as-is." Indeed, no reasonable jury could say anything except that plaintiff sought a court's help to change the status quo as a condition to his closing the deal. But suing Grinberger

to get him to correct the title was not a third option. Nor was suing the Klors an available choice (including in the guise of “equity”), since he had no third-party beneficiary standing, and the contract required him to close with Grinberger before pursuing title claims. (See Point III.)

Given all of this, the plaintiff’s only remaining argument is that he had a “reasonable time” to seek various changes to the status quo and, if none of that worked out, he could still “accept title as is” as a last resort. This makes an absurdity out of the plain language of Paragraph 21.

What constitutes a “reasonable time” is usually an implication of fact and not of law and must be derived from the language used by the parties considered in the context of the subject matter and the attendant circumstances, in aid of the apparent intention. Mazzeo v. Kartman, 234 N.J. Super. 223, 231 (App. Div. 1989); West Caldwell v. Caldwell, 26 N.J. 9, 28, (1958). This is typically a question for the jury but may be (as here) properly disposed by summary judgment. Mango v. Pierce-Coombs, 370 N.J. Super. 239, 257 (App. Div. 2004).

The dispositive words here are “absent litigation” and “as-is.” (Pa267.) With respect to “absent litigation”, the plain intent is that plaintiff’s acceptance of title as-is had to occur before Grinberger got dragged into court. Plaintiff’s commencement of this action contradicted this litigation-avoidance purpose, particularly where the plaintiff’s allegations spoke to Grinberger’s purported

failure to rectify the title. (Pa19.) Those allegations say nothing about plaintiff's acceptance of title as-is.

"Absent litigation" also meant that the plaintiff's option did not remain alive during any litigation, supposedly as a back-up plan. The self-evident purpose of Paragraph 21 was to require the plaintiff to acquire the property up front and bring the title litigation himself.

Once that occurred, Grinberger would be insulated from post-closing litigation. The doctrine of merger provides that acceptance of the deed "satisfies and extinguishes all previous covenants which relate to or are connected with the title, possession, quantity or emblements of the land." Caparrelli v. Rolling Greens, Inc., 39 N.J. 585, 591 (1963). Under this principle, if plaintiff had accepted title as-is, that would have been fatal to his contract claims against Grinberger. By bringing this contract action, which would have been barred, plaintiff necessarily repudiated his option.

Plaintiff's construction of Paragraph 21 also re-arranges the allocation of risks and burdens implicit that provision. By not exercising his option to accept title as-is, plaintiff foisted upon Grinberger (and the Klors) the litigation costs and risks the contract expressly sought to avoid. Also implicit in plaintiff's argument is his expectation that other parties would incur the carrying costs during the action, and undertake the ongoing risks of property ownership, and (after all that)

Grinberger would still have to wonder if plaintiff would actually close. Meanwhile, according to plaintiff, he could hold onto his purchase money and wait for the title to change to his liking. But if the title didn't improve, then (according to him) he could still "accept title as-is" or still escape the contract.

All of this renders the litigation-avoidance purpose of the cancellation provision meaningless. The contract never offered the optionality to possibly upgrade the title in court and, if that failed, to revert to the status quo ante.

With respect to the words "as-is", they are similarly fatal to plaintiff's argument. These words plainly meant the condition of title at the moment Grinberger gave his notice of cancellation. They do not mean "as will be", or "as I want you to make it become", or even "as it was before our unsuccessful journey through the courts." "As-is" meant "you have to make your choice now."

Plaintiff's actual choice is perfectly clear from the record. He never made a "unqualified and unconditional" exercise of his option to accept title as-is. Robert & Richard Assocs., supra, 202 N.J. Super. at 366. He repudiated that option by insisting on a change to the status quo before he would close.

Summary judgment was properly granted, and the decision below should be affirmed.

POINT II

THE EMAILS BETWEEN SIMHCA KLOR AND GRINBERGER ARE INADMISSIBLE AND, IN ANY EVENT, DO NOT ESTABLISH THE CONTINUED EXISTENCE OF THE CONTRACT

Plaintiff points to emails between Simcha Klor and Grinberger, purportedly to establish the continued existence of the contract after his commencement of this action. (Pa521-531.) The emails are inadmissible settlement discussions. In any event, they do not prove that the Minzberg-Grinberger contract was still alive, or that plaintiff gave his unqualified and unconditional acceptance of title as-is. (See Point I.)

As a threshold matter, the emails were inadmissible because they contain various words and phrases – seemingly in Hebrew and Yiddish – that were not translated. See *NJ Judiciary Language Access Plan* (2022 Ed.), Standard 4.4 (“Unless otherwise permitted by the court, all evidentiary documents are to be presented in English and all non-English documents intended to be introduced into evidence must be accompanied by a Statement/Certificate of translation.”)

Leaving that aside, the emails purportedly show that on April 30 and May 1, 2023 – i.e., nearly two years after Grinberger’s closing attorney cancelled the contract (Pa270), and after this action was well under way – Grinberger supposedly admitted the continued existence of Minzberg contract. The emails actually show

that Klor and Grinberger were negotiating when, where and how they might go to rabbinical arbitration, e.g. (a) by Grinberger: “Us going to Bais din is a waist of time we need mr minsberg to come.” (Pa523), (b) by Grinberger: “Are we going for advise or as din tora?”(Pa522), (c) by Klor: “We need to go to Bais Din/Rov to pasken what you and me have to do.” (Pa523), etc. Any purported “admission” to the contract was, at most, collateral to this negotiation over a possible alternative forum to adjudicate their dispute.

Rule 408 provides:

When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, with or without a mediator present, including offers of compromise or any payment in settlement of a related claim, is not admissible either to prove or disprove the liability for, or invalidity of, or amount of the disputed claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations.

On summary judgment, inadmissible settlement communications cannot create a disputed issue of material fact. Shotmeyer v. N.J. Realty Title Ins. Co., 195 N.J. 72, 89 (2008)(Defendant title insurance company’s settlement offer to plaintiff was inadmissible for the purpose of establishing plaintiff’s theory of waiver, which was a defense to the insurer’s summary judgment motion.)

Plaintiff's assertion that Grinberger admitted the continued existence of the contract is not a reasonable inference from the emails. By April 30, 2023, Minzberg was being sued by Grinberger, who was claiming he had a viable contract. All Grinberger was really saying was that he was "the [monkey] in the middle." (Pa524.) Meanwhile, he was actively defending this case, including by arguing the contract had been properly cancelled.

In any event, the emails are inadmissible. Rule 408 does not merely encompass "offers of compromise or any payment in settlement." It also insulates statements and conduct in "settlement negotiations" generally, "including" offers and payments. The "statement" or "conduct" itself doesn't need to specifically speak to the settlement. As here, an item could be tangential or collateral or even irrelevant. If it occurs "in" a settlement negotiation, it's off-limits as evidence.

The Rule also draws no distinction about *what* is sought to be settled. Parties might discuss a procedural matter (as here, where and how to arbitrate), or the merits, or both. Rule 408 only asks whether something is sought to be settled, and not what is being discussed.

Rule 408 is equally unconcerned with whether that negotiation occurred in the proceeding where it is sought to be introduced, or in another action or arbitration, or (as in Shotmeyer, supra) before any action or arbitration has begun.

Plaintiff cannot pluck a purported “admission” from the Klor-Grinberger arbitration negotiation to create a factual dispute in this action.

If there is any limitation in Rule 408, it is only that the “statement” or “conduct” be made by a “party” or their attorney. Grinberger and Klor satisfy this requirement, so any statement in their emails made “in settlement negotiations” is inadmissible.

Rule 408 does allow the admission of the statement or conduct for “another purpose”, i.e. for a purpose other than “proving or disproving the liability for, or invalidity of, or amount of the disputed claim.” Here, the emails were introduced by plaintiff for the direct purpose of proving Grinberger’s liability on a contract, and to disprove (or impeach) Grinberger’s assertion that the contract was cancelled. (Pa521-531.) These purposes fall squarely within the prohibition of Rule 408.

For these reasons, the Klor-Grinberger emails did not reveal an issue of fact that impeded summary judgment. Nor, in any event, can they negate the effect of the notice of cancellation communicated by Grinberger’s closing attorney almost two years earlier. (Pa270.) Nor can the emails compensate for plaintiff’s own failure to give an unqualified and unconditional acceptance of title as-is, or negate his repudiation of that option through his actions and inaction. (See Point I.)

The judgment below should be affirmed.

POINT III

PLAINTIFF’S ESTOPPEL CLAIM FAILED AS A MATTER OF LAW ON THE SUMMARY JUDGMENT RECORD

Plaintiff’s promissory estoppel claim essentially urged that Simcha Klor promised and assured him (through plaintiff’s son) that he would not stand in the way of plaintiff’s purchase of the property from Grinberger, provided that a certain fence would not be moved and plaintiff would “deal with the septic tank in a way desired by Klor.” (Am. Cmplt. ¶ 8, Pa19.) Plaintiff further alleged that, in reliance on Simcha’s assurances, he entered into the contract with Grinberger (Id. ¶ 9) but then Klor refused “to transfer title back to Grinberger in accordance with Grinberger’s contract with Klor.” (Pa23.)

The trial Court correctly dismissed the estoppel claim as “derivative” of plaintiff’s contract claim against Grinberger. Where, as here, the plaintiff’s contract claim fails, so does their estoppel claim. See, generally, Mita v. Chubb Comput. Servs., Inc., 337 N.J. Super. 517, 529 (App. Div. 2001).

The estoppel claim fails for two additional reasons. First, title was held by Simcha and Mirel as tenants by the entirety. (Pa131.) There was no allegation, and nothing in the motion record, to suggest Mirel Klor promised, assured or represented anything to plaintiff. The best plaintiff can muster is that Mirel “was present” (Pb36) when Simcha allegedly made his statements. But there is nothing

to show that she expressly agreed with them, or ratified them, or did anything in reaction to them. Nor does anything suggest that Mirel owed plaintiff any duty to speak, such that an estoppel might arise from her silence. Heuer v. Heuer, 152 N.J. 226, 238 (1998).

The claim against Mirel rests only on the long-discredited notion that she had no independent property rights and her husband made all the decisions for her. In any event, whatever verbal promise Simcha supposedly made was unenforceable under N.J.S.A. 46:3-17.4, which provides: “Neither spouse may sever, alienate, or otherwise affect their interest in the tenancy by entirety during the marriage or upon separation without the written consent of both spouses.” There is no writing from either Simcha or Mirel.

“Equity follows the law” is a maxim that instructs that “as a rule a court of equity will follow the legislative and common-law regulation of rights, and also obligations of contract.” Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 183 (1985)(cites & punct. omitted); see also Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 561 (App. Div. 2007); Hardy v. Jackson, 476 N.J. Super. 394, 404 (App. Div. 2023). Plaintiff cannot circumvent the statute through a claim in equity.

Second, the Klors never had an obligation to “transfer title back to Grinberger.” Their counterparty was Newport. (Pa131.) There was no claim for

equitable reformation to substitute Newport for Grinberger as plaintiff's counterparty, such as due to mutual mistake. See, generally, St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 577 (1982). Plaintiff waved away the distinction between Grinberger and Newport as a "typographical error" (6T9), but this merely presumes he would have prevailed on a reformation claim he never made.

Grinberger and Newport cannot be presumed to be interchangeable. An entity and its owners are legally distinct and entitled to separate recognition. Lyon v. Barrett, 89 N.J. 294, 301 (1982). Plaintiff's counterparty was Grinberger, while the Klors' counterparty was Newport, and that disconnect is also fatal to the estoppel claim.

Even assuming, arguendo, that the promissory estoppel claim against Simcha was viable, it could do nothing to revive plaintiff's contract with Grinberger, or alter the meaning and effect of the cancellation provision, or remove the title defects that allowed Grinberger to cancel, or excuse plaintiff's failure to express his unqualified and unconditional acceptance of title as-is. (Point I.) At most, estoppel "provides equitable relief to restore a plaintiff to the position he would have been in, had the relied-upon promise not been made and later broken." Goldfarb v. Solimine, 245 N.J. 326, 331 (2021). Here, that would mean (at best) recovery of the expenses he incurred (e.g. title search, survey and similar pre-

closing expenses) which he supposedly would not have incurred, since (according to his theory) he would not have entered into the contract but for Simcha's assurances.

But really, the estoppel claim was just a roadmap for an argument plaintiff wanted Grinberger to advance against the Klors, i.e. that they had supposedly waived their title objections. Yet Grinberger did not have to advance any claims or arguments against the Klors. His right was to give notice of cancellation and plaintiff had to accept title as-is and pursue the Klors in his own name. Yet plaintiff did not unconditionally exercise that option, so he never acquired Grinberger's title claims. Given this, the estoppel claim was just an attempt by plaintiff to circumvent the contract Grinberger by creating a purported "equitable" relationship with the Klors.

For the same reasons, plaintiff was not a third-party beneficiary of the Newport-Klor deed, and therefore had no standing to make a direct claim against the Klors. Again, the estoppel claim was just plaintiff's attempt to use equity to circumvent the absence of any standing at law.

In determining third-party beneficiary standing, the inquiry focuses on whether the parties to the contract intended others to benefit from the existence of the contract, as distinguished from the benefit merely being an unintended incident of the agreement. Ross v. Lowitz, 222 N.J. 494, 513 (2015); see also, Broadway

Maint. Corp. v. Rutgers, 90 N.J. 253, 259 (1982); Pollack v. Quick Quality Rests., Inc., 452 N.J. Super. 174, 186 (App. Div. 2017)(citing Model Jury Charge (Civil) § 4.10B), cert den. 232 N.J. 394 (2018). If (as here) there was no intention that a third party would receive a benefit, they are merely an incidental beneficiary with no standing to maintain claims on the agreement. Id.; see also Brooklawn v. Brooklawn Hous. Corp., 124 N.J.L. 73, 76 (1940).

Nothing in the Newport-Klor deed here suggests that plaintiff (or anyone else) was an intended beneficiary. (Pa131.) This is obvious from the fact the deed came into existence on October 31, 2019 (Id.), whereas the Minzberg-Grinberger contract was made on March 3, 2021. (Pa110.) The general idea that Newport might thereafter sell the property to someone else is insufficient to confer third-party standing on that potential buyer, since that is merely incidental.

For all of these reasons, the estoppel claim against Simcha Klor was properly dismissed.

POINT IV

PLAINTIFF'S PROPOSED AMENDMENT TO ADD TORTIOUS INTERFERENCE CLAIMS WAS PROPERLY DENIED

After discovery, and while Grinberger and Newport's motion for summary judgment was pending, plaintiff moved to amend his complaint to add causes of action for tortious interference with contract (TIC) and tortious interference with prospective economic advantage (TIPEA). (Pa550.) The motion was properly denied.

While motions to amend are to be liberally granted, they must be considered in light of the factual situation at the time it is made. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). Here, there was a full discovery and summary judgment record for the trial Court to consider in determining the potential merit of the proposed amendment.

From that record, plaintiff had no answer to a simple question: if plaintiff never had a contract, would the Klors have done anything different? The answer was self-evidently "no": (a) they would always have their concern about the septic encroachment, which existed before this action (Pa549) and had not been addressed since the original purchase from Newport (Contract Rider ¶ 12, Pa128), and (b) they would have always asserted their claim under Jewish law (essentially that they had the first-right to acquire the lot themselves), regardless of whether

plaintiff or anyone else purported to be the buyer (Pa549). The Klors were acting in advancement of their own interest, which is fatal to a tortious interference claim as a matter of law. Cedar Ridge Trailer Sales, Inc. v. Nat'l Cmty. Bank of N.J., 312 N.J. Super. 51, 67 (App. Div. 1998); Russo v. Nagel, 358 N.J. Super. 254, 268 (App. Div. 2003).

It is not “malice” for the Klors to assert their own rights and interests, even if that stood in the way of plaintiff’s own goals. According to plaintiff, he was entitled to pursue his interests, yet anyone with a competing or contrary interest is “malicious” and “interfering.”

Plaintiff admitted the Klors were acting in their own interest. (Pa553.) Yet plaintiff sought to transform this into “tortious interference” by arguing the Klors were “[taking] advantage of a situation.” (Id.) This adds nothing, since the pursuit of an “advantage” is (by definition) for the one’s own benefit. See Cedar Ridge Trailer, *supra*.

Similarly, plaintiff’s pronouncement that the Klors had “no lawful right” to what they were seeking (Pa553) changed nothing. Even if the trial Court eventually determined the Klors’ arguments and contentions had no merit, that would not retroactively make them “malicious.” A party’s advancement of their own interest – even if based on a mistaken conception of the law or facts – is not intentional interference another party’s contract “without justification.”

In any event, the Klors did not actually interfere with any right of the plaintiff. His option was to “accept title as-is” and pursue any title claims after his closing with Grinberger. (Point I.) Nothing the Klors did deprived plaintiff of this right. Nor did the Klors cause Grinberger to breach his contract with plaintiff, since he merely exercised a stated right to cancel. If anyone repudiated the contract, that was plaintiff himself. (Id.)

With respect to TIPEA, plaintiff’s burden was even greater and not met. As an initial matter, this cause of action adds nothing, since plaintiff had a contract with Grinberger. The purpose of the TIPEA tort is to protect “the right to pursue one’s business or occupation without harassment or undue influences.” Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 750 (1989). Nothing in this record suggested that plaintiff sought a general or ongoing relationship with Grinberger (or Newport).

Even assuming that TIPEA stood independently, the allegations about defendant’s subjective motivation – here, supposedly to sabotage plaintiff’s contract – did nothing to establish that the Klors used “wrongful means” to advance that motive. That requires acts of fraud, dishonesty or illegality. Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 205 (App. Div. 1995), cert den. 141 N.J. 99 (1995); see also, Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 586 (E. & A. 1934).

The proposed second amended complaint (Pa555) did not allege the Klors *did* anything tortious. Plaintiff merely alleged that “Simcha Klor communicated numerous conditions that he said would allow him to transfer the property back, including agreeing to a fence, and redoing the septic system.” (Pa557.) Thus, according to plaintiff, Simcha was negotiating in his own interest. Mere speech in pursuit of one’s own goals is not wrongful, malicious, fraudulent or improper.

Plaintiff’s proposed amendment also admitted Simcha had specific reasons for his position, e.g. the septic encroachment, possible interference with this use of his home, and privacy concerns (Pa558). Plaintiff’s mere disagreement with the legal and factual validity of these issues does nothing to transform Simcha’s advocacy of them into “wrongful means.”

Plaintiffs further alleged that the “Klors have refused to transfer title” to Grinberger. (Pa557.) But the Klors were never obligated to convey to Grinberger. (Pa131.) In the proposed amendment, plaintiff still had no answer for the disconnect between the Klors’ relationship with Newport, and his separate contract with Grinberger. Nor, in any event, was plaintiff ever deprived by the Klors of his bargained-for right to “accept title as-is.”

For these reason, plaintiff’s motion to amend was without merit and therefore properly denied.

CONCLUSION

The judgment below should be affirmed.

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April 28, 2025

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-000099-24-T4

YOSEF HAIM MINZBERG,

Plaintiff/Appellant,

v.

SHIMON GRINBERGER, SIMCHA
KLOR, MIREL KLORE and
NEWPORT ESTATES, LLC,

Defendants/Respondents.

Civil Action

**ON APPEAL FROM THE
SUPERIOR COURT OF NEW
JERSEY, LAW DIVISION,
OCEAN COUNTY**

**SAT BELOW: HONORABLE
VALTER H. MUST, J.S.C.**

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT MIREL KLORE

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PRELIMINARY STATEMENT

Plaintiff Haim Yosef Minzberg (“*Plaintiff*”) seeks to obtain through this litigation what he was unable, and unauthorized, to obtain via his written contract: good and clear title to real property known as Block 501, Lot 1.12 in the Township of Lakewood (the “*Property*”) from defendant Shimon Grinberger (“*Grinberger*”). In doing so, Plaintiff asks the court to re-write his contract to eliminate a clear and unambiguous provision which gave Grinberger the right to terminate the contract in the case of “title defects.”

The trial court correctly dismissed Plaintiff’s contract claim against Grinberger, as well as Plaintiff’s derivative claim for promissory estoppel against defendants Simcha Klor (“*Simcha*”) and Mirel Klor (“*Mirel*”) (together, the “*Klors*”), based on the undisputed facts in the record:

- Plaintiff entered into the contract with Grinberger to purchase the Property for \$299,000, despite the fact that Grinberger did not own the Property and had no right to obtain the Property in his individual name.
- The Klors were, and remain, the title owners of the Property, and their purported obligation to transfer title of the Property to defendant Newport Estates, LLC (“*Newport Estates*”)—but not Grinberger—is the subject of a Rabbinical Arbitration that Plaintiff chose not to join.
- The contract, as modified by an attorney review letter dated March 11, 2021 (the “*Attorney Review Letter*”), provided that if title was unmarketable or uninsurable (which it obviously was since Grinberger never possessed title), Grinberger would have 30 days to dispose of the title defect (or by April 10, 2021), and if he could not do so “absent

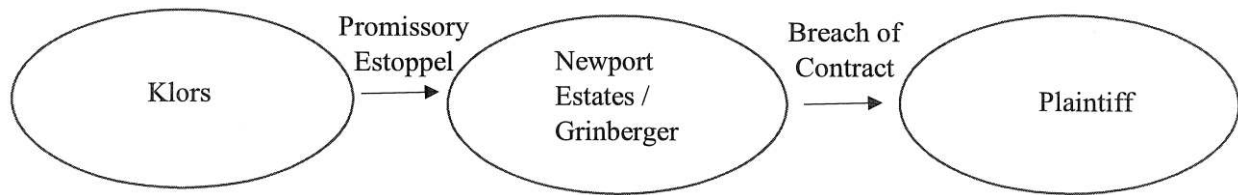
litigation,” Grinberger could terminate the contract. If he did, Plaintiff would have the “final right” to accept title as-is, which he never did.

- Paragraph 16 of the Attorney Review Letter further provided that all notices under the contract must be in writing.
- Grinberger was unable to dispose of the title defects and on June 23, 2021, he terminated the contract in writing.
- Plaintiff never exercised his option to accept title as-is, as he: (i) never sent a written notice exercising such right to Grinberger; (ii) never served a time of essence demand; and (iii) never sought to compel the transfer of title as-is in his complaint. Instead, Plaintiff filed this action on September 6, 2022, to compel the Klors to transfer the Property to Newport Estates, and for Newport Estates to transfer the Property to Grinberger, and for Grinberger to transfer the Property to Plaintiff.

Stated simply, Plaintiff entered into a contract to buy the Property from someone who did not own it, and that person properly terminated the contract when he was unable to acquire title himself. The trial court correctly found that it was undisputed both that Grinberger properly exercised the termination provision in the Attorney Review Letter, and that Plaintiff never exercised his option to accept title as-is, and properly dismissed Plaintiff’s contract claim against Grinberger accordingly.

The trial court also correctly dismissed Plaintiff’s factually, legally and equitably unsupportable claim for “promissory estoppel” against the Klors. The crux of Plaintiff’s “promissory estoppel” theory was that Simcha made various unspecified promises, at unspecified times, and that Plaintiff relied on Simcha’s

unspecified promises in deciding to enter into the contract with Plaintiff. It was undisputed, however, that Plaintiff had never even *met* Mirel, let alone rely on any non-existent representation by her. Based on this theory, Plaintiff sought the entry of judgment compelling the Klors to transfer the Property to Grinberger, so Grinberger could then transfer the Property to Plaintiff.



The trial court correctly found that since Plaintiff had no contractual right to acquire title directly from Grinberger, Plaintiff's claim for promissory estoppel against the Klors failed as well, since even if the Klors were required to transfer the property to Newport Estates (but not Grinberger), Plaintiff still had no right to purchase the Property. For the same reason, the trial court did not abuse its discretion in denying Plaintiff's motion to amend its complaint to assert a claim for tortious interference with such properly terminated contract.

Plaintiff had no right to acquire the Property after Grinberger terminated the contract, and after he undeniably failed to exercise the right to "accept title as-is" from Grinberger. The trial court properly dismissed Plaintiff's Amended Complaint in its entirety, and the Appellate Division should affirm in all respects.

PROCEDURAL HISTORY

On September 6, 2022, Plaintiff filed a Complaint in this action against Grinberger and Simcha. Pa1. On November 21, 2022, Plaintiff filed an Amended Complaint, joining Mirel as a defendant. Pa18.

In the Amended Complaint, Plaintiff alleged that Grinberger failed to take “even minor steps” to “reclaim” the Property from the Klors, despite the fact that Grinberger never possessed title to the Property in the first place and never had any right to acquire title to the Property from the Klors.

Plaintiff asserted a single cause of action against the Klors for “promissory estoppel,” in which Plaintiff sought to force the Klors to transfer the Property to Grinberger, individually, so that Grinberger could sell the Property to Plaintiff. Pa22-23. Specifically, Plaintiff alleged that Simcha—but not Mirel—“made numerous promises to Plaintiff, on behalf of himself and his family including Mirel Klor, in regard to the Property, and Plaintiff relied on those promises to enter into the contract and to continue his contract with Grinberger.” Pa23. Plaintiff did not, however, identify the “promises” allegedly made by Simcha or the factual basis of Plaintiff’s belief that Simcha was authorized to speak on behalf of Mirel. Ibid. Importantly, Plaintiff did not allege that Mirel made any promise of any kind to Plaintiff. Ibid. Plaintiff requested the entry of judgment compelling Grinberger to specifically perform the contract and sell the Property to Plaintiff – despite the fact

that Grinberger never owned the Property or had any right, individually, to obtain title to the Property. Ibid. Implicit in Plaintiff's requested relief was to compel the Klors to transfer the Property to Grinberger, individually, so that Grinberger could then transfer the Property to Plaintiff. Ibid.

On June 20, 2023, Newport Estates intervened in this action and filed a Crossclaim against the Klors, in which Newport Estates sought the entry of final judgment requiring the Klors "to convey clear title to the [Property]." Pa51; Pa54. However, the assertion of this claim was in no way inconsistent with Grinberger's assertion that his contract with Plaintiff had been permissibly terminated.

On July 11, 2023, Simcha filed an Answer to Newport Estates' Crossclaim, as well as his own affirmative crossclaim against Newport Estates. Pa56. In Simcha's Crossclaim, Simcha alleged that Newport Estates misrepresented the location of the septic field prior to the transaction between Newport Estates and the Klors, as the Klors subsequently learned that contrary to Newport Estates' representation, the septic field did extend over the property line between the Klors' lot and the Property. Pa59-60. As a result, the transfer of the Property by the Klors to Newport Estates would immediately render the Klors' property non-compliant with the minimum required separation distances for individual subsurface disposal systems set forth at N.J.A.C. 7:9A-4.3. Pa60-61. Simcha requested the entry of judgment extinguishing and otherwise enjoining enforcement of the Deed Covenant

requiring the transfer of the Property to Newport Estates, vesting title in the Property in the Klors, free of any such restriction, and fixing and awarding damages or other compensation to Newport Estates representing the fair and reasonable value of the Property as of the closing date of the original sale. Pa62. In addition, Simcha requested the entry of judgment requiring Newport Estates to compensate Simcha for the attorneys' fees and costs incurred in defending against Plaintiff's claim. Pa62-63.

Simcha's allegations also confirmed the existence of "title defects" that would provide (on top of title not being in Grinberger's name) a proper basis for cancellation of the Grinberger-Plaintiff contract. Plaintiff's complaint focused on Grinberger's purported failure to get the Property from Newport Estates, but ignored the separate impediments to Newport Estates getting the title from the Klors.

On July 12, 2023, Mirel filed her own Answer to Newport Estates' Crossclaim, as well as her own affirmative Crossclaim against Newport Estates, which was identical in substance to the Crossclaim filed by Simcha. Pa66.

On September 6, 2023, the Klors, Grinberger, personally and on behalf of Newport Estates, and Shimon Bandman ("*Bandman*"), the other member of Newport who is not a party to this action, entered into an Agreement to Submit to Arbitration before the Rabbinical Court of Mechon L'Hoyroa (the "*Arbitration Agreement*"). Da1. In the Arbitration Agreement, the Klors, Grinberger, Bandman and Newport

Estates agreed to submit to binding arbitration all controversies (claims and counterclaims between them, “including but not limited to the controversies related to the [Subdivision Lot] and all claims, cross claims, and third party claims which were or could have been asserted” in the litigation. Ibid.

Given the Arbitration Agreement, on September 13, 2023, Mirel moved to stay the litigation pending the outcome of the arbitration before the Rabbinical Court. Da4.

On September 28, 2023, Plaintiff cross-moved to stay the arbitration, despite the fact that he was not a party to that proceeding. Da6.

On October 19, 2023, the trial court entered a Consent Order which stayed the litigation for a period of 45 days and provided that in the event the arbitration before the Rabbinical Court was not completed within 45 days, the parties had the right to re-file their respective motions. Pa87. On December 18, 2023, the trial court entered a second Consent Order which extended the stay to January 31, 2024, subject to the parties’ right to re-file their respective motions in the event the arbitration was not completed by the expiration of the stay. Pa91.

On February 2, 2024, Grinberger and Newport Estates moved for the entry of an order to place the litigation back on the active trial list, despite the fact that Grinberger and Newport Estates were bound by the Arbitration Agreement. Pa95. On February 14, 2024, Mirel re-filed a motion to stay the litigation pending the

outcome of the arbitration before the Rabbinical Court. Da9. By orders dated March 1, 2024, the trial court placed the matter back onto the active trial list and denied Mirel's motion to stay the litigation. Pa100; Da11.

On May 16, 2024, Grinberger and Newport Estates filed a motion for summary judgment and the dismissal of Plaintiff's complaint. Pa238.

On June 4, 2024, before filing any opposition to the pending motion for summary judgment, Plaintiff filed a motion for leave to file an amended complaint. Pa550. Plaintiff sought to add a count for tortious interference with contract and prospective contract as against the Klors. Pa555.

On June 20, 2024, the court heard oral argument of the motion for summary judgment and the motion to amend. 1T.¹ Judge Must framed the summary judgment issue as follows:

THE COURT: Let me – okay, well on that clausal [sic] – I want to hear from Minzberg's attorney. If in fact that is the case, when they entered the contract the Minzbergs knew through their attorney that the sale of this property was contingent upon the Klors deeding it over. And if during – at a certain point they said they're not going to do it, we cannot deliver to you title to this property, they canceled. We gave it a shot, but we canceled. Why is there any liability? That's a standard -- they got out of the contract. He says, we – we were hoping we could do it. We can't get clear title, all bets are off. Why – how – why is there a cause of action after that?

¹ Mirel shall cite to the Transcript of Hearing dated June 20, 2024 as “1T” and the Transcript of Motion dated July 19, 2024, as “2T”.

[1T 11-8 to 1T 11-20].

Importantly, the question of whether Plaintiff's claims against the Klors could survive if Plaintiff's claims against Grinberger and Newport Estates were dismissed was discussed with the court. Counsel for Simcha expressly stated that if the court were to find that Plaintiff's contract with Grinberger was terminated, Plaintiff's derivative claims against the Klors must also be dismissed:

THE COURT: No you don't have exposure to Minzberg. So – do you?

MR. HEINZE: Well, correct. Because his claims – his claims are contract based.

THE COURT: I – I –

MR. HEINZE: So if the Court determines that the contract was properly canceled, all that evaporates. I still have whatever issues I have with Mr. Dasti [counsel for Grinberger and Newport Estates].

[1T 32-15 to 1T 32-23].

Thus, Plaintiff was on notice that the resolution of the summary judgment motion may dispose of his claims against the Klors by operation of law.

During oral argument, Plaintiff's counsel conceded that Grinberger sent a letter pursuant to the terms of the contract purporting to cancel the contract. 1T 34-23 to 1T 35-11. Nonetheless, Plaintiff's counsel argued that there was an "open discovery question" as to whether Grinberger somehow worked in concert with the Klors to prevent the consummation of Plaintiff's contract. 1T 47-13 to 1T 48-14.

Ultimately, Judge Must decided to adjourn the motion for summary judgment for two cycles to allow for the production of certain text messages, but indicated that he was “inclined to grant this application for summary judgment based on the fact that there was a letter sent from one attorney to the other terminating the contract by truthfully indicating that we can’t transfer title.” 1T 53-21 to 1T 54-3. Judge Must further indicated that Plaintiff could supplement his submission based on the text messages, if any. 1T 55-4 to 1T 55-12. Judge Must also adjourned Plaintiff’s motion to amend for two cycles. 1T 56-18 to 1T 56-24.

On July 5, 2024, Plaintiff submitted supplemental papers in further opposition to the motion for summary judgment and in support of his motion to amend the complaint which included excerpts from the deposition of Bandman (which occurred after the initial oral argument), and additional emails and text messages produced by the parties. Pa483.

On July 19, 2024, with this supplemental motion record, Judge Must continued argument on the motion for summary judgment and the motion to amend. 2T. In his introductory comments, Judge Must indicated that there was “no factual dispute” that Grinberger rightfully terminated the contract pursuant to its terms. 2T 6-3 to 2T 6-15. Judge Must further stated that “if I dismiss the Minzberg complaint there is no reason for me to allow an amendment of the claim to bring in new claims against – because that – any claims he has against the Klors are derivative of a breach

of contract,” and “if I say the contract was rightfully terminated, there goes the rest of the theories of liability.” 2T 7-16 to 2T 7-22.

During colloquy with counsel, Plaintiff’s counsel argued, for the very first time in the 2+ years of litigation, that Plaintiff could exercise his option to accept title as-is under Paragraph 21 of the Attorney Review Letter before Grinberger could terminate the contract. 2T 8-2 to 2T 9-9. But Plaintiff’s counsel readily admitted, as he must, that Plaintiff never purported to exercise such option at any time prior to instituting this lawsuit or even prior to the summary judgment briefing:

THE COURT: Contract. Do I have that? Paragraph twenty-one, if title is unmarketable or uninsurable seller will have thirty days to dispose of the title defect. If seller cannot do so absent litigation either party – either party may terminate the contract, although buyer has the final right to accept title as is before buyer may terminate the contract.

Now here’s the next question. Buyer has the right to accept title. It gives no time frames as to that.

MR. DASTI: As is, correct.

THE COURT: As is.

MR. DASTI: As is.

THE COURT: And – and – and you’re saying, well why can’t he do that right now? Yeah.

MR. DASTI: Judge, I don’t – I think in fairness after two –

THE COURT: I – I get that.

MR. DASTI: Letter was agreed to –

THE COURT: Well – well, here’s the thing. Here’s the thing. Here’s the thing. If a contract – basic contract law says if you don’t put a time frame in there doesn’t visciate the whole thing, it’s – it’s you simply say well, what would be a reasonable time frame under the circumstances for them to exercise their option to take the title as is. Was that ever done?

MR. FRISCH: *Well, Judge, it’s been done now. Meaning –*

THE COURT: *No. Counsel, was that ever done except for – until right now?*

MR. DASTI: *No.*

MR. FRISCH: *I don’t know, Judge.*

[2T 15-15 to 2T 16-23 (emphasis added)].

Judge Must concluded that there was no factual dispute that Grinberger rightfully terminated the contract and that Plaintiff never exercised any putative option to accept title as-is and granted summary judgment accordingly. 2T 24-24 to 2T 25-11. In addition, Judge Must dismissed Plaintiff’s “promissory estoppel” claim against the Klors, finding that such claim was derivative of Plaintiff’s contract with Grinberger, and that “[t]here was no contract to interfere with after it was terminated.” 2T 26-13 to 2T 26-19. Lastly, Judge Must denied Plaintiff’s motion to amend the complaint to add tortious interference claims against the Klors for the same reason. 2T 26-2 to 2T 26-3.

On July 19, 2024, the court entered an Order dismissing Plaintiff’s Amended Complaint as against all defendants and intervenor-defendant in its entirety with

prejudice. Da13. On September 6, 2024, the court entered a Corrective Amended Order which again dismissed Plaintiff's Amended Complaint in its entirety, with prejudice, and certified the Order as final. Pa591-592.

On September 11, 2024, Plaintiff filed a notice of appeal from the September 6, 2024 Order. Pa593. For the reasons set forth below, the appeal is without merit, and the Appellate Division should affirm the dismissal of Plaintiffs' complaint in its entirety, with prejudice.

STATEMENT OF FACTS

A. The Klors Acquire the Property

In May 2019, Newport Estates, as seller, and the Klors, as buyers, entered into a contract for the purchase of a yet-to-be-created lot for the purchase price of \$775,000. Pa110.

By letter dated May 20, 2019, Noah M. Burton, Esq., real estate counsel for the Klors, wrote to Newport Estates and advised that the contract was rejected but that the Klors would approve the contract subject to the additional terms in the attorney review letter. Pa124. Mr. Cohn, Esq., counsel for Newport Estates, responded by letter dated July 5, 2019, in which Mr. Cohn advised that the May 20, 2019 review letter was acceptable subject to certain modifications. Pa127. Specifically, Newport Estates proposed to include the following affirmative representation:

12. Septic Tank. Seller certifies that the septic field does not extend over the property line. Seller agrees to indemnify and hold the Buyer harmless from any claim that the septic field encroaches over the property line and, in the event of a successful claim against the Buyer the Seller agrees to perform any work necessary to bring the septic field into compliance with building code requirements. [Pa128 (emphasis added)].

Thereafter, Newport Estates and the Klors modified their agreement. Instead of subdividing the existing lot (Block 501, Lot 1.01) into three (3) new lots as originally intended, the parties agreed to subdivide the existing lot into two (2) new

lots (Lots 1.11 and 1.12), with the Klors ultimately receiving a larger parcel. As such, Grinberger and the Klors agreed to increase the purchase price by \$175,000, for a total purchase price of \$950,000. Pa108.

On October 31, 2019, Newport Estates, as grantor, executed a Deed in favor of Simcha and Mirel, as grantees, transferring ownership of Block 501, Lot 1.01, for the sum of \$950,000. Pa132. The Deed included a covenant (the “*Deed Covenant*”), which provides:

At Grantor’s cost, there will be a subdivision of Lot 1.01 into proposed Lots 1.11 and 1.12. Grantee shall transfer proposed Lot 1.12 [the Property] to Grantor promptly after filing of the subdivision map and Grantor shall promptly record such deed. Grantee is restricted from transferring title to any portion of existing Lot 1.01 until after the subdivision map is filed and the deed transferring proposed Lot 1.12 to Grantor (or Grantor’s designee) has been recorded. This restriction shall expire in one (1) year and thirty (30) days. [*Ibid.*]

B. The Klors Learn that the Septic Field Extends Over the Boundary Line Which Rendered the Transfer of the Property to Newport Estates Impracticable and Inequitable

Subsequent to the filing of the subdivision map, the Klors learned that the location of the septic field did indeed extend over the boundary line between the Klors’ lot and the Property, as indicated in the original survey performed at the time of the installation of the septic system in 1994. Pa72. In addition, subsequent to the transaction, the Klors learned that as a result of the subdivision, the boundary line of the septic field is located within 10 feet of the boundary line of the lots, in violation of the minimum required separation distances for individual subsurface sewage

disposal systems (N.J.A.C. 7:9A-4.3). Ibid. As a result, the Property cannot be conveyed from the Klors to Newport Estates. Ibid.

C. Grinberg Enters into a Contract to Sell the Property to Plaintiff, Despite the Fact that Grinberger Did Not Possess and Had No Right to Possess Title to the Property

On March 3, 2021, Grinberger, individually—but not Newport Estates—as seller, and Plaintiff, as buyer, entered into a contract for the purchase of the Property for the purchase price of \$299,000. Pa253. The contract required Grinberger—but not Newport Estates—to deliver to Plaintiff at the closing a duly executed Bargain and Sale Deed with Covenant as to Grantor’s Acts and other Deed satisfactory to Plaintiff. Pa256. The contract did not provide that the parties’ obligations were conditioned upon the conveyance of the Property from the Klors to Newport Estates or to Grinberger so that Grinberger, individually, could convey the Property to Plaintiff. Pa253-265.

Plaintiff retained Noah Burton, Esq. to represent him in connection with the transaction. Pa178. Mr. Burton was recommended to Plaintiff by Plaintiff’s real estate agent because Mr. Burton had represented the Klors and “knew all the details of the lot and subdivision.” Ibid.

During the attorney review process, by letter dated March 8, 2021, Mr. Burton, on behalf of Plaintiff, proposed to amend the contract to include the following term:

21. Title. If title is unmarketable and uninsurable, Seller will have 30 days to dispose of the title defect. If Seller cannot do so absent litigation, either party may terminate the Contract, although Buyer has the final right to accept title as-is before Buyer may terminate the Contract. [Pa267].

In addition, Paragraph 16 of the Attorney Review Letter provided that “[a]ll notices under this Contract must be in writing.” Ibid.

Michael A. Cohn, Esq., counsel for Grinberger, accepted the proposed changes on behalf of Grinberger on March 11, 2021. Pa268.

Thus, under the plain language of the Attorney Review Letter, Grinberger—who never held title to the Property in the first place—had until April 10, 2021, to “dispose of the title defect.” This would require obtaining title to the Property from the Klors, despite the fact that the Deed Covenant, on its face, did not obligate the Klors to transfer title to Grinberger, individually.

Grinberger was unable to dispose of the title defect and was unable to convey the Property to Plaintiff. Pa243. As such, on June 23, 2021, Mr. Cohn emailed Mr. Burton and stated:

Mr. Grinberger hereby terminates the contract. As we now realize, Mr. Klor is in title and therefore Mr. Grinberger does not have the legal authority to transfer title to Mr. Minzberg. [Pa270].

At no point did Plaintiff state, in writing, that he would accept title as-is, in lieu of the termination of the contract. At no point has Plaintiff ever demanded, in writing or in a time of essence demand letter, that Grinberger immediately convey

title as-is in exchange for the payment of \$299,000. Instead, on September 6, 2022, Plaintiff instituted this litigation. Pa1.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFF’S CLAIMS AGAINST MINZBERG GIVEN THE UNDISPUTED FACTS THAT GRINBERGER PROPERLY TERMINATED THE CONTRACT WITH PLAINTIFF AND THAT PLAINTIFF NEVER EXERCISED HIS OPTION TO ACCEPT TITLE AS-IS (2T 6-3 TO 2T 6-15; 2T 24-24 TO 2T 26-3)

A. Standard of Review

The Appellate Division employs the same standard that governs the trial courts in reviewing summary judgment orders. Prudential Property & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998).

Summary judgment must be granted when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to summary judgment as a matter of law.” R. 4:46-2(c). To avoid summary judgment, the non-movant must clearly establish an issue of material fact. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954). To do so, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response by affidavits or as otherwise provided in the court rule, must set forth specific facts showing that there is a genuine issue for trial. R. 4:46-5(a); see also Sullivan v. Port Auth. of NY and NJ, 449 N.J. Super. 276,

279-80 (App. Div. 2017); Miller v. Bank of Am. Home Loan, 439 N.J. Super. 540, 551 (App. Div. 2015).

The role of the motion judge is to determine whether there exists a genuine issue of material fact by considering whether the evidence presented, viewed in the light most favorable to the non-moving party, is sufficient to permit a rational factfinder to resolve the dispute in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-252 (1986)).

Here, like Judge Must below, this court should conclude that there is no question of fact that Grinberger properly exercised his right to terminate the contract under Paragraph 21 of the Attorney Review Letter, and that Plaintiff did not exercise his option to accept title as-is. Accordingly, Plaintiff's claims against Minzberg were properly dismissed.

B. No Question of Fact that Grinberger Properly Terminated the Contract

Resolution of Plaintiff's claims against Minzberg turns on the interpretation and enforcement of Paragraph 21 of the Attorney Review Letter which provides:

If title is unmarketable or uninsurable, Seller will have 30 days to dispose of the title defect. If Seller cannot do so absent litigation, either party may terminate the Contract, although Buyer has the final right to accept title as-is before Buyer may terminate the Contract. [Pa267].

To determine whether Grinberger properly terminated the contract or whether Plaintiff properly exercised his option to accept title as-is under this contractual provision, this court must apply New Jersey's well-settled rules of contract interpretation.

“It is well-settled that ‘[c]ourts enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.’” In re County of Atlantic, 230 N.J. 237, 254 (2017) (quoting Manahawkin Convalescent v. O’Neill, 217 N.J. 99, 118 (2014)). “A basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner.” Hardy ex. rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009). If the language of a contract “ ‘is plain and capable of legal construction, the language alone must determine the agreement's force and effect.’ ” Twp. of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 74–75 (App. Div. 2011) (quoting CSFB 2001–CP–4 Princeton Park Corporate Ctr., LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 120 (App. Div. 2009)); Barr v. Barr, 418 N.J. Super. 18, 32 (App. Div. 2011) (court must enforce contract as written).

The court must not supply terms to contracts that are plain and unambiguous, nor can it make a better contract for either of the parties than the

one which the parties themselves have created. Maglies v. Estate of Guy, 193 N.J. 108, 143 (2007); Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999). “It has been decided many times and in many cases that the court will not make a different or a better contract than the parties themselves have seen fit to enter into.” East Brunswick Sewerage Authority v. East Mill Assocs, Inc., 365 N.J. Super. 120, 125 (App. Div. 2004) (citing Washington Construction Co. v. Spinella, 8 N.J. 212, 217 (1951)).

Here, the parties’ contract, as modified by the Attorney Review Letter, is clear and unambiguous: if Grinberger could not cure a title defect within 30 days, Grinberger could terminate the contract unless Plaintiff exercised his right to accept title as-is. The Attorney Review Letter was dated March 11, 2021, meaning that Grinberger had until April 10, 2021, to dispose of any title defect. It is undisputed that Grinberger did not possess title to the Property, which is a substantial “defect”. In order to cure this defect, he needed to obtain title directly from the Klors. He was unable to do so, since the Klors had no obligation whatsoever to transfer title to Grinberger, in his individual capacity. As such, Grinberger had the right to terminate the contract. He exercised this right on June 23, 2021, when his attorney wrote to Grinberger’s attorney as follows:

Mr. Grinberger hereby terminates the contract. As we now realize, Mr. Klor is in title and therefore Mr. Grinberger does not have the legal authority to transfer title to Mr. Minzberg. [Pa270 (emphasis added)].

It cannot be disputed that Grinberger, clearly and in writing, terminated the contract.

C. No Question of Fact that Plaintiff Never Exercised His Right to Accept Title As-Is

The question then becomes whether Plaintiff exercised his right to accept title as-is as an alternative to the termination of the contract. It is undisputed that he never did.

“In a real estate transaction, an option contract is a unilateral agreement requiring a party to convey property at a specified price, provided the option holder exercises the option ‘in strict accordance’ with the terms and time requirements of the contract.” Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates, 182 N.J. 210, 223 (2005) (citing State By and Through Adams v. New Jersey Zinc Co., 40 N.J. 560, 576 (1963) (citing Schlein v. Gairoard, 127 N.J.L. 358, 359-60 (E. & A. 1941))). The “general rule” with option contracts is that “time is of the essence.” Brick Plaza, Inc. v. Humble Oil & Refin. Co., 218 N.J. Super. 101, 104 (App. Div. 1987). Exact compliance with the terms of the option contract is required “[b]ecause the property owner cannot withdraw the offer,” while the option holder is “free to accept or reject”

the offer. Brunswick Hills Racquet Club, *supra*, 182 N.J. at 223 (quoting Goodyear Tire & Rubber Co. v. Kin Props., Inc., 276 N.J. Super. 96, 105 (App. Div. 1994)).

In cases where the manner of exercising the option is not specified in the option itself, notice of its “unqualified” acceptance by the optionee is required. Robert and Richard Associates v. State Div. of Purchase and Property, 202 N.J. Super. 352, 366 (App. Div. 1985) (citing West Caldwell v. Caldwell, 26 N.J. 9, 26 (1958); Martindale v. Fiduciary Counsel, Inc., 133 N.J. Eq. 408, 410-11 (E. & A. 1942); Lakewood Tp. Mun. Util. v. S. Lakewood Water Co., 129 N.J. Super. 462, 472 (App. Div. 1974); 6 *Williston, Contracts* (3d ed. Jaeger 1962), § 887BB at 530-531)). In addition, the optionee’s acceptance must be unconditional. Ibid.

In this case, the record is clear and undisputed that Plaintiff never exercised any option to accept title as-is. He certainly did not clearly, unequivocally and unconditionally state, in writing, that he would pay the purchase price and accept title as-is. Plaintiff’s argument in this regard was nothing more than an eleventh-hour attempt to defeat the motion for summary judgment, which was properly rejected by Judge Must.

i. Plaintiff Never Sent a Written Notice to Grinberger Purporting to Exercise His Option to Accept Title As-Is

First, it is undisputed that Plaintiff never communicated, in writing, his intention to accept title as-is. As noted above, the contract must be read as a whole. Hardy, supra, 198 N.J. at 103. While Paragraph 21 does not indicate the precise manner by which Plaintiff must exercise the option to accept title as-is, Paragraph 16 of the Attorney Review Letter unambiguously provides that “[a]ll notices under this Contract must be in writing.” Pa267. It is undisputed that Plaintiff never sent a written notice to Grinberger or his attorney in which Plaintiff expressed his intention to accept title as-is. Plaintiff never served a written time of essence notice demanding that Grinberger immediately convey title as-in in exchange for the payment of the \$299,000 purchase price. This failure, in and of itself, supports the conclusion that Plaintiff never exercised the option to accept title as-is.

ii. Plaintiff’s Eleventh-Hour Assertion that He “Would” Accept Title As-Is Was Not Unequivocal or Unconditional

Second, even if the court were to consider Plaintiff’s assertion made in opposition to the motion for summary judgment as evidence of his intent to exercise the option to accept title as-is, such assertion is wholly deficient under New Jersey law.

As noted above, the exercise of an option must be “unqualified and unconditional.” Robert & Richard Assocs., *supra*, 202 N.J. Super. at 366. Here, the very first time Plaintiff even vaguely referenced an intent to accept title as-is was in his supplemental opposition to Grinberger’s motion for summary judgment, filed on July 5, 2024—*more than 3 years after Grinberger terminated the contract*. In his belated certification, Plaintiff states:

Had it come down to it, I would have paid Grinberger the full purchase price and fought the Klor’s for the property. I was always and still ready, willing and able to do so. Even though I don’t think that he didn’t treat me in a fair and honest way, and never told me that he knows that Mr. Klor will try to hold on illegally to the property that Klor admits he doesn’t own in any way and which is the reason he claimed to try to help to get it from Mr. Klor, but never forced him, not even with a warning letter.

[Pa545 (emphasis added)].

Suggesting that “had it come down it, I *would have* paid Grinberger the full purchase price” is a far cry from asserting, unequivocally and unconditionally, that he was transmitting the full purchase price in accordance with the option set forth in Paragraph 21 of the Attorney Review Letter. Indeed, saying you “*would have*” done something only confirms, to a certainty, that you had not actually done that thing.

Plaintiff himself readily acknowledges that for more than a year after Grinberger’s termination, Plaintiff continued to “discuss[] solutions by which

[he] would close subject to the Klors and bring this action,” and provides text message communications with Grinberger. Pa545; Pa533-543. These communications, in which Plaintiff purportedly addressed the conditions under which he might, at some point in the future, close on the purchase, do not equate to an unequivocal and unconditional exercise of the option to immediately accept title as-is. Quite the opposite, these communications reveal that Plaintiff never took any unequivocal and unconditional action to accept title as-is.

iii. Plaintiff’s Eleventh-Hour Assertion that He “Would” Accept Title As-Is Was Not Timely

Similarly, Plaintiff’s suggestion that he “*would*” accept title as-is, raised for the very first time in July 2024, is untimely as a matter of law.

As noted above, the “general rule” with option contracts is that “time is of the essence.” Brick Plaza, supra, 218 N.J. Super. at 104. Making time of the essence “is an effective, time honored tool of contract administration and enforcement” which “provides certainty and objectivity in the definition of rights and obligations between contracting parties.” Gorrie v. Winters, 214 N.J. Super. 103, 107 (App. Div. 1986).

Here, there can be no doubt that Plaintiff never demanded that Grinberger convey title as-is by a certain date. There is no “time of essence” letter in the record in which Plaintiff demands that Grinberger transfer title as-is on a certain

date. Indeed, to this very day, there is no writing of any kind in which Plaintiff purported to exercise his option to accept title as-is.

Yet even without a time of essence requirement, and even if the court considered Plaintiff's eleventh-hour suggestion in his supplemental opposition that he "*would*" accept title under certain conditions as a proper exercise of the option, such exercise is still untimely. "Ordinarily, where no time limit is set forth in the contract for its completion, a reasonable time limit is implied." Ridge Chevrolet-Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149, 155 (App. Div. 1990); see also Becker v. Sunrise at Elkridge, 226 N.J. Super. 119, 129 (App. Div. 1988); River Development Corp. v. Liberty Corp., 45 N.J. Super. 445, 464 (Ch. Div. 1957), aff'd 51 N.J. Super. 447 (App. Div. 1958), aff'd 29 N.J. 239 (1959) ("It is well-settled that where no time is fixed for the performance of a contract, by implication a reasonable time was intended.").

Waiting years before finally suggesting that he might accept title is unreasonable as a matter of law.

The "reasonableness" of Plaintiff's eleventh-hour suggestion must be evaluated alongside the entirety of Paragraph 21 of the Attorney Review Letter. Under Paragraph 21, Grinberger was given 30 days to cure any title defect, or by April 10, 2021 (30 days after execution of the Attorney Review Letter on March 11, 2021). Pa267. If, by April 10, 2021, Grinberger could not cure such

title defect, he had the right to terminate, unless Plaintiff exercised his right to accept title as-is. The parties contemplated a period of days, not months, and certainly not years, for Plaintiff to decide how to proceed. When Grinberger exercised his right to terminate on June 23, 2021, it was incumbent upon Plaintiff, at that time, to immediately exercise his option to accept title as is.

Yet Plaintiff did not do so in June 2021, or any other point in time in 2021, 2022 or 2023. It was not until July 2024, more than 3 years after Grinberger terminated the contract, when Plaintiff, for the first and only time, expressed his vague, equivocal suggestion that he “would” pay Grinberger the full purchase price “had it come down to it.” Pa545. That is patently unreasonable and untimely.

Moreover, Paragraph 21 of the Attorney Review Letter contemplated that Plaintiff would elect to accept title as-is to avoid Grinberger having to engage in litigation to dispose of the title defect. Upon receiving Grinberger’s written termination notice, Plaintiff had a choice: immediately accept title as-is, or allow the contract to be terminated. If Plaintiff chose to accept title as-is, Grinberger would have no obligation to engage in litigation to try to cure any title defect; that obligation would belong to Plaintiff. Plaintiff did not advise Grinberger that he would accept title as-is. Instead, Plaintiff *sued* Grinberger and the Klors, causing the very outcome which Paragraph 21 aimed to avoid. Then, after years

of litigation, and when it was clear that the court would dismiss his claims, Plaintiff, for the first time, asserted that he “*would*” pay the purchase price and accept title. Plaintiff’s assertion is far too little and much too late.

iv. **Plaintiff Did Not Seek the Entry of Judgment Compelling Grinberger to Transfer Title As-Is**

There is no better proof that Plaintiff never exercised his option to accept title as-is than the fact that Plaintiff did not seek such relief in the lawsuit that he filed in September 2022. Had Plaintiff properly and timely exercised such option, the following events would have occurred: (a) first, Plaintiff would have served a time of essence demand letter upon Grinberger, setting the time and place of the transfer of title as-is in exchange for the payment of the \$299,000 purchase price; (b) second, if Grinberger failed to transfer title as-is in accordance with the time of essence demand letter, Plaintiff would have served a default notice; (c) third, if Grinberger still failed to transfer title as-is, Plaintiff would have filed an action in court to compel Grinberger to transfer title as-is in accordance with Paragraph 21 of the Attorney Review Letter. Yet the record is clear: none of this happened. While Plaintiff filed a lawsuit, conspicuously absent is any request for the entry of judgment compelling Grinberger to transfer title as-is, in exchange for the payment of the purchase price. This is because Plaintiff never demanded that Grinberger do so. Plaintiff’s failure to include

such relief in his pleading constitutes an implicit concession that he never sought to exercise the option contained in Paragraph 21 of the Attorney Review Letter.

The trial court correctly found that there was no fact question that Grinberger properly terminated the contract pursuant to Paragraph 21 of the Attorney Review Letter, and that Plaintiff never exercised any option to accept title as-is. Summary judgment was properly granted and Plaintiff's claims against Minzberg were properly dismissed, and this court should affirm in all respects.

POINT II

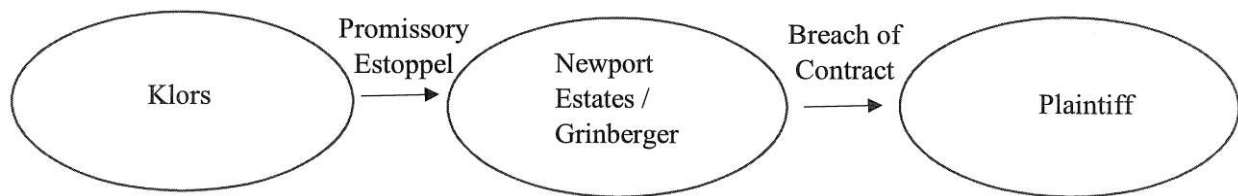
THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFF'S SOLE CLAIM FOR PROMISSORY ESTOPPEL AS AGAINST THE KLORS BECAUSE SUCH CLAIM WAS DERIVATIVE AND DEPENDENT UPON THE EXISTENCE OF A VALID CONTRACT BETWEEN PLAINTIFF AND GRINBERGER

The trial court also correctly dismissed Plaintiff's claim for promissory estoppel against the Klors upon concluding that the viability of such claim was dependent on the validity of the contract.

To bridge the unbridgeable gap between himself and the ownership of the Property, Plaintiff concocted a baseless "promissory estoppel" theory against the Klors in which Plaintiff alleged that Simcha "made numerous promises to Plaintiff, on behalf of himself and his family including Mirel Klor, in regard to

the Property, and Plaintiff relied on those promises to enter into the contract and to continue his contract with Grinberger.” Pa23. Plaintiff requested the entry of judgment compelling Grinberger to specifically perform the contract and sell the property to Plaintiff, and implicit in this requested relief was to compel the Klors to transfer the Property to Grinberger so that Grinberger can then transfer the Property to Plaintiff.

In other words, Plaintiff’s promissory estoppel theory was the first step in a two-step process to transfer title from the Klors → Grinberger → Plaintiff:



But because the court correctly found that the second step in this process could not happen because Grinberger properly terminated his contract with Minzberg, Plaintiff had no ability to recover the Property, even if he were to succeed on any claim against the Klors. In other words, because Plaintiff would never have the ability to obtain title to the Property, Plaintiff’s claim for promissory estoppel is not viable, because any actions by the Klors did not proximately cause any harm to Plaintiff.

The doctrine of promissory estoppel requires Plaintiff to show that there has been “(1) a clear and definite promise; (2) made with the expectation that

the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment.” Segal v. Lynch, 211 N.J. 230, 253 (2012). Where, like here, a plaintiff is attempting to utilize the theory of promissory estoppel to obtain specific performance, the plaintiff must prove the elements of a claim for promissory estoppel by clear and convincing evidence. See Lobiondo v. O’Callaghan, 357 N.J. Super. 488, 499-500 (App. Div. 2003).

The trial court correctly dismissed Plaintiff’s promissory estoppel claim because there could not possibly be any detriment to Plaintiff resulting from any “promises” made by the Klors. Plaintiff’s contract to purchase the property from Grinberger was rightfully terminated, and Plaintiff therefore had no interest whatsoever in the Property. He simply could not obtain from the Klors, via a promissory estoppel theory, what he could not obtain directly from Minzberg, via a terminated contract.

POINT III

THE MOTION JUDGE DID NOT ERR BY SUA SPONTE DISMISSING PLAINTIFF’S CLAIMS AGAINST THE KLORS

Plaintiff also argues that the motion judge erred by sua sponte dismissing his claims against the Klors because Plaintiff “did not have an opportunity to address the merits of the promissory estoppel claim.” Pb31-34. Plaintiff’s argument fails for two reasons.

v. **Plaintiff Was on Notice that the Disposition of His Contract Claim Against Grinberger Would Similarly Dispose of His Promissory Estoppel Claim against the Klors**

First, Plaintiff is factually incorrect that he did not have an opportunity to address the merits of his promissory estoppel claim. During the first oral argument of the motion for summary judgment, Simcha's attorney expressly stated that if the court determines that Grinberger's contract with Plaintiff was properly terminated, then Plaintiff's claims against the Klors "evaporates", which is why the Klors were "indirectly" implicated in the motion. 1T 32-15 to 1T 33-9. Thus, Plaintiff was placed on notice that it was the Klors' position that if Plaintiff's contract claim against Grinberger was dismissed, so too must Plaintiff's promissory estoppel claim against the Klors be dismissed. Plaintiff was aware that it was the Klors' position that if there was no contract, then there is no basis for Plaintiff to obtain title to the Property, which was the sole remedy sought by Plaintiff in his "promissory estoppel" claim against the Klors.

Following the first oral argument on June 20, 2024, the motion judge adjourned the motion for two cycles and expressly allowed Plaintiff to supplement his opposition accordingly. Thus, Plaintiff had the opportunity to respond to the Klors' contention that the viability of Plaintiff's promissory estoppel claim was dependent upon and derivative of the viability of Plaintiff's contract claim. Plaintiff had a notice and an opportunity to be heard, the

minimum requirements of due process. See Klier v. Sordoni Skanska Constr. Co., 337 N.J. Super. 76, 84 (App. Div. 2001). He cannot be heard to complain when he simply failed to avail himself of such opportunity.

vi. The Trial Court's Sua Sponte Dismissal of Plaintiff's Claims against the Klors was Harmless Error

Yet even if the motion judge should have withheld the dismissal of Plaintiff's patently non-viable promissory estoppel claim until the filing of a separate (redundant) motion for summary judgment by the Klors, the motion judge's conduct in this regard constitutes harmless error.

Under R. 2:10-2, any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result. "The harmless error standard requires that there be some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." State v. Lazo, 209 N.J. 9, 26 (2012).

Here, because the court ultimately would have dismissed Plaintiff's promissory estoppel claims for the very same reasons expressed by the court, the dismissal was harmless error. In his brief, Plaintiff asserts that his promissory estoppel claim was "unaffected" by the dismissal of his contract

claim against Grinberger. Pb40. Yet while Plaintiff engages in a misleading discussion of the other elements of a promissory estoppel which were not implicated by the court's ruling on the viability of Grinberger's termination of the contract (i.e., the existence of a clear and definite promise by Mirel (none exists), an expectation of reliance upon such promise, reasonable reliance), Plaintiff fails to confront the critical fact: the only relief sought as against the Klors was judgment compelling the transfer of the Property to Grinberger, so that Grinberger could transfer the Property to Plaintiff pursuant to his contract. Because Plaintiff no longer has a right to obtain the Property from Plaintiff, he cannot obtain the Property from the Klors.

Plaintiff argues that “[h]ad Simchal Klor been truthful up front regarding his intent to interfere with any third party's purchase of the lot, Minzberg would have entered into a contract with another seller, prior to the meteoric rise in prices in that neighborhood, and prior to the significant rise in construction costs.” Pb38. Setting aside the fact that there is not a single pre-contract representation by Simcha identified by Plaintiff—and certainly no pre-contract representation by Mirel, who Plaintiff has never met or spoken with in his life—Plaintiff's argument is wildly misleading. Plaintiff could have walked away from the Property in June 2021, when Grinberger terminated the contract. He could have avoid the “meteoric rise” in prices by finding a new property at that

time. He chose to continue to fight with Grinberger and the Klors, with the sole intention of buying the Property. He never tried to enter into a contract with another seller, because he did not want any other property. He only has himself to blame for any increased prices or construction costs.

POINT IV

THE MOTION JUDGE DID NOT ABUSE ITS DISCRETION BY DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND HIS COMPLAINT AGAINST THE KLORS

A. Standard of Review²

This court reviews a trial court's grant or denial of a motion to amend a pleading under an abuse of discretion standard. Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998). While motions for leave to amend pleadings are to be liberally granted, they nonetheless are best left to the sound discretion of the trial court in light of the factual situation existing at the time each motion is made. R. 4:9-1; Du-Wel Products v. U.S. Fire Ins., 236 N.J. Super. 349, 364 (App. Div. 1989).

“[C]ourts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to

² Plaintiff does not identify the applicable “abuse of discretion” standard of review in their brief.

permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted.’’ Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) (quoting Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256-57 (App. Div. 1997)). A motion to amend is properly denied when the motion’s purpose is to re-litigate an issue that the court had already decided. Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 539-40 (App. Div. 2009).

Here, given the futility of Plaintiff’s proposed claims, the trial court did not abuse its discretion in denying Plaintiff’s motion to amend.

B. The Trial Court Did Not Abuse Its Discretion In Denying Plaintiff’s Motion to Amend

Plaintiff sought leave to assert a claim for tortious interference with contractual relations against the Klors. Specifically, in his proposed Second Amended Complaint, Plaintiff sought to allege that “Plaintiff was under contract with Grinberger to purchase a lot that was titled in the name of the Klors, but actually belonged to Grinberger and his entity, intervenor, Newport Estates LLC” and was “entitled to close under his contract,” but that “[t]he Klors wrongfully interfered with the Plaintiff’s rights maliciously to obtain the property in place of the Plaintiff.” Pa561-62. The motion judge correctly held that the Klors could not, as a matter

of law, possibly interfere with Plaintiff's contract with Grinberger, since that contract had been properly terminated.

i. **The Trial Court Correctly Found that the Klors' Alleged Interference Could Not Have Harmed Plaintiff Since Plaintiff's Contract Was Properly Terminated**

An action for tortious interference with contractual relations requires a plaintiff to prove (1) actual interference with a contract; (2) that the interference was inflicted intentionally by a defendant who is not a party to the contract; (3) that the interference was without justification; and (4) that the interference caused damage.” Dello Russo v. Nagel, 358 N.J. Super. 254, 268 (App. Div. 2003). The court correctly found that even if the Klors' refusal to transfer the Property to Newport Estates was the reason why Grinberger could not deliver marketable and insurable title to Plaintiff, Grinberger still had the right under Paragraph 21 of the Attorney Review Letter to terminate the contract. Thus, the Klors' alleged conduct could not possibly have caused Plaintiff to lose his contractual rights to purchase the Property, since Grinberger properly terminated those rights. The trial court did not abuse its discretion in refusing to allow Plaintiff to assert such futile claim against the Klors.

ii. **Plaintiff Failed to Allege that Mirel Intentionally Interfered with Plaintiff's Contract Because Plaintiff Did Not, and Could**

Not, Allege that Mirel Had Actual Knowledge of Plaintiff's Contract

Additionally, while the trial court did not address this separate basis for the denial of the motion, this court, in reviewing whether the trial court abused its discretion, can conclude that Plaintiff failed to allege that Mirel intentionally interfered with Plaintiff's contract because Plaintiff did not, and could not, allege that Mirel had actual knowledge of Plaintiff's contract.

The interference must be intentional. See, e.g., Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 751 (1989). Interference is intentional when “ ‘the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action.’ ” Dello Russo, supra, 358 N.J. Super. at 268. Accordingly, it would be axiomatic that one cannot intentionally tortiously interfere with a contract of which one is unaware. Lightening Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993) (applying New Jersey law); Trump Taj Majal Associates v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A., 761 F.Supp. 1143, 1164 (D.N.J. 1991), aff'd, 958 F.2d 365 (3d Cir. 1992) (applying New Jersey Law). Applying New Jersey law, the Third Circuit has stated that “[a]ctual knowledge of the contract with which a defendant supposedly interfered with is a prerequisite to making out a claim for tortious interference.” Mylan v. SmithKline Beecham Corp., 723 F.3d 413 (3d

Cir. 2013) (citing Lightening Lube, supra, 4 F.3d at 1167 (“once a plaintiff establishes the defendant’s knowledge of the contracts at issue and the defendant’s intent to harm the plaintiff with respect to some of these contracts, the relevant issue as to liability is whether the injury which followed was the proximate result of the alleged interference”); Printing Mart, supra, 116 N.J. at 751); see also *Restatement (Second) of Torts* § 766, comment I (requiring that an actor “have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract” to incur liability).

Here, Plaintiff did not, and could not, allege that Mirel was aware of the existence of Plaintiff’s contract with Grinberger. Mirel confirmed during her deposition that she had no knowledge about Plaintiff or his contract to purchase the Property:

Q. Have you ever met the plaintiff in this case, Mr. Minzberg?

A. No.

Q. Have you ever spoken to Mr. Minzberg?

A. No.

Q. Now, the testimony is that his son came to your home a couple of times in Lakewood. Do you recall Mr. Minzberg’s son being at your home in Lakewood?

A. No.

Q. Did you ever have any conversations with his son?

A. No.

[Pa573].

Mirel also testified that she was not aware that the Property had been listed for sale:

Q. Were you aware of the fact that the neighboring property, that the neighboring lot on the left, as we've described it, the vacant lot, was listed for sale?

A. No.

...

Q. So, you were not aware that this was listed with a broker to sell?

A. No.

Q. And you were not aware that there was a realtor sign located on the property?

A. Don't recall.

[Pa577-578].

Most significantly, Mirel testified that she had no knowledge about Plaintiff's contract:

Q. Were you aware that Mr. Minzberg's contract had him paying more than 275 for the lot?

A. No.

[Pa580].

It is difficult to comprehend how Mirel's deposition testimony was the impetus for the filing of a motion to amend the complaint to include a claim for tortious interference, when Mirel testified that she never spoke with Plaintiff, had no idea that the Property was being offered for sale, and had no idea about Plaintiff's contract. Plaintiff conclusively alleges in the proposed second amended complaint that "[t]he Klors were aware of the fact that Plaintiff had entered into a contract," but this allegation is knowingly false. Pa558. This court should not permit Plaintiff to file a demonstrably untrue claim against Mirel.

iii. Plaintiff Failed to Allege that Mirel Maliciously Interfered with Plaintiff's Contract Because Plaintiff Did Not, and Could Not, Allege that Mirel Had No Justification or Excuse for Refusing to Transfer the Subdivision Lot to Newport Estates

As another basis to find that the trial court did not abuse its discretion in denying Plaintiff's motion to amend, this court can conclude that Plaintiff failed to allege that Mirel maliciously interfered with the unknown contract between Plaintiff and Grinberger.

The interference must be without justification or excuse, often described as "malice." See, e.g., Printing Mart, *supra*, 116 N.J. at 751; Singer v. Beach Trading Co., Inc., 376 N.J. Super. 63, 70 (App. Div. 2005). "An individual acts with malice when he or she intentionally commits a wrong without excuse or justification."

Dello Russo, *supra*, 358 N.J. Super. at 268 (citing Cox v. Simon, 278 N.J. Super. 419, 433 (App. Div. 1995)). The fact that a breaching party acted “to advance [its] own interest and financial position does not establish the necessary malice or wrongful conduct.” *Ibid.* (quoting Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 451-52 (App. Div. 1976)). In Kurtz v. Oremland, 33 N.J. Super. 443 (Ch. Div. 1954), the court observed that a “[w]rongful act connotes any act which will, in the ordinary course, infringe upon the rights of another to his damage, *except and unless it be done in the exercise of an equal or superior right.*” “Basic to our free enterprise system is the right to enter or to refrain from entering or continuing a contractual relationship. Rejection of an offer, or termination of a contract in accordance with its express terms, is a right the exercise of which is unencumbered by the threat of tort liability.” Rothermel v. International Paper Co., 163 N.J. Super. 235, 244 (App. Div. 1978).

Courts have gone to great lengths to define this “malice,” or lack of justification or excuse. Opinions point out that “malice” in this context does not mean “ill will in the ordinary sense,” but that the harm was inflicted “intentionally and without excuse.” *See, e.g.,* Lamorte Burns & Co., Inc. v. Walters, 167 N.J. 286, 306 (2001); Printing Mart, *supra*, 116 N.J. 739. As the New Jersey Supreme Court has observed:

Often it is stated that the relevant inquiry is whether the conduct was sanctioned by the “rules of the game,” for where a plaintiff’s loss of business is merely the incident of healthy competition, there is no compensable tort injury. The conduct must be both “injurious and transgressive of generally accepted standards of common morality or of law.” The line clearly is drawn at conduct that is fraudulent, dishonest or illegal and thereby interferes with a competitor’s economic advantage.

[Ibid.].

In determining whether the conduct complained of is improper, New Jersey courts look to *Restatement (Second) of Torts* § 767 for guidance. As such, courts consider “the nature of and motive behind the conduct, the interests advanced and interfered with, societal interests that bear on the rights of each party, the proximate relationship between the conduct and the interference, and the relationship between the parties.” Nostrame v. Santiago, 213 N.J. 109, 122 (2013) (citing *Restatement (Second) of Torts* § 767); see also Main Street at Woolwich, LLC v. Ammons Supermarket, Inc., 451 N.J. Super. 135, 152 (App. Div. 2017). These considerations are expressed as a balancing test for courts to apply in evaluating whether an act of interference is improper. Ibid.

Here, Plaintiff did not, and could not, allege that Mirel acted with the requisite level of “malice” in purportedly interfering with Plaintiff’s unknown-to-her contract. Rather, the proposed second amended complaint generally and conclusively stated that “[t]he Klors were aware of the fact that Plaintiff had entered into a contract, and

wrongfully decided to prevent him from closing, by refusing to reconvey title to Defendants Grinberger and Newport.” Pa558. Plaintiff further generally and conclusively alleged that “[t]his conduct is wrongful and was done with malice to interfere with Plaintiff’s rights under his contract with Grinberger.” Ibid. Yet the proposed pleading did not contain any allegations regarding the reasons why Mirel has refused to transfer the Property to Newport Estates. Without knowing why Mirel has refused to transfer the Property, this court cannot conclude that Mirel has refused to do so for malicious or illegitimate reasons. Plaintiff’s failure to set forth any allegations regarding Mirel’s subjective intent in connection with her conduct is fatal to any claim for tortious interference on its face.

In actuality, Mirel had asserted legitimate reasons for her refusal to transfer the Property to Newport Estates, which are the subject of the Rabbinical Arbitration. As set forth in the her Crossclaim against Newport Estates (which is now the subject of the pending Rabbinical Arbitration), Mirel maintains that Newport Estates certified that the septic field did not extend over the property line to induce and convince the Klors to enter into that part of the transaction involving the subdivision. Ibid. Mirel asserts that she did, in fact, rely on this representation, which was false. Ibid. Subsequent to the transaction, the Klors learned that the septic field does, upon information and belief, extend over the boundary line between the Property and the remainder of 850 Bellevue. Ibid. In addition, subsequent to the transaction, the

Klors learned that, upon information and belief, as a result of the subdivision, the boundary of the septic field is located within 10 feet of the boundary line, in violation of the minimum required separation distances for individual subsurface sewage disposal systems (N.J.A.C. 7:9A-4.3). Ibid.

As a result of Newport Estates' misrepresentation, the Klors have not conveyed the Property to Newport Estates. The Klors have not refused to do so in order to maliciously interfere with Plaintiff's contract, but rather because of their legitimate claim that Newport Estates misrepresented the location of the septic field vis-à-vis the subdivision boundary, which renders the transfer impracticable, if not impossible.

Moreover, the Klors have asserted the Jewish legal principle of *Dina de-Bar Metrza*, which provides the owner of the abutting lot with a right of first refusal when property is put for sale. Under this principle, the abutter (here, the Klors) have the right to match any third-party offer (here, the offer made by Plaintiff) and take title for himself.

The question of Mirel's obligation to convey the Property to Newport Estates—which formed the basis of Plaintiff's putative tortious interference claim—will be resolved by the Rabbinical Court. At the very least, the Klors' assertion of various legitimate reasons for their refusal to transfer the Property to Newport Estates fatally undermines any allegation that the Klors have acted maliciously. This

court should conclude that the trial court did not abuse its discretion in denying Plaintiff's motion to amend on this separate basis.

CONCLUSION

For the reasons set forth above, Mirel respectfully requests that the judgment below be affirmed in its entirety.

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HAIM YOSEF MINZBERG <i>Plaintiff,</i> -against- SHIMON GRINBERGER, SIMCHA KLOHR, MIREL KLOHR, and NEWPORT ESTATES, LLC <i>Defendants.</i>	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-000099-24-T4 On Appeal from Summary Judgment Order of Disposition LAW DIVISION: OCEAN COUNTY DOCKET NO.: OCN-L-001971-22 CIVIL ACTION Sat Below: Hon. Valter H. Must, J.S.C.
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OMNIBUS REPLY BRIEF OF PLAINTIFF-APPELLANT HAIM YOSEF
MINZBERG
IN REPLY TO DEFENDANT-APPELLEES SHIMON GRINBEGGER, SIMCHA
KLOHR, MIREL KLOHR AND NEWPORT ESTATATES LLC

Date Submitted: June 19, 2025

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INTRODUCTION

Respondent Grinberger (“Respondent”)’s opposition brief is riddled with misstatements of the record that serve as the foundation for nearly all of his arguments. Chief among these are the claims that Appellant knew at the time of negotiation and prior to contract execution that (i) Grinberger lacked any equitable interest in the Property; and (ii) that legal title was held by the Klors. These assertions are not only unsupported by the record, but in many instances directly contradicted by it. Mischaracterizing evidence or citing misleading portions of the record cannot transform disputed facts into undisputed ones suitable for summary judgment.

Aside from these misstatements, Respondent Grinberger offers no meaningful rebuttal to Appellant’s core contention: that there are multiple, clearly disputed material facts which preclude summary judgment, both on the breach of contract claim and on the Consumer Fraud Act (“CFA”) claim.

Respondent makes no attempt to refute Appellant’s argument that the trial court erred in determining that the title-related misrepresentations were not material. To the contrary, Respondent argues that these facts were *so* material as to render the contract void *ab initio*. As set forth in Appellant’s opening brief, the trial court’s conclusion that the title-related misrepresentations were immaterial is untenable

under the CFA, a liberally-construed and explicitly remedial statute meant to capture such fundamental misrepresentations.

As to the breach of contract claim, Respondent fails to engage with — let alone refute — the numerous factual disputes raised by Appellant, including: (i) whether the contract was effectively terminated; (ii) whether months and years of ongoing negotiations between the parties rendered that termination ineffective; (iii) whether Appellant exercised his right to accept the Property subject to the title defects; and (iv) whether any delay in doing so was reasonable under the circumstances.

Instead, Respondent repeats his misstatement that his co-member, Mr. Bandman, never consented to the contract and that Grinberger lacked authority to bind Newport Estates. On that basis, he argues that the contract was void *ab initio* due to "legal impossibility." This position is both factually and legally flawed. As the record reflects, Bandman testified that Grinberger did have authority to act on behalf of Newport. Moreover, Respondent's reliance on "legal impossibility" misapplies the doctrine. The issue here is not legal impossibility but, at most, a clerical or execution error — one that could be remedied by equitable reformation, not used to invalidate the agreement wholesale.

PROCEDURAL HISTORY

Appellant relies on the procedural history in its opening appellate brief.

STATEMENT OF FACTS

Appellant relies on the statement of facts in its opening appellate brief.

REBUTTAL ARGUMENT

I. POINT 1. RESPONDENTS FAILED TO REBUT THE IMPROPER STAY OF CROSS-CLAIMS

Respondents fail to address — and therefore concede — Appellant’s argument that the trial court erred in staying the cross-claims among Grinberger, Newport Estates, and the Klors pending the outcome of their private arbitration. As set forth in Point I of Appellant’s opening brief, the issues subject to arbitration were not isolated or collateral, but in fact deeply intertwined with the very claims asserted by Appellant. By staying those interrelated claims while allowing Respondent to pursue summary judgment, the trial court deprived Appellant of the opportunity to fully develop and test the factual record, resulting in an uneven and procedurally flawed adjudication.

II. POINT 2. RESPONDENTS FAILED TO REBUT EXISTENCE OF MATERIAL FACTUAL DISPUTES ON THE BREACH OF CONTRACT CLAIM.

Appellant's opening brief identified three material factual disputes that preclude summary judgment on the breach of contract claim: (a) whether the contract was ever effectively terminated by Grinberger, in light of continued correspondence and negotiations between the parties evidencing their shared intent to proceed to closing (App. Br. at 20-21); (b) whether Appellant exercised his contractual right to accept title as-is (App. Br. at 20-21); and (c) whether any delay in exercising that right was reasonable under the circumstances (App. Br. at 21-25). Each of these issues presents disputed questions of fact that the trial court improperly resolved on summary judgment, despite not sitting as the finder of fact. Notably, Respondent Grinberger entirely fails to refute the existence of these factual disputes. *See generally*, Grinberger Br. The following sections refute the arguments of Simcha Klor and Mirel Klor and establish that factual disputes remain regarding each of these three issues, preventing summary judgment on the breach of contract claim.

**A. POINT 2A. FACTUAL DISPUTES REMAIN REGARDING
WHETHER THE CONTRACT WAS TERMINATED**

The Klor Respondents contend that the contract was terminated under Paragraph 21 of the attorney review letter due to the presence of unresolvable title defects. However, that argument misconstrues the language of the contract, misapplies New Jersey law, and ignores the actual conduct of the parties. Summary

judgment cannot be sustained on this ground because—at a minimum—there is a genuine factual dispute as to whether the contract was ever properly terminated.

i. The June 23 Termination E-mail Was Procedurally Deficient

New Jersey courts enforce clear and unambiguous contract terms as written. *Korb v. Spray Beach Hotel Co.*, 24 N.J. Super. 151, 155 (App. Div. 1952) (when the parties have expressed their intentions in plain language, the court's role is to enforce the contract as written).

Respondents' position that the contract was effectively terminated upon the discovery of a title defect is flatly contradicted by the plain text of Paragraph 21. That clause provides that “[i]f title is unmarketable or uninsurable, Seller will have 30 days to dispose of the title defect. If Seller cannot do so absent litigation, either party may terminate the Contract, although Buyer has the final right to accept title as-is *before Buyer may terminate the Contract.*” (Pa-267, emphasis added).

This is not a self-executing termination clause. The structure of the provision requires that: (1) a title defect arise; (2) the Seller be unable to resolve it without litigation; and (3) the Buyer be afforded the opportunity to accept title “as-is” *before* any termination occurs. That final right of election belongs exclusively to the Buyer (Minzberg), and the Seller cannot terminate until the Buyer either affirmatively declines that option or fails to respond after being clearly offered it. No such process occurred here.

The June 23, 2021 email that purported to “terminate” the contract did not comply with the terms of Paragraph 21, nor with basic contract principles. The email stated in full:

“Mr. Grinberger hereby terminates the contract. As we now realize, Mr. Klor is in title and therefore Mr. Grinberger does not have the legal authority to transfer title to Mr. Minzberg.... [instruction to office staff:] Lauryn, please prepare a return check to Buyer to be mailed to Mr. Burton’s office.”

Pa-270.

This email is wholly insufficient as a contractual termination under Paragraph 21. It contains no mention of the buyer’s right to accept title as-is, and no indication that the seller made any effort to offer that option prior to terminating — despite the clause explicitly requiring that the **buyer be afforded the final right of election**. A seller may not unilaterally terminate the contract under Paragraph 21 without first presenting the buyer with the opportunity to proceed. The absence of even a **passing reference to that election** — let alone a formal or reasonable opportunity to exercise it — renders the termination defective as a matter of law.

Contrary to the Klors’ implication, the Buyer’s right to proceed “as-is” is not automatically triggered and silently waived if unexercised immediately. This assumption that the buyer must leap to exercise a right without it ever being formally triggered or offered turns the contract on its head.

Here, there is no evidence that Grinberger provided any written or oral notice informing Appellant of his final right to accept title as-is, nor any evidence that

Grinberger waited for an election before sending an email purporting to terminate the contract. Indeed, Respondents offer no contemporaneous communication in which Grinberger outlined the defect, advised that litigation would be necessary to cure it, or gave Appellant a clear opportunity to elect performance despite the defect. That procedural failure is fatal to their termination defense.

ii. The Parties' Post-Termination Conduct Demonstrates That Neither Treated the Contract as Terminated

Even if Paragraph 21 could, in theory, be enforced absent any notice of Minzberg's right to accept title as-is, the parties' subsequent behavior precludes summary judgment. After the alleged termination, Grinberger and Minzberg continued to communicate frequently, exchanging texts and other messages in an attempt to resolve the title issues and proceed toward closing. (Pa-533-543; Pa-544-545).

For example, in a text exchange between Grinberger and Minzberg on December 9, 2021, Grinberger asked Minzberg "where are you holding" and the response from Plaintiff was "Im calling Enny every single day and leave massages and no one is calling back." (sic) (Pa-537). This correspondence related to a survey and determining the location of the Klors' fence and reaching a solution. This discussion continued into 2022. (Pa-357-538).

On March 3, 2022, Grinberger asked Minzberg if he was ready to close. Mr. Minzberg replied "Yes, I have no choice." (Pa-539-540). On or about April 2022,

Grinberger stated that he would finish this after Pesach [Passover]. (Pa-541). Ultimately, Mr. Grinberger stated in June 2022 that he had no energy to fight (using the Hebrew word for strength, “koach”). (Pa-542). None of these messages ever indicated that the contract was in fact canceled by Mr. Grinberger, and the messages stretch a whole year from the date of the purported termination. Grinberger’s testimony also demonstrates that he understood that the contract was still active and enforceable. These communications evidence a mutual understanding that the contract was still operative, and that neither party had disengaged from the contractual relationship. *See* Pa301 at 38:18-22 (Grinberger testifying that he felt “obligated” to Minzberg to try to get the lot back from Klor and that he expressed such obligation to Minzberg); Pa300-301 at 36:2-13; 41:1-6 (Grinberger testifying that he asked Minzberg by text message on February 28, 2022 if he was ready to close because Grinberger was still under the assumption that Klor would transfer title back to him). This discussion continued until Minzberg determined that litigation was the only option.

Such conduct supports a waiver of any purported termination and, at a minimum, creates a triable issue of fact. *See Marioni v. 94 Broadway, Inc.*, 374 N.J. Super. 588, 607-08 (Super. Ct. App. Div. 2005) (where parties continued to act, after alleged breach, as if the contract remained viable, a waiver will be found and the parties will be deemed to have extended the time for performance); *Salvatore v.*

Trace, 109 N.J. Super. 83, 91-92 (Super. Ct. App. Div. 1969) (parties’ continued discussion in expectation of further steps to consummate closing operated as a waiver “even though, as here, the subject contract involves realty, and, moreover, provides that the date fixed ...could be extended *only* ‘by mutual consent in writing.’”)

Notably, Grinberger continued engaging with Appellant as if the agreement remained on foot—undermining the Klors’ present litigation position that the contract had been terminated by Grinberger.

iii. Any Ambiguity About Termination Procedures or Notice Requirements Precludes Summary Judgment

To the extent the Klors now argue that termination occurred by implication, or that Appellant failed to satisfy some formal notice requirement to preserve the contract, such arguments only highlight the existence of factual and legal ambiguities. These ambiguities—regarding whether Paragraph 21 was triggered, whether Minzberg was properly given his “final right,” and whether the parties’ conduct ratified or waived any termination—are exactly the kind of fact-driven disputes that must be resolved at trial.

New Jersey courts routinely deny summary judgment where the parties’ post-dispute behavior introduces doubt about whether a contract has been terminated. *See Marioni* 374 N.J. Super. at 610 (lower court should have assumed contract was binding and enforceable for summary judgment purposes where negotiation and

conduct post alleged-termination indicated that the seller waived its rights and treated the contract as active).

Respondents' reliance on Grinberger's own self-serving email to terminate the contract under Paragraph 21 is procedurally and substantively inadequate, contrary to New Jersey case law, and inconsistent with Grinberger's post-termination behavior. There is no evidence that Grinberger complied with the agreed-upon election process. Accordingly, the claim of valid termination remains a disputed fact—one that precludes summary judgment.

B. POINT 2B. FACTUAL DISPUTES REMAIN WHETHER APPELLANT EXERCISED HIS CONTRACTUAL RIGHT TO ACCEPT TITLE "AS-IS"

Respondents argue that even if the contract was not effectively terminated, Minzberg never properly exercised the "as-is" option afforded to him under Paragraph 21 of the attorney review letter. That argument is both factually and legally flawed. At a minimum, there remains a genuine dispute of material fact as to whether Minzberg's conduct—particularly in the months following the purported termination—constituted a valid exercise of that option.

i. The Contract Did Not Require a Formal or Specific Written Acceptance

Paragraph 21 does not require the Buyer to exercise the "as-is" option through a formal writing, specific phrasing, or within a designated time frame. It simply

provides that the “Buyer has the final right to accept title as-is before Buyer may terminate the Contract.” It is silent as to how that option must be exercised.

Under New Jersey law, when the terms of an option contract are silent or ambiguous regarding the manner of exercise, the provision is construed strictly against the party bound by the option and in favor of the party who holds the discretionary right. *See Martindell v. Fiduciary Counsel, Inc.*, 133 N.J. Eq. 408, 410 (E. & A. 1943) (when language in an option contract “is ambiguous or uncertain, it is to be strictly construed in favor of the party bound and against the party not bound.”)

Courts applying New Jersey law — including cases cited by Respondents — have held that where a contract confers discretion or an option, that right may be exercised through words or conduct, so long as the intent is clear. *See, e.g., Marjer v. Layfmen*, 140 N.J. Eq. 68, (1947).

Mirel Klor’s reliance on *Robert and Richard Associates v. State Div. of Purchase and Property*, 202 N.J. Super. 352 (App. Div. 1985) is misplaced. The option clause at issue in that case specifically provided for (i) an “option to purchase the land and the building”, (2) that notice of intent to exercise the option had to be given within a certain time frame, and (3) that if the would-be purchaser failed to exercise the purchase option and to consummate the purchase within a certain time, its rights under the purchase option would have no further force and effect. *Id.* at

365-66. The issue between the parties in that case was *when the bilateral contract* was deemed to have been formed and binding. *Id.* at 366. It says *nothing* about whether and when the rights of the purchaser are extinguished. Contrary to Respondent’s position, the court did **not** hold that an “unqualified acceptance” was the *only* method to exercise an option — nor did it state that any failure to provide formal notice extinguishes the right. In fact, the *Robert & Richard* court found that negotiations and conduct were probative of whether a contractual right remained viable, and specifically emphasized that the option remained open because no definitive action had been taken to conclude the matter one way or the other. *Id.* at 367. That

logic cuts in Appellant’s favor. Here, Minzberg and Grinberger remained in consistent contact following the purported termination email, jointly working toward a solution and repeatedly discussing closing logistics. Moreover, Grinberger testified that Minzberg asked Grinberger to give him the rights to fight Klor and resolve title on his own, and that Grinberger agreed to give him the rights. (Pa301 at 38:23-39:13). Minzberg and his attorney communicated with Grinberger and Grinberger’s attorney proposals to take over Grinberger’s rights under his agreement with Klor to proceed with the transaction through the summer of 2022. (Pa163, Interrogatory #26). Those ongoing negotiations, far from constituting abandonment, are direct

evidence that Minzberg continued to press toward closing — conduct consistent with exercising his right to proceed despite known title defects.

Respondents’ remaining cases — *West Caldwell v. Caldwell*, 26 N.J. 9, 26 (1958); *Lakewood Twp. Mun. Util. Auth. v. S. Lakewood Water Co.*, 129 N.J. Super. 462, 472 (App. Div. 1974); and *Martindell*, *supra* — all address whether unilateral acceptance can form a binding contract. None stand for the proposition that a buyer forfeits an option by failing to meet a notice requirement that does not exist in the contract. They say nothing about extinguishing rights under a buyer’s discretionary provision like Paragraph 21.

Even *Marjer*, cited by Simcha Klor, supports Appellant: there, the court explained that informal exercise of an option is viable where the lessee’s conduct clearly conveyed intent: “In the absence... of a specific provision [requiring particular notice], any form of notice ... or showing a clear intention ... to exercise his option ... is sufficient.” 140 N.J. Eq. at 70.

The same principle applies here. While Paragraph 21 confers a unilateral right to Minzberg, it does not impose any procedural precondition on its exercise. The provision does not by its terms require any notice, much less a specific form of notice. Minzberg’s efforts to resolve the title issue, his active coordination with surveyors, and his communications to Grinberger and Grinberger’s attorney

expressing readiness to close and fight Klor for title on his own were entirely consistent with exercising his option to accept the Property as-is.

At a minimum, whether those actions constituted effective exercise of Paragraph 21's "as-is" right is a factual question for the jury. It cannot be resolved on summary judgment.

ii. Grinberger's Conduct Confirms He Understood the Deal Was Still Alive

Even if the Klor Respondents now deny that Minzberg exercised the "as-is" option, Grinberger's actions contradict that. Grinberger continued to engage in direct negotiations with Minzberg about resolving the Klor impasse. Text messages between Minzberg and Grinberger show discussion of specific terms of closing, including survey issues, fence placement, and scheduling a closing date (see March 3, 2022 text messages, Pa-539-542). The text message also refer to attorneys working on "finishing the closing" even in late June 2022 (Pa-543-544). Grinberger testified that he agreed to give Minzberg the right to fight Klor for title. (Pa 301 at 6-13).

Had Grinberger truly believed that Minzberg had not exercised the "as-is" option, he would have rejected these communications outright, and certainly not have agreed to give Minzberg the rights in the property to fight Klor. Instead, he facilitated further negotiations, accepted Minzberg's efforts to resolve the impasse,

and discussed closing mechanics. This conduct confirms that both parties understood the deal to be ongoing.

iii. Even if Formal Acceptance Was Required, the Record Contains Evidence That Minzberg Expressed a Willingness to Proceed Despite the Defect

Even if the Court were to require some clear expression of acceptance, that evidence exists in the record. Following the June 23, 2021 termination email, Minzberg explicitly conveyed his willingness to take title as-is and pursue title from Klor himself—precisely the right Paragraph 21 confers. *See* Pa-163 (Minzberg refused termination and indicated he would pursue title from Klor).

Minzberg’s actions over the subsequent 12+ months further confirmed this position: He engaged in continuous outreach to Grinberger about progressing toward closing; He coordinated surveys and shared title-related documents with Grinberger (Pa-538–539); He followed up repeatedly on closing arrangements and offered practical workarounds to Klor’s resistance (Pa-541–543).

Taken together, these communications create a triable issue of fact about whether Minzberg exercised his “as-is” option. Whether his intent was sufficiently “clear and affirmative” is a quintessential fact question—not one to be resolved on summary judgment.

iv. The Klor Defendants’ Arguments About Delay or “Litigation” Are Misplaced

Respondents argue that Paragraph 21 prohibits Buyer from litigating title issues and that any exercise of the “as-is” option must have occurred immediately,

without delay. That is a strained and self-serving reading. Paragraph 21 simply says that “if Seller cannot [cure] absent litigation, either party may terminate the contract, although Buyer has the final right to accept title as-is.”

That clause does not prohibit litigation altogether—rather, it recognizes that once litigation becomes necessary to cure title, the parties have a choice: terminate or accept the defect. Here, Minzberg elected the latter, not by filing suit, but by proceeding in good faith, offering to handle the title dispute himself, and urging Grinberger to move forward. Litigation did not begin until a year later—after months of attempted cooperation and broken promises.

And even if timeliness matters, whether any delay was “reasonable” under the circumstances—given the parties’ continued negotiations and false reassurances—is a fact issue that cannot be resolved on summary judgment.

Whether Minzberg exercised his “as-is” right is, at the very least, a factual question that turns on the parties’ conduct and intentions. No clear-cut waiver, abandonment, or default occurred. Respondents cannot rely on a formalistic reading of Paragraph 21 to override a year’s worth of conduct pointing toward ongoing efforts to close the deal. Summary judgment was therefore improper.

**C. POINT 2C. FACTUAL DISPUTE REMAINS WHETHER ANY DELAY
IN EXERCISE OF AS-IS RIGHT WAS REASONABLE**

Once the trial court erroneously concluded that Minzberg had not exercised his as-is right in response to the June 2021 termination email, it went on to evaluate

whether his later, unequivocal election to proceed — made during summary judgment briefing and hearing (Pa545) — was legally effective under Paragraph 21. (6T, 10:17–13:7).

The court correctly acknowledged that where a contract contains no specific timing provision, performance must occur within a “reasonable time.” *See Perth Amboy Dry Dock Co. v. Crawford*, 103 N.J.L. 440, 445 (1927); *Becker v. Sunrise at Elkridge*, 226 N.J. Super. 119, 129 (App. Div. 1988). But it erred in ruling, as a matter of law, that Minzberg’s delay was unreasonable. That question is quintessentially one for the jury. *See Lastowski v. Lawnicki*, 115 N.J.L. 230, 234 (1935); *Dixie Mill Supply Co. v. H.B. Smith Mach. Co.*, 128 N.J.L. 242, 246 (1942).

Here, both the facts and inferences are disputed. Grinberger claims that no “as-is” election was made until July 2024 (6T, 16:18–22), while Minzberg points to extensive post-termination communications — including proposals of how to assign Grinberger’s rights to Minzberg to fight Klor for title (Pa163), text messages, survey coordination, and requests to close (Pa533–543) — all reflecting an ongoing desire to proceed despite unresolved title issues. These facts could easily support a finding that Minzberg elected to accept imperfect title earlier, or that his later election was reasonable under the circumstances. Not only *can* these facts support the inference in favor of reasonable delay, but on summary judgment, the court *must* draw the

inference in Plaintiff's favor. *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 540 (1995).

This is not a case of buyer delay due to indecision. It is a case of seller-side defect — specifically, Grinberger's inability to deliver title because of the Klor holdout — coupled with the buyer's continued willingness to close. As argued below:

[The parties] spent a year texting back and forth with each other about trying to close and negotiate with Klor... [I]t wasn't necessary for [Minzberg] to reach his final decision [earlier]... So it is reasonable... he was always willing to [proceed as-is], but as long as they were working to try to get [title] without him having to buy it... if the parties are working together, then it's reasonable..." (6T, 17:15–18:9).

The law supports this view. In *Becker*, the Appellate Division found that where a seller delayed performance, a buyer's willingness to "wait out the delay" was reasonable and protected by contract. 226 N.J. Super. at 130–31. It would be inequitable to allow a seller to create delay and then claim the buyer was untimely. The same principle applies here.

The Klor Respondents' suggestion that the as-is option "expired" because it was not exercised prior to litigation is unfounded. Paragraph 21 states that the Seller may terminate if the title defect cannot be cured "absent litigation," but Buyer retains a final right to accept title as-is. The clause does not bar the Buyer from litigating to secure title once he exercises that right. Indeed, if the Buyer cannot litigate to secure

title, the “as-is” clause would be rendered meaningless in the very scenario it was designed to address — where a third-party refuses to cooperate.

Mirel Klor also counters that the 30-day cure window in Paragraph 21 suggests that any delay longer than that is presumptively unreasonable. But that provision speaks only to the seller’s time to cure a title defect — not to the buyer’s timing in electing to proceed. Moreover, the contract does not say that the buyer must accept title within those 30 days, nor does it condition the buyer’s as-is right on doing so. The only temporal requirement is that buyer must make that election “before buyer may terminate.” Minzberg never terminated. Instead, he pursued the transaction for over a year and ultimately filed this suit to enforce it.

Mirel Klor also contends that “time is of the essence” applies to all option contracts, and therefore Minzberg’s delay extinguishes his right to enforce the contract. That argument is doctrinally flawed. Under New Jersey law, time is *not* presumed to be of the essence in real estate contracts or option clauses; it must be either expressly stated in the agreement or clearly implied from the surrounding circumstances. Mirel Klor’s reliance on *Brick Plaza, Inc. v. Humble Oil & Refin. Co.*, 218 N.J. Super. 101, 104 (App. Div. 1987), is misplaced. In *Brick Plaza*, the option clause explicitly included a time deadline, and the court simply enforced the plain terms of that provision. In that context—where performance was required

within a set period—the court correctly applied a “time is of the essence” analysis to determine that a five month delay was too long.

Here, by contrast, Paragraph 21 of the attorney review letter contains no such language. It does not impose a time limit for the buyer’s exercise of the as-is option, nor does it suggest that time is of the essence. And more importantly, the parties’ extended post-termination communications and ongoing efforts to proceed with the transaction undermine any implication that strict timing governed their conduct. Thus, Mirel Klor’s “time is of the essence” argument cannot displace the well-settled principle that where a contract sets no deadline, performance must occur within a reasonable time—a factual question for the jury. See *Lastowski v. Lawnicki*, 115 N.J.L. 230, 234 (1935); *Dixie Mill*, 128 N.J.L. at 246.

At the very least, the reasonableness of Minzberg’s delay — and the legal effect of the parties’ conduct — are fact questions that cannot be resolved on summary judgment. As the Appellate Division warned in *Mazzeo v. Kartman*, 234 N.J. Super. 223, 231 (App. Div. 1989), the trial judge “went wide off the mark” in declaring delay unreasonable where evidence and inferences pointed both ways. The same is true here. Summary judgment must be reversed

III. POINT 3. THE CONTRACT WAS NOT VOID DUE TO “LEGAL IMPOSSIBILITY”

Instead of responding to Appellant’s argument that disputed factual issues remain, Respondent Grinberger pivots to an argument not considered below, that the

contract is unenforceable due to “legal impossibility” — asserting that he could not have transferred the Property because it was owned by Newport, and not by him individually. (Resp. Br. at 12-13). This, he asserts, relieves him of liability for breach of contract. In support of this claim, Grinberger cites the certification of his partner in Newport, Mr. Bandman, claiming that Bandman “never consented to or agreed to a contract to eventually sell the property to Appellant.” Grinberger Br. at 15 (citing Pa247). But this assertion is plainly contradicted by Bandman’s own subsequent deposition testimony, in which he acknowledged that Respondent was the de facto manager of Newport, had authority to enter listing agreements to sell the Property on behalf of Newport, and that Bandman also approved the sale price. (Pa491–92 at 21:13–22:23). Grinberger’s own deposition testimony further confirms that he had authority to sell the Property (Pa294 at 11:5–7) and that Bandman had approved the sale plan (Pa294 at 13:11–15).

Moreover, Grinberger admitted in both his certification and deposition that he executed the contract in his individual name “by mistake.” (Pa244; Pa293–94 at 9:9–10:2). Bandman similarly testified that he was aware of the contract with Appellant and that the use of Grinberger’s personal name was a clerical error attributable to the realtor — a mistake he had known about for years. (Pa492 at 22:24–23:24).

Grinberger’s reliance on “legal impossibility” is legally untenable. The issue here — that Grinberger, rather than Newport, signed the contract — constitutes, at

most, a correctible execution error. New Jersey courts have long held that such errors are subject to equitable reformation where the parties' intent is otherwise clear. *See St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden*, 88 N.J. 571, 577 (1982). If Grinberger executed the contract in his individual capacity by mistake, and all parties intended Newport to be the actual contracting party, equitable reformation is the appropriate remedy to align the contract with the parties' intent. Such a clerical error does not void the contract nor render performance impossible.

Even absent reformation, this type of error does not trigger the narrow doctrine of "legal impossibility." As the Appellate Division has made clear, "[i]mpossibility or impracticability of performance are complete defenses where a fact essential to performance is assumed by the parties *but does not exist at the time for performance.*" *Connell v. Parlavecchio*, 255 N.J. Super. 45, 49 (App. Div. 1992) (emphasis added). Importantly, "[t]he defense does not include instances where the difficulty is the personal inability of the promisor to perform." *Sullivan as Tr. of Sullivan Grantor Retained Income Tr. v. Max Spann Real Estate & Auction Co.*, 465 N.J. Super. 243, 263–64 (App. Div. 2020). As that court explained, a "party cannot render contract performance legally impossible by its own actions." *Id.*

Here, what Respondent Grinberger characterizes as a "legal impossibility" — his inability to convey title individually — was a known circumstance at the time of

contracting, not a supervening event. At the time he entered the contract, Respondent knew that equitable interest was held by Newport and that legal title rested with the Klors, who were refusing to reconvey the Property. His conduct amounts to a calculated risk, not legal impossibility. “[H]op[ing] everything was going to work out” in the face of known risks, does not create a basis to void a contract for impossibility. *Id.* at 264. POINT 4

**IV. . RESPONDENT GRINBERGER’S UNSUPPORTED
ASSERTIONS OF APPELLANT’S KNOWLEDGE DO NOT
CREATE UNDISPUTED FACTS SUPPORTING NO
LIABILITY UNDER THE CFA.**

Appellant’s opening brief raised three distinct challenges to the trial court’s summary judgment ruling on the Consumer Fraud Act (“CFA”) claim: (i) that genuine issues of material fact exist as to what Appellant actually knew at the time the contract was entered into, precluding summary disposition (App. Br. at 28-29); (ii) that the court erred in finding that Grinberger’s misrepresentation of his authority to execute the contract on behalf of Newport was not material under the CFA (App. Br. at 26-28); and (iii) that the court erred in finding Grinberger’s concealment of the true status of title — namely, that the Property was not owned by him or Newport, but by the Klors, who refused to reconvey it — was not material for CFA purposes (App. Br. at 29-30).

In his response, Grinberger does not dispute that the misrepresentations, if made, were material. In fact, elsewhere in his brief, he argues that these same misrepresentations were so significant as to render the contract void ab initio due to “legal impossibility.” Yet, when addressing the CFA claim, Respondent Grinberger argues there was no misrepresentation at all, asserting that “Appellant was aware that the title was not in the vendor’s name, and knew that Respondent Grinberger did not hold title.” Resp. Br. at 10. This assertion is repeated no fewer than **eight** times in Grinberger’s brief, but not once is it supported by any competent citation to the record. Instead, Respondent relies on mischaracterizations of the record, which Appellant addresses below:

1. Grinberger Br. at 2, citing Pa177–231:

“Appellant retained the services of Noah Burton because he was advised ... Mr. Burton had represented [the Klors]. Therefore, Mr. Burton was aware of the title issues. Hence, Mr. Burton carefully included [Paragraph 21] of the attorney review letter.”

While Mr. Burton may have known of the earlier *subdivision*, it remains disputed whether he knew the Klors still held title or were refusing to reconvey it. (5T pp.13-15, 6T pp. 44-45). There is no record evidence that Burton knew about the Klor’s retaining the deed, no record evidence that Burton communicated such knowledge to Appellant, and no record evidence that Appellant himself was aware of the title defect at the time of contracting.

2. Grinberger Br. at 2, citing Pa178:

“As indicated by the Appellant in his Certification (Pa178): ‘Because of this lot being a subdivision, the real estate agent who represented us both recommended that I use the same attorney who had represented the Klohrs, Noah Burton, as he knew all of the details of the lot and subdivision ...’ This document evidences that the Appellant was fully aware of the potential title defects.”

The Certification cited does *not* evidence anything about what Appellant knew. In fact, it is *undisputed* that Appellant had no actual knowledge that the Klors possessed title, or that Grinberger individually was not the owner of the Property. (Pa-159; Pa-366 at 58:20-25; Pa-360 at 34:2-12; Pa-370 at 76:15-20). The Certification merely states that Mr. Burton “knew all the details of the lot and subdivision.” Nothing more about Mr. Burton’s knowledge is known. Respondent offers no testimony from Mr. Burton to establish this disputed fact. (5T pp 13-15) In fact, the trial court below expressed surprise that Defendants did not depose Mr. Burton to ascertain whether he knew about title being in the Klors name at the time of the Minzberg-Grinberger contract. (6T, p 44-45) The cited Certification does not resolve the factual dispute about Appellant’s knowledge.

3. Grinberger Br. at 2, citing Pa178 again:

“Additionally, it was known during the negotiation period that the Respondent did not possess title to the property, and would not, individually, ever obtain title to the property. (Pa178).”

Again, the citation does not state what Respondent Grinberger claims it states. The Certification cited (Pa178) acknowledges that “in a recorded conversation with

[Appellant’s], Mr. Klohr made it clear that he simply had no intention of returning the property...In that conversation he also did not deny that Plaintiff executed the contract in reliance on the prior conversations.” Pa178, ¶7. But as is clear from the Certification and referenced audio, this conversation occurred well after the contract was signed — not during negotiations. *See* Pa-364 at 51:19; Pa-178; Pa-185 (establishing the recorded meeting occurred on or about June 15, 2022). It cannot establish what Appellant knew at the time of contracting. Even if Respondent intended to rely on Paragraph 10 of the Certification, that paragraph merely reflects Appellant’s awareness that the lot was part of a subdivision and that he made efforts to introduce himself to the Klors as neighbors — not that he knew they held legal title. The only competent evidence in the record is that Appellant did *not* know the Klors held the deed. (Pa-159, Interrogatory #10; Pa-366 at 58:20-25; Pa-360 at 34:2-12; Pa-370 at 76:15-20).

4. **Grinberger Br. at 3, citing Pa267**

“Respondent Grinberger individually, never had equitable title to the property which is the subject of this litigation. This was explained to the Appellant on numerous occasions, both before and after the contract was entered into, including the contract as amended in accordance with the attorney review letter from Mr. Burton. (See paragraph 21 of the attorney review letter Pa267).” Resp. Br. at 3

Grinberger claims that his lack of ownership was “explained to Appellant... before the contract was entered into,” citing only Paragraph 21 of the attorney review

letter. But Paragraph 21 is a standard provision concerning curable title defects. It does not establish that Appellant knew title remained with the Klors or that they were unwilling to reconvey it. There is no evidence that Mr. Burton — or anyone else — explained this to Appellant, and again, the record supports only the opposite.

5. – 7. Grinberger Br. at 10–11 (three additional assertions without citation):

“Appellant was aware that the title was not in the vendor's name, and knew that Respondent Grinberger did not hold title. This knowledge undermines the claim of fraud.” Resp. Br. at 10.

“Therefore, allegations of fraud against Grinberger are unfounded since there were no misrepresentations of fact made to the Appellant; the Appellant was fully aware of the title circumstances prior to proceeding with the property transaction.” Resp. Br. at 11

“[N]o fraudulent misrepresentation occurred as the Appellant was aware of all pertinent facts related to the title and property conditions prior to the contract signing, negating any claim of fraudulent misrepresentation or concealment.”

Respondent Grinberger repeatedly claims that Appellant was “fully aware” of the title issues prior to contract formation, but offers no evidentiary support. These assertions are conclusory and directly contradicted by the record. Simply repeating the claim multiple times does not make it true, let alone undisputed.

8. Grinberger Br. at 16, citing Pa126, Pa123, Pa110, and Pa265:

“Contrary to the Appellant's claims, evidence including the attorney review letter and communications between the Appellant and third parties clearly indicates that the Appellant was aware of the title issues at the time the contract became binding. This is further corroborated by email correspondence from the attorney for the Respondent Michael Cohn to the attorney for the Appellant. (Pa126). Certainly, the attorney review letter (Paragraph 2), the due diligence paragraph in the contract (Pa110), and the

email correspondence (Pa123) prove that Appellant was aware Grinberger did not hold title to the subject property, from the outside of the transaction.” Resp. Br. at 16

Respondent Grinberger contends that various communications and boilerplate provisions establish Appellant’s awareness. But the cited email at Pa126 pertains to an earlier 2019 transaction involving Newport and the Klors — not the subject contract. The email at Pa123 is also unrelated and pre-dates the Grinberger–Minzberg agreement. If Grinberger’s intent was to show what Mr. Burton knew in 2019, this does not establish Burton’s knowledge about the state of affairs two years later. Even if Respondent meant to reference later attorney correspondence, those documents (e.g., Pa265–268) do not mention any unresolved title issue or the Klors’ retention of title. The “due diligence” paragraph (Pa110) is a standard form disclosure under New Jersey law ensuring parties understand the importance of obtaining legal advice and does not evidence knowledge of a specific defect. Finally, Paragraph 2 of the attorney review letter (Pa265) merely provides a 30-day due diligence period for the buyer to investigate the Property to determine whether “the property is suitable for Buyer’s intended use.” Buyer’s *right* to examine whether the Property was suitable for his use does not evidence any knowledge of the serious title misrepresentations made in the contract.

In sum, none of the record citations offered by Grinberger support his contention that Appellant knew the true status of title or the limits of Grinberger’s

authority at the time of contracting. His argument that there was no misrepresentation rests on repeated, unsubstantiated assertions that are plainly contradicted by the record. At a minimum, these factual disputes concerning knowledge, disclosure, and materiality preclude summary judgment on Appellant's CFA claim.

V. POINT 5. PARAGRAPH 21 OF THE ATTORNEY REVIEW LETTER DOES NOT DEFEAT THE CFA CLAIM

Respondent argues that Paragraph 21 of the attorney review letter defeats the CFA claim because it allegedly placed Appellant on notice of “the potential for title issues” and afforded him the contractual right to accept title as-is if defects were discovered. This argument mischaracterizes both the purpose and legal effect of Paragraph 21.

Paragraph 21 is a standard clause in real estate contracts designed to address unforeseen title defects — issues that might arise despite the seller's good-faith effort to convey clean title. It is not a license for the seller to misrepresent or conceal known defects, or to falsely claim ownership of property he does not hold. The clause provides a mechanism for addressing curable defects — not a shield against liability for fraudulent misrepresentation or concealment.

The presence of such a clause does not relieve a seller from liability under the CFA for misrepresenting the most fundamental term of the transaction: the seller's legal authority and ability to convey title. *See, e.g., Gennari v. Weichert Co.*

Realtors, 148 N.J. 582, 605 (1997) (affirmative misrepresentations of material fact are actionable under the CFA, even without intent to deceive). Where, as here, the seller affirmatively represented that he could convey title while concealing that legal title was held by third parties who refused to transfer it, Paragraph 21 is irrelevant. It cannot immunize a seller from liability for deceptive practices.

Moreover, Respondent offers no authority — nor could he — for the proposition that a standard attorney review clause waives a buyer’s statutory right to be free from fraudulent inducement under the CFA. To the contrary, New Jersey courts have repeatedly emphasized that the CFA is remedial in nature and must be construed liberally to protect consumers from precisely this type of misconduct. *See Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994), *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139 (1999).

In sum, Paragraph 21 neither disclosed the true nature of the title problem nor absolved Grinberger of responsibility for material misrepresentations and omissions. It therefore does not defeat the CFA claim.

VI. POINT 6. GRINBERGER IS NOT EXEMPT FROM CFA LIABILITY AS A “CASUAL SELLER” OF REAL ESTATE

As an alternative ground to uphold the trial court’s summary disposition, Respondent Grinberger argues that he is exempt from CFA liability because he was a “non-professional, casual seller” of real estate. Grinberger Br. at 8-9. To support this claim, he analogizes himself to a homeowner selling his own residence, as in

DiBemardo v. Mosley, 206 N.J. Super. 371, 376 (App. Div. 1986), or to a business that sells a single property it owns and operates from, as in *48 Horsehill v. Kenro Corp.*, 2006 WL 349739 (N.J. Super. App. Div. 2006). Grinberger Br. at 9.

This argument is entirely unavailing. The factual record demonstrates that Grinberger and Newport Estates were engaged in real estate development as a business, not as isolated, casual sellers. Grinberger testified that his entire career has been in construction and real estate. (Pa303 at 46:15–47:2). The Property at issue was not a personal residence, but part of a larger redevelopment project aimed at transforming the neighborhood into a new subdivision. (Pa294 at 11:15–20; 12:4–15). This was a commercial undertaking from inception — not an incidental transaction.

This is precisely the type of conduct that removes a party from the “casual seller” exception recognized in *Zaman v. Felton*, 219 N.J. 199 (2014) and related cases. The New Jersey Supreme Court has made clear that the CFA applies broadly to protect buyers from misrepresentations in commercial real estate transactions and does not shield those who are regularly engaged in property development.

Grinberger’s attempt to recast himself as a layperson engaged in a one-off sale of real estate is contradicted by his own testimony and the broader context of the transaction. He is not a private homeowner unfamiliar with real estate, but a seasoned developer pursuing a commercial redevelopment. Accordingly, the “casual seller”

exemption has no application here, and Respondent remains fully subject to the protections and obligations of the CFA.

VII. POINT 7. THE PROMISSORY ESTOPPEL CLAIM IS NOT DERIVATIVE OF THE BREACH OF CONTRACT CLAIM AND IS NOT OTHERWISE BARRED

A. The Estoppel Claim is Not Derivative of the Contract Claim

Respondents attempt to sidestep the promissory estoppel claim by branding it “derivative” of the breach of contract claim. This is incorrect as a matter of law and logic. Promissory estoppel is an independent cause of action in equity that arises in the absence of an enforceable contract or where contract claims fail for technical reasons. The elements — a clear promise, reasonable reliance, expectation of reliance, and resulting detriment — are fully distinct from any breach-of-contract analysis. *See Toll Bros. v. Board of Chosen Freeholders*, 194 N.J. 223, 253 (2008).

Mita v. Chubb Comput. Servs., Inc., 337 N.J. Super. 517, 522 (Super. Ct. App. Div. 2001) — the case Simcha Klor cites in support of this position — is entirely inapposite. In *Mita*, the court rejected a promissory estoppel claim by an at-will employee who was reluctant to sign a non-compete agreement and was merely told she would not be terminated **at that time** for refusing to sign. *Id.* at 522. Crucially, the employee admitted that her employer never promised she would not be terminated in the future, and there was no alteration to her status as an at-will employee who could be terminated at any time, with or without cause. *Id.*

The distinctions between *Mita* and the instant case are fundamental. First, *Mita* involved a direct contractual relationship between employer and employee governed by a well-established legal framework for at-will employment, whereas this case involves a third party's clear promise not to interfere with Plaintiff/Appellant's separate contractual relationship with a seller. Second, there was no definitive promise in *Mita* — only a temporal reassurance. Here, by contrast, the promise was explicit: that the Klors would not interfere with the transaction if certain conditions were met. Finally, there is nothing in the record suggesting this promise was time-limited or revocable at will, as in the employment context. Accordingly, *Mita* offers no support for the dismissal of Plaintiff/Appellant's promissory estoppel claim.

Simcha and Mirel Klor's arguments that "no harm" resulted because the contract was eventually terminated are circular and ignore the relevant timeline. The harm — inducement to enter the contract, and subsequent expenditures to uphold it and forego other opportunities — predated any alleged termination. Indeed, the Klors' refusal to return the deed is what *caused* the termination, as confirmed by Grinberger's termination letter (Pa-269). Had the Klors abided by their prior promise not to interfere, the transaction would have closed. The reliance and resulting detriment were complete long before litigation commenced.

B. The Estoppel Claim Does Not Require a Surviving Contract

The Klors argue that since Minzberg can no longer obtain the Property from Grinberger, he cannot claim detriment. As a preliminary matter, it is not at all clear that Minzberg can no longer obtain the Property from the Klors, as the trial court below emphasized that it could order conveyance of title to Minzberg free and clear of the Klors' claims. (6T:5, 10–11). Indeed, this is the remedy Plaintiff still seeks. In any event, estoppel is not dependent on the availability of specific performance or the continued viability of a separate contract. Estoppel protects parties who change their position to their detriment based on a promise, even if they never had a valid contract with the promisor. *See Pop's Cones, Inc. v. Resorts Intern. Hotel, Inc.*, 307 N.J. Super. 461, 469-70 (Super. Ct. App. Div. 1998) (reliance on promise to relocate justified reliance damages even though no final lease was signed). Minzberg's harm — entering a contract and forgoing other opportunities, incurring costs, and years of effort — is not undone simply because specific performance may no longer be available. That only limits the remedy, not the cause of action. *See Goldfarb v. Solimine*, 245 N.J. 326, 331 (2021) (equity may provide reliance damages when specific enforcement is unavailable).

C. There Is Ample Evidence of Promissory Conduct and Reasonable Reliance

The Klors also argue that there was no “clear and definite promise.” This ignores the record. Simcha Klor admitted that he told Minzberg's son there would

be no issue with the purchase so long as certain conditions — about fencing and septic placement — were met. (Pa-365 at 54:13–22; Pa-406–07 at 24:10–27:5). Minzberg agreed to these terms and entered the contract with Grinberger in reliance on that promise. Even when confronted later, Klor did not deny the promise — he merely said that “was before I knew what was going on.” (Pa-193 at 8:23–9:2). That is quintessential evidence for a jury to decide.

Minzberg’s reliance was not only reasonable but foreseeable — it is undisputed that the meeting took place before the contract was signed, specifically to secure neighbor buy-in and avoid disputes. (Pa-177–178). There is no requirement under estoppel doctrine that the promise be in writing, or that the promisor be a direct party to the contract ultimately signed.

D. Mirel Klor’s Attempts to Evade Liability Raise Factual Questions

Mirel Klor disclaims any involvement, yet the record is replete with questions of actual and apparent authority, including her own testimony that her husband handled all the issues relating to the lot and spoke for her in those dealings. (Pa-579 at 43:5–12; 48:17–23). Her contradictory testimony about whether and how her husband spoke for her presents classic credibility issues that must be resolved by a jury. Likewise, whether Minzberg reasonably relied on Simcha’s apparent authority is a question for the factfinder. See Restatement (Second) of Agency § 8. The argument that Mirel owed no duty to speak is beside the point — the issue is whether

her conduct, silence, and marital partnership gave rise to the reasonable impression that Simcha spoke on her behalf in dealing with property they jointly owned.

The citation to *Heuer v. Heuer*, 152 N.J. 226 (1998) is inapposite. That case involved the enforceability of post-nuptial agreements as the husband was estopped from contesting the validity of his wife's prior divorce. The case says nothing about promissory estoppel or agency authority.

E. N.J.S.A. 46:3-17.4 Does Not Bar Estoppel Relief

Simcha Klor invokes N.J.S.A. 46:3-17.4 — requiring joint consent to alienate property held by the entirety — to argue that any promise was void unless in writing. This confuses enforceability of deeds with liability for promissory conduct. Estoppel is not used to force a deed transfer without formal compliance with the statute. Rather, it allows equitable relief for reliance on a promise, even if that promise could not have lawfully conveyed property. *See Pop's Cones*, 307 N.J. Super. at 469 (remedy limited to reliance damages even where contract not formed). The Klors' argument effectively grants them a license to make promises, induce reliance, and then walk away with impunity — precisely what estoppel doctrine prevents.

F. Privity and Third-Party Beneficiary Arguments Miss the Mark

The estoppel claim is not based on the Newport deed nor requires third-party beneficiary standing. It arises from independent promissory conduct, not from privity or contract enforcement. The Appellate Division has made clear that

equitable doctrines like promissory estoppel apply “even when no contract resulted.” *Pop’s Cones*, 307 N.J. Super. at 468. The Klors’ extended discussion of the Newport deed, or who was technically in privity with whom, is a red herring. Estoppel addresses reliance on a promise — not contractual enforcement rights.

At most, these are factual questions — whether the promise was made, whether it was clear, and whether the reliance and detriment were reasonable and substantial. The trial court erred in resolving these questions on summary judgment, and its conclusion that the estoppel claim “went away” once it found no contract liability was doctrinally and procedurally wrong.

**VIII. POINT 8. THE TRIAL COURT ERRED BY SUA SPONTE
DISMISSING THE PROMISSORY ESTOPPEL CLAIM
WITHOUT NOTICE OR A PENDING MOTION**

The Klor Respondents attempt to justify the trial court’s sua sponte dismissal of the promissory estoppel claim by arguing (1) that Plaintiff had notice and an opportunity to be heard, and (2) that the error was harmless because the claim allegedly lacked merit. Both arguments are legally and factually wrong.

**A. There Was No Pending Motion on the Promissory Estoppel Claim,
and No Fair Notice or Opportunity to Be Heard**

It is black-letter law in New Jersey that summary judgment cannot be granted sua sponte unless the affected party is afforded notice and an opportunity to respond. *Klier v. Sordoni Skanska Constr. Co.*, 337 N.J. Super. 76, 84 (App. Div. 2001). Even where a party’s own motion is pending, the trial court cannot dismiss a claim sua

sponte unless that claim is actually the subject of a properly filed motion with the requisite briefing. See *Shurkin v. Elar Realty Co.*, No. A-0727-22, 2023 N.J. Super. Unpub. LEXIS 2015, at 8 (App. Div. Nov. 13, 2023) (trial court erred in granting summary judgment on claim where defendant had not moved for such relief).

Here, the trial court dismissed Plaintiff's promissory estoppel claim against both Simcha and Mirel Klor, even though: (i) no motion for summary judgment on that claim was ever filed by Simcha Klor; (ii) Mirel Klor's only motion for summary judgment was filed early in the case, before discovery was complete, and was explicitly denied by the court (4T 14:3-7); (iii) no renewed motion was filed by either Klor; and (iv) the issue was not briefed or argued in the context of any pending motion.

Mirel Klor's suggestion that Plaintiff was "on notice" because counsel opined during oral argument that the promissory estoppel claim might be impacted by the contract claim, is plainly insufficient to satisfy due process. Judicial speculation (or worse, opposing party's speculation) during oral argument is not the functional equivalent of a properly filed motion, with supporting statements of material facts and legal briefing. As *Klier* makes clear, "[t]he purpose of [summary judgment rules] is obvious, that is, to afford the party against whom relief is sought notice of the application, together with a meaningful opportunity to respond." 337 N.J. Super. at 84.

Moreover, in *Shurkin*, the Appellate Division rejected the precise argument advanced here: that a plaintiff's briefing on one issue (summary judgment in his favor) somehow provided sufficient notice of the court's possible ruling against him on another issue. That argument was rejected as a violation of basic procedural fairness — and it should be rejected here as well.

B. The Error Was Not Harmless

The Klor Respondents' second argument — that the trial court's sua sponte dismissal was harmless error — is also meritless. The promissory estoppel claim was not “patently non-viable.” Rather, Plaintiff presented detailed evidence (discussed *supra*) establishing genuine and material disputes of fact on each element of the claim, including whether Simcha Klor made clear promises that induced Minzberg to enter into the contract, and whether Mirel Klor was bound by those promises through authority or acquiescence.

The Klors argue that because Plaintiff's contract with Grinberger was allegedly terminated, there could be no reliance or harm stemming from their conduct. That argument, however, confuses liability under promissory estoppel with the viability of the underlying contract. The core of the estoppel claim is not about enforcing the contract with Grinberger — it is about holding the Klors accountable for inducing Plaintiff to rely on representations that they would not interfere with his purchase of the Property. That promise, and Plaintiff's reliance, occurred before any

purported termination — and the damages stem precisely from the fact that Plaintiff was misled into entering into the contract in the first place. The estoppel claim seeks redress for detrimental reliance — including the loss of other purchasing opportunities and increased construction costs — not just specific performance.

Moreover, Mirel Klor's argument the error was harmless because the Court would have made the same finding on the promissory estoppel claim regardless of any briefing ignores the many arguments in this briefing decoupling the two claims.

Finally, the suggestion that Plaintiff "chose" to continue the fight rather than buy a different property only underscores the need for jury factfinding. The question of whether Plaintiff's reliance was *reasonable*, and whether it caused cognizable harm, is a quintessential jury issue — and cannot be dismissed as legally foreclosed, let alone without a pending motion.

IX. POINT 9. THE COURT ERRED IN DENYING LEAVE TO AMEND; THE KLORS CANNOT USE DELAY THEY CREATED TO BAR VIABLE TORT CLAIMS

The trial court abused its discretion in denying Plaintiff's motion for leave to amend. While leave to amend is entrusted to the court's discretion, that discretion must be exercised within the framework of Rule 4:9-1's liberal standard and must consider both whether the amendment is futile and whether it would prejudice the nonmoving party. *See Notte v. Merchs. Mut. Ins. Co.*, 185 N.J. 490, 501 (2006).

Neither element is satisfied here.

A. The Klors' Claims of Delay and Surprise Ring Hollow

Any suggestion that the timing of the amendment caused prejudice to the Klors is disingenuous. The very information forming the basis of the proposed tortious interference claims — namely, the Klors' intent and motives in obstructing the transfer of the property — was **only uncovered in their own depositions**, which were taken in late May 2024, despite many requests to conduct them earlier. Plaintiff filed the motion to amend on **June 4, 2024**, mere days after Mirel Klor's deposition concluded. The timing was prompt and directly responsive to newly developed evidence. Any delay in discovery is a direct result of the Klors' own refusal to schedule their depositions. The record reflects this. *See* 4T at 14:3–7 (“Discovery is not even remotely complete. [The Klors] refuse to schedule depositions.”)

The law does not reward litigants for manufacturing prejudice through dilatory tactics.

B. The Proposed Claims Are Plausible, Not Futile

The Klors argue the amendment was futile, insisting they could not interfere with the contract because (1) Grinberger terminated it and (2) they acted in their own interest. But these arguments mischaracterize the tort.

New Jersey law does not require a *breach* of contract to sustain a claim for tortious interference with contractual or prospective relations. The proper focus is whether there was “intentional interference without justification,” and whether that

interference proximately caused damage. *DiMaria Constr. v. Interarch*, 351 N.J. Super. 558, 567 (App. Div. 2001), *aff'd o.b.*, 172 N.J. 182 (2002). Regardless of whether Grinberger properly terminated the contract, the Klors' interference — which clearly was the *cause* of that termination — was a wrongful interference that resulted in harm to Plaintiff.

The Klors' insistence that they were simply protecting their own interests — including a claim based on a religious doctrine of land priority — does not automatically render their interference “justified” as a matter of law. Where a party knowingly obstructs a transaction to benefit themselves, that conduct is not immune simply because it is self-interested. *Lamorte Burns & Co. v. Walters*, 167 N.J. 285 (2001).

Here, the Klors repeatedly inserted themselves into the transaction: pressuring Grinberger to cancel; proposing self-serving terms; and (as Simcha Klor admitted) knowing about the existing contract and actively seeking to derail it. That is sufficient to plausibly allege intentional and unjustified interference — especially when viewed in light most favorable to the Plaintiff.

To the extent the trial court accepted Mirel Klor's testimony that she had no knowledge of the contract or sale, that too was improper at the amendment stage. Mirel Klor is a co-owner of the property, executed the deed to Newport, and was present for key interactions regarding the Property. Her claim that she did not know

the lot was for sale, or that any contract existed, goes to credibility — not legal sufficiency. Such questions must be resolved by a factfinder, not the court at the pleadings stage. See *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746 (1989) (court must accept plaintiff’s allegations as true on motion to amend, absent futility as a matter of law). Moreover, even if the strongest claims lie against Simcha Klor, that is no reason to deny leave to amend as to either defendant.

C. Malice is a Factual Issue

The Klors claim that Plaintiff failed to adequately plead “malice.” But malice in this context does not mean personal animus or hostility — it means interference without justification or excuse. *Printing Mart*, 116 N.J. at 751. That determination depends on the motive, means, and context of the interference. See *Nostrame v. Santiago*, 213 N.J. 109, 122 (2013).

Moreover, acting in one's self-interest, such as advancing financial goals, does not automatically negate malice if the actions are deemed wrongful or unjustified. *Lamorte*, 167 N.J. 285, *Russo v. Nagel*, 358 N.J. Super. 254 (App. Div. 2003), *Cedar Ridge Trailer Sales, Inc. v. National Community Bank of New Jersey*, 312 N.J. Super. 51 (App. Div. 1998).

“The test for determining the adequacy of a pleading” is “whether a cause of action is ‘suggested’ by the facts. *Printing Mart*, 116 N.J. at 746. The record already contains ample circumstantial evidence — Simcha Klor knew of the contract,

wanted the Property himself, and coordinated with Grinberger to oppose the sale. While Mirel Klor denies knowledge, her credibility and awareness are questions for the factfinder, especially considering her co-ownership and participation in the refusal to reconvey.

At a minimum, Plaintiff is entitled to explore those questions through further discovery and plead his claims. The amendment was not futile.

To the extent Defendants assert they acted on legitimate business concerns, or that Simcha's motives were not "malicious," those are fact-bound defenses — not grounds to deny leave to amend.

X. POINT 10. THE TRIAL COURT ERRED BY FAILING TO ORDER EQUITABLE RELIEF TO TRANSFER TITLE AND ENFORCE THE CONTRACT

The trial court had both the authority and the factual basis to grant specific performance. Having found no encroachment from the septic field, the court expressly acknowledged it could "grant[] title in the lot... to Newport Estates free and clear of any claims of the Klohrs," followed by transfer to Plaintiff upon payment. (6T:5, 10–11.) This remedy was proper and available.

Alternatively, equity supports granting Plaintiff the relief to which he was contractually entitled. "[E]quity regards as done that which ought to be done." *Mihranian, Inc. v. Padula*, 134 N.J. Super. 557, 563 (App. Div. 1975). As contract vendee, Plaintiff should be treated as holding equitable title. The Klors' refusal to

return property they never purchased, and were obligated to reconvey, is the true source of the failed closing — not any default by Plaintiff.

Equitable relief remains the only fair resolution: Grinberger/Newport receive the agreed-upon price; Plaintiff receives the contracted Property; and the Klors' baseless obstruction is remedied by court order. That result is not only legally supported, but compelled by fairness.

CONCLUSION

For the foregoing reasons, the trial court's judgment should be reversed, and the case remanded with direction to reinstate Plaintiff's claims and allow him the opportunity to pursue appropriate relief against all Defendants.