FILED, Clerk of the Appellate Division, July 10, 2024, **A-001440-23**

Superior Court of New Jersey
Appellate Division

A-1440-23

JAMES PARK,

Appellant/Plaintiff,

v.

LISA A. CLEMMONS, as Executrix of the Estate of Patricia Ann Halligan, ESTATE OF PATRICIA ANN HALLIGAN, TERRIE O'CONNOR REALTORS, PATRICIA MCKENNA, and DON LEHACH dba ASSURANCE INSPECTION SERVICE,

Respondents/Defendants,

MALEEN CREPP,

Defendant.

On Appeal From Judgment of the Law Division, Bergen County, Hon. David N. Natsta, J.S.C., BER-L-5217-20

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT[1]

Appellant/plaintiff James Park respectfully submits this brief on appeal from the Law Division's various Orders dismissing all properly-joined defendants, on piecemeal summary judgment motions. Appellant also appeals from two other adverse Orders which were adverse.

Reversal is warranted because the piecemeal orders, when reviewed both individually and as a whole, erroneous legal standards resulted in plaintiff's denial of trial and denial of fair justice.

STATEMENT OF THE CASE

This action involves a consumer fraud and fraudulent inducement to purchase a house using demonstrably false facts. The house, situated in River Vale, Bergen County, was sold by a seller who affirmatively represented that the property was connected to a "municipal sewer" system; and affirmatively represented the house as not using a septic tank system. Likewise, the seller's brokers, defendants Terrie O'Connor Realtors and Patricia McKenna, affirmatively represented in their New Jersey Multiple Listing Service listing and elsewhere that the property was connected to "municipal sewer" and affirmatively represented as not having a septic tank

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[1] The transcripts of Law Division hearings filed are as follows:
T1:__ motion hearing 8-11-22
T2:__ motion hearing 4-14-23
T3:__ motion hearing 5-12-23
T4:__ motion hearing 8-25-23

system. The buyer's home inspection service, defendant Don Lehach DBA Assurance Inspection Service, affirmatively stated that the property was connected to "municipal sewer" system.

Plaintiff relied upon both the seller's disclosure, upon the seller's brokers' disclosures, and upon plaintiff's own home inspection service, in purchasing the property. Almost six years after the purchase, a septic system that had been alive and active all along shockingly revealed itself, overflowed, and created a disruption to plaintiff's normal life, and ultimately had to be replaced with a direct municipal sewer connection at a significant expense.

When plaintiff sued these defendants stating that their factually false representations resulted in plaintiff's financial injury, the Law Division's motion judge held, in separate motion proceedings and separate orders, that none of the defendants would be responsible for their express statements that induced plaintiff's reliance. Plaintiff maintains that the Law Division's Orders are contrary to settled case law and are inherently inconsistent, and require reversal.

STATEMENT OF FACTS

In 2014, plaintiff James Park purchased the house at 618 Sloat Place, River Vale, New Jersey. (Plaintiff's wife Sue Lee's name was not on the purchasing records but they have been married at all relevant times since before the house was purchased.) Park Dep at 11. Pa542; see Pa134-38 (plaintiff's interrogatory responses).

Park saw the actual MLS properly listing before purchasing it. Park Depo 17-19; Sue Lee Depo at 18. Pa542; see Pa134-38 (plaintiff's interrogatory responses).

The listing sheet, created by defendant Terrie O'Connor was shown to Park as Park Dep Exhibit 1. Id. The listing sheet stated, in relevant part, that the house was connected to "municipal sewer." Kimm Cert, Exhibit 4. The NJMLS listing sheet was made and posted on MLS by defendant Terrie O'Connor Realtors. Sue Lee Depo at 18-19. Pa542; see Pa134-38 (plaintiff's interrogatory responses).

Prior to closing of title, Park signed off on the Seller's Disclosure Statement. Park Depo at 26-28; Park Depo Exhibit 2; Kimm Cert. Exhibit 5. On page 3, under the heading, "PLUMBING, WATER AND SEWAGE," the seller checked off as follows:

PLUMBING, WATER AND SEWAGE

Yes	No	Unknown		
			30.	What is the source of your drinking water? [✓] Public [ ] Community System [ ] Well on property [ ] Other (explain)
[ ]	[ ]		31.	If your drinking water supply is not public have you performed any tests on the water? If so when? Attach a copy of or describe the results.
[ ]	[✓]	[ ]	32.	Does the wastewater from any clothes washer, dishwasher, or other appliance discharge to any location other than the sewer, septic, or other system that services the rest of the property?
		[ ]	33.	When was well installed?
		[ ]		Location of Well?
[ ]	[✓]		34.	Do you have a softener, filter, or other water purification system? [ ] Leased [ ] Owned
			35.	What is the type of sewage system? [✓] Public Sewer [ ] Private Sewer [ ] Septic System [ ] Cesspool [ ] Other (explain):
[ ]	[ ]		36.	If you answered "septic system," have you ever had the system inspected to confirm that it is a true septic system and not a cesspool?
		[ ]	37.	If Septic System, when was it installed? Location?
		[ ]	38.	When was the Septic System or Cesspool last cleaned and/or serviced?
[ ]	[✓]		39.	Are you aware of any abandoned Septic Systems or Cesspools on your property?
[ ]	[ ]	[ ]	39a.	If "yes," is the closure in accordance with the municipality's ordinance? (explain):
[ ]	[✓]		40.	Are you aware of any leaks, backups, or other problems relating to any of the plumbing systems and fixtures (including pipes, sinks, tubs and showers), or of any other water or sewage related problems? If "yes," explain:
[ ]	[✓]		41.	Are you aware of any shut off, disconnected, or abandoned wells, underground water or sewage tanks, or dry wells on the property?
[ ]	[✓]	[ ]	42.	Is either the private water or sewage system shared? If "yes," explain:
			43.	Water Heater: [ ] Electric [ ] Fuel Oil [✓] Gas

A. Number 35, Seller represented that the house was "Public Sewer."

B. Number 39, Seller was "not aware" of any abandoned Septic Systems or Cesspools.

C. Number 40, Seller stated Seller was aware of no leaks, etc.

D. Number 41, Seller represented that Seller was aware of no wells or other underground tanks etc., including "sewage tanks."

E. Thus, the Seller not only falsely represented the existence of the "municipal sewer" but also falsely represented the absence of any septic tanks or systems. Pa543; see Pa134-38 (plaintiff's interrogatory responses).

A Seller's Condition Disclosure Statement form is intended to cause the receiving party to rely upon it. Choi Depo at 15-17. It means what it says. Choi, the buyer's real estate agent, reviewed the disclosures with the buyer and explained it, and the buyer relied upon it. Choi Depo at 43-45. Pa543; see Pa134-38 (plaintiff's interrogatory responses).

All of the seller's written representations revealed to be false because in 2020, plaintiff suffered repeated sewer backup problems inside the house, even black stuff into the kitchen sink sewer, and ultimately discovered an active septic system. Park Depo at 69-70; Sue Lee Depo at 24-25, 40-41. The overflow was so bad that:

> A. At one point we had black stuff coming out of the sink where the tub -- the same bathroom where we had a lot of issues with the tub clogging, we had like a black -- I don't know what you call them -- it did come up a few times, but we didn't know the cause of it.

Park Depo at 70. Pa544; see Pa134-38 (plaintiff's interrogatory responses).

Plaintiff hired a contractor and plumber and, through their efforts, located an active septic system that was filled to the top with sewage, and that had to be drained, was captured in photographs marked as Exhibit 8 in the Park Deposition:

Kimm Cert. Exhibit 6 (P171, P172). Pa544

That was the very first time plaintiff James Park had ever seen a septic system. "I didn't know what septic system was until I witnessed it." Park Dep at 21; at 50-25 (photos). Pa544; see Pa134-38 (plaintiff's interrogatory responses).

The sewage from the house was "going into the tank." Park Depo 73:18. "All I know is it was active and it was very close from being overflown." 73:10-11. Pa545; see Pa134-38 (plaintiff's interrogatory responses).

In River Vale, the tax office does not send a bill for "sewage line." Pineda Cert. Therefore, the absence of any "sewer tax" does not mean that there was a septic system installed on any given property. Pa545; see Pa134-38 (plaintiff's interrogatory responses).

Fact discovery is incomplete; defendants have failed/refused to attend their deposition despite repeated requests from plaintiff, having repeatedly stated that they would appear after plaintiff's deposition, then after plaintiff's wife's deposition. Pa545

Plaintiff incurred approximately $23,000 to install a new "main sewer in front of the house" and to "cleanout" the septic system that was about to overflow. Park Depo at 49-50. Pa545; see Pa137 (plaintiff's interrogatory responses).

Had defendants either told plaintiff truthfully or disclaimed any knowledge of the sewer system being either septic or municipal sewer, plaintiff would not have relied upon its multiple disclosures of both the "municipal sewer" status and the alleged "absence of the septic system." Pa545

Shortly after entering into the contractor purchase of the subject property, plaintiff retained defendant Don Lehach DBA Assurance Home Inspections and requested a comprehensive inspection of the property. In a home inspection service report dated August 5, 2020, defendant Don Lehach rendered a report stating in relevant part: "The home appeared to be connected to the municipal sewer system." At page 16, lines 1-2. Plaintiff relied upon the home inspection service report as well. See Pa136 (plaintiff's interrogatory responses).

During the ensuing six years of ownership of the house, plaintiff came to learn in Year 6 that the property had never been connected to the municipal sewer system,

and in fact it had been a septic system all along. Plaintiff discovered that a live septic system was backing up, and was about to overflow on to a grass yard. Pa422

Based upon the latent discovery of the lack of municipal sewer connection, plaintiff sued defendants. Count 1 alleged Violation of the NJ Consumer Fraud Act by Defendants Clemmons and Estate of Patricia Halligan. Count 2 alleged Violation of the NJ Consumer Fraud Act by Defendants Terrie O'Connor Realtors and Sales Person(s). Count 3 alleged Violation of the NJ Consumer Fraud Act by Defendant Don Lehach DBA Assurance Home Inspections. Count 4 alleged Common Law Fraud or Misrepresentation by Defendants Clemmons, Estate and Terrie O'Connor Realtors. Count 5 alleged Breach of Agreement and Covenant of Good Faith by Defendants Clemmons, Estate, Terrie O'Connor Realtors and Agent(s). Count 6 alleged Breach of Agreement and Covenant of Good Faith by Defendant Don Lehach DBA Assurance Home Inspections. Pa1-25.

On September 4, 2020, the complaint was filed. The case was pretried by Judge David Nasta, J.S.C. Ultimately, Judge Nasta dismissed all defendants on summary judgment, other than the Estate of Patricia Halligan. Lisa Clemmons, as Executrix, was dismissed by Order of April 14, 2023; the brokers Terrie O'Connor and Patricia McKenna were dismissed by Order of May 12, 2023; and Don Lehach, dba Assurance Inspection Service, was dismissed by Order of August 25, 2023. Final judgment, by default, was entered against the Estate of Patricia Halligan on

December 4, 2023.

During the course of pretrial proceedings, the motion judge also entered two orders of relevance to plaintiff: (1) Order filed August 11, 2022, denied plaintiff's motion to waive affidavit of merit as inapplicable or due to common knowledge; and (2) Order filed May 12, 2023, denied plaintiff's motion to suppress defendants' answers for failure to attend depositions.

PROCEDURAL HISTORY

On September 4, 2020, the summons and complaint were filed. Pa1.

On September 15, 2020, plaintiff filed a motion to correct a party identification issue on ecourts. Pa25.

On October 26, 2020, defendant Lisa A. Clemmons' Answer was filed. Pa29.

The same day, defendant Don Lehach's Answer was filed. Pa45

On December 4, 2020, defendants Terrie O'Connor Realtors and Patricia McKenna's answer was filed. Pa59.

On December 29, 2020, plaintiff filed a motion to waive the Affidavit of Merit Act to defendant Don Lehach, as a licensed home inspector. Pa76.

On January 5, 2021, defendant Lisa A. Clemmons filed a motion to dismiss the complaint. Pa106-14.

On January 22, 2021, the Law Division entered an Order dismissing the complaint as to Lisa Clemmons due to discovery. Pa117

On March 24, 2021, defendant Lisa A. Clemmons filed a second motion to dismiss the complaint. Pa119-127.

On April 12, 2021, plaintiff opposed with a cross-motion to reinstate the complaint from an administrative dismissal. Pa128-51.

On April 19, 2021, the Law Division filed an Order reinstating the complaint. Pa152.

From then, through August 2023, discovery proceeded and orders were entered. See March 18, 2022, discovery order, Pa172; July 8, 2022, discovery Order, Pa192.

On July 15, 2022, plaintiff filed a motion to waive expert report as to the home inspector's negligence under the "common knowledge" doctrine. Pa194-231.

On August 11, 2022, the Law Division entered an Order denying plaintiff's motion for waiver. Pa230. Oral argument was held the same date. See T1:.

On August 16, 2022, a Consent Order was entered for further discovery. Pa232

On February 16, 2023, defendant Lisa Clemmons filed a motion for summary judgment. Pa258-407.

On March 13, 2023, Michael S. Kimm, Esq. Letter to Court Pa408

On March 21, 2023, plaintiff filed a cross-motion to suppress Lisa Clemmons' answer for failure to attend depositions. Pa409-548.

All defendants opposed plaintiff's cross-motion. Pa549-595.

On April 6, 2023, 2023, defendants Terrie O'Connor and McKenna filed their

motion for summary judgment. Pa596-723.

On April 14, 2023, the Law Division issued an Order granting defendant Lisa Clemmons' motion for summary judgment. Pa724. Oral argument was held the same date. See T2:.

On April 14, 2023, the same judge issued an Order denying plaintiff's motion to suppress defendant Lisa Clemmons' answer for failure to attend deposition. Pa726

On May 2, 2023, plaintiff filed a cross-motion to suppress Terrie O'Connor and McKenna's answers for failure to attend deposition by. Pa728

On May 12, 2023, the motion judge entered an order denying plaintiff's cross-motion to strike, Pa780, and entered an Order granting summary judgment in favor of defendants Terrie O'Connor and McKenna. Pa781. Oral argument was held the same date. See T3:.

On July 7, 2023, defendant Don Lehach filed his motion for summary judgment. Pa787-900. Plaintiff opposed. Pa-901-41.

On August 25, 2023, the motion judge issued an Order granting defendant Don Lehach's motion for summary. Pa942 Oral argument was held the same date. See T4:.

Between September 20, 2023, and November 15, 2023, plaintiff filed motions for entry of default and default judgment against Estate of Patricia Halligan. Pa945-1017. On December 7, 2023, default judgment was entered against the Estate of

Patricia Halligan. Pa1018. The Estate of Patricia Halligan had long previously been wound down.

On January 15, 2024, a timely notice of appeal was filed. Pa1019

QUESTIONS PRESENTED

1. Whether the Law Division erred by granting summary judgment dismissing each of the three groups of defendants, given that there exist material issues of fact arising from each defendant's role in the affirmative, false, injurious representations made to induce plaintiff's purchase and consequential injury.

2. Whether the Law Division erred by denying the completion of discovery before proceeding with summary judgment motion practice.

3. Whether the Law Division erred by denying plaintiff's motion to deem the home inspector's negligence as within the "common knowledge" of lay jurors.

4. Whether the Law Division erred by refusing to enforce deposition notices before proceeding with summary judgment practice.

ARGUMENT

I

BECAUSE THE SELLER'S FRAUDULENT REPRESENTATION IS DOCUMENTED, AND ADMITTED, THE GRANT OF SUMMARY JUDGMENT WAS PLAINLY CONTRARY TO SETTLED LAW AND THE ISSUE SHOULD BE TRIED TO A JURY [Pa409-548; T2]

Given the undisputed fact that defendant Lisa Clemmons, as the seller, made

a flagrantly false representation in the Seller's Disclosure form stating that the house was connected to "municipal sewer" and not to "septic system," the motion judge's grant of summary judgment was not only wrong but perplexing.

Summary judgment dismissal is appropriate where the material facts are undisputed or, as was the case below, were beyond a genuine dispute in favor of the opponent. For purposes of summary judgment analysis, the opposing party's facts and fair inferences are required to be deemed true and in a light most favorable to the non-moving party. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995). Here, the evidence should be seen in the light of Kimm's role in the case with all reasonable inferences in Kimm's favor.

Under the summary judgment procedure, a movant will be granted summary judgment if the court finds, after reviewing the full motion record in the light most favorable to the non-moving party, Strawn v. Canuso, 140 N.J. 43, 48, 657 A.2d 420 (1995), that there is no genuine issue of material fact. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995). As stated in Brill, summary judgment procedure requires the judge to review the existence or non-existence of material facts, calling for:

> a determination whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. [Id. at 540, 666 A.2d 146 (internal quotations and

citation omitted).]

It is not the court's role to assess the credibility of the parties' assertions. Rather, that is reserved for the trier of fact. The Court's role is "to determine whether there is a genuine issue for trial." Id. at 540, 666 A.2d 146 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). Throughout that process, the court must assume the non-movant's facts as true and draw all inferences in favor of the non-movant. Brill v. Guardian Life Ins. Co. of Am., supra, 142 N.J. at 536.

A "motion [for summary judgment] should ordinarily not be granted where an action or defense requires determination of a state of mind or intent. . ." In re Estate of Hirokazu Sano, 2011 N.J. Super. Unpub. LEXIS 3049, *19 (2011).

Applying the foregoing principles, taking the facts presented by plaintiff as true, defendant Lisa Clemmons has failed to make a prima facie entitlement to summary judgment and therefore the motion should have been denied. The transcript, T2, shows that the motion judge did not accept plaintiff's facts are face value and instead posited other possibilities rather than deeming the allegations true and drawing all favorable inferences. Thus, at T2:16-17 the motion judge impermissibly frames the issue with open possibilities rather than known facts:

> It appears from the facts now before this court that the dispute is simply as follows: Whether or not Ms. Clemmons knew that the property was or was not, in fact, connected to a public sewage system. It appears today that it may very well have been and that there may just have been an abandoned septic system, but whether it's an abandoned septic system or an active septic system, what's before this Court is whether or

> not Ms. Clemmons, the executrix of the estate, had knowledge of the existence of that septic system, whether it was abandoned or active.

This is beyond the court's role under Brill. Since the Seller's Disclosure states "municipal sewer," that fact must be taken as true. The Seller's Disclosure was not the only problematic item.

The relationship between Lisa Clemmons and the Terrie O'Connor Realtors is that of principal and agent for disclosed principal, and, as such, the acts of the agent within the scope of its responsibility is chargeable to the principal. Nat'l Premium Budget Plan Corp. v. Nat'l Fire Ins. Co., 97 N.J. Super. 149, 234 A.2d 683 (L. Div. 1967) Clearly, when the listing broker listed the MLS data along with "Municipal/Sewer," that fact was chargeable to defendant Lisa Clemmons and the latter cannot escape that fact by stating that "no verbal discussions" were held between her and the plaintiff and plaintiff's agent. Thus, not only did the seller make a fraudulent statement, its agent also made an independent and vicarious fraudulent statement giving rise to the injury.

The Supreme Court has held that even where the principal is "actually innocent," if the agent's fraudulent/tortious acts have caused injury to others, the principal is fairly chargeable if the principal had known about the tortious acts Sewell v. Metro. Life Ins. Co., 118 N.J.L. 308, 310, 192 A. 575 (1937). In Tannenbaum & Milask, Inc. v. Mazzola, 309 N.J. Super. 88, 706 A.2d 780 (App. Div. 1998), the Appellate Division discussed that a principal will be held vicariously liable

for the wrongful acts of its agent in relation to third-parties.

Directly on point, the Supreme Court held in Weintraub v. Krobatsch, 64 N.J. 445, 456-57, 317 A.2d 68 (1974) that caveat emptor ("buyer beware") no longer prevails, and that the non-disclosure or fraudulent disclosure of a material condition as to a property that has been sold and purchased will trigger liability. After surveying the case law developments across the entire country, in an in-depth discussion, the Supreme Court rejected caveat emptor:

> Our courts have come a long way since the days when the judicial emphasis was on formal rules and ancient precedents rather than on modern concepts of justice and fair dealing. While admittedly our law has progressed more slowly in the real property field than in other fields, there have been notable stirrings even there. See Schipper v. Levitt & Sons, Inc., 44 N.J. 70 (1965); Reste Realty Corporation v. Cooper, 53 N.J. 444 (1969); cf. Marini v. Ireland, 56 N.J. 130 (1970); Totten v. Gruzen, et al., 52 N.J. 202 (1968). In Schipper we elevated the duties of the builder-vendor in the sale of its homes and in the course of our opinion we repeatedly stressed that our law should be based on current notions of what is "right and just." 44 N.J. at 90. In Reste we expressed similar thoughts in connection with the lease of real property. We there noted that despite the lessee's acceptance of the premises in their "present condition" (a stipulation comparable to that of the purchasers in their contract here), the landlord was under a duty to disclose a material latent condition, known to him but unobservable by the tenant; we pointed out that in the circumstances "it would be a wholly inequitable application of caveat emptor to charge her with knowledge of it." 53 N.J. at 453-454. Both Schipper and Reste were departures from earlier decisions which are nonetheless still relied on by the seller here. No purpose would now be served by pursuing any discussion of those earlier decisions since we are satisfied that current principles grounded on justice and fair dealing, embraced throughout this opinion, clearly call for a full trial below; to that end the judgment entered in the Appellate Division is:

Reversed and remanded.

The Supreme Court settled, in the context of Gennari v. Weichert Co. Realtors, 148 N.J. 582, 691 A.2d 350 (1997), as to a false disclosure, that a Consumer Fraud Act violation occurs "even in the absence of knowledge of the falsity of the misrepresentation, negligence, or the intent to deceive." On the other hand, as to an omission or failure to disclose, "plaintiff must show that the defendant acted with knowledge." Id. at 506. The Court held:

> Weichert made affirmative misrepresentations about the builder's experience and qualifications as well as the quality of his homes. Because of the affirmative nature of the misrepresentations, we need not resolve the standard that applies when a statement may be construed as a knowing omission or act of concealment. See, e.g., Chattin, supra, 124 N.J. at 527, 591 A.2d 943 (Stein, J., concurring). Hence, the purchasers need not show that Weichert agents knew that the misrepresentations were false or that Weichert intended to deceive them.
>
> Weichert's misrepresentations were not idle comments or mere puffery. As the Appellate Division stated: "[n]ot just 'any erroneous statement' will constitute a misrepresentation prohibited by [the Act]. The misrepresentation has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase." 288 N.J. Super. at 535, 672 A.2d 1190. Weichert was more than just a listing broker. It controlled the marketing, advertising, and sale of the homes at Squire's Runne. Through its trailer and signs, Weichert maintained a presence on the site. In fact, Weichert's synergistic business arrangement approached a joint venture with the builder.
>
> For most people, the purchase of a house will be the most important investment of a lifetime. The houses at Squire's Runne cost over $ 300,000. Weichert anticipated profits of $ 200,000 from the sale of the houses. Its misrepresentations about the builder and the houses were material, false, and made to induce the purchasers to buy at

> Squire's Runne. We need not probe the outer limits of liability under the Act to hold Weichert accountable for its misrepresentations.

Id. at 606-07.

Here, if defendant Lisa Clemmons truly believes that the "Municipal/Sewer" representations and the "No/Septic System" representations had been made by her real estate broker without her providing the information, i.e., her active participation in the fraudulent concealment and fraudulent disclosure, then Clemmons would have a cross-claim against her brokers. The dispute with plaintiff, however, requires trial. The motion judge totally disregarded these binding authorities. Thus a reversal is warranted.

II

BECAUSE THE SELLER-BROKERS' FRAUDULENT REPRESENTATION IS DOCUMENTED, AND ADMITTED, THE GRANT OF SUMMARY JUDGMENT WAS PLAINLY CONTRARY TO SETTLED LAW AND THE ISSUE SHOULD BE TRIED TO A JURY [Pa728-779; T3:]

The defendants seller-brokers Terrie O'Connor and Patricia McKenna were in the same position as defendant seller Lisa Clemmons, but further emphasized its own role by listing and engaging in marketing of the property as "municipal sewer" connected property. See, in particular, Pa789-95. Here, too, the legal analysis is similar to the legal analysis applied to the seller's fraudulent disclosure resulting in financial harm to plaintiff.

The Supreme Court settled, in the context of Gennari v. Weichert Co. Realtors, 148 N.J. 582, 691 A.2d 350 (1997), as to a false disclosure, that a Consumer Fraud Act violation occurs "even in the absence of knowledge of the falsity of the misrepresentation, negligence, or the intent to deceive." Either this means what the Supreme Court held, or it does not. The motion judge clearly erred by disregarding the binding case law.

Here, too, the motion judge disregarded the plain, admitted facts by re-casting the case as one for some unknown "intent" or "knowledge" on the part of the brokers that could be proved by the plaintiff, which is totally irrelevant and immaterial:

> Under questioning Mr. Kimm 1 has stated very clearly and a review of the arguments and all of the papers submitted is that there is no evidence, simply zero evidence that either Terrie O'Connor, the broker, or Ms. McKenna, the realtor, had any specific knowledge of a septic system. So there is no material fact that has to go before a jury for a decision.
>
> I therefore had some questioning of Mr. Kimm with regard to anything that Terrie O'Connor and/or Ms. McKenna should have know, should have known through due diligence or otherwise acting as a reasonably prudent broker and agent whereby they could have potentially, potentially discovered the existence of this, I'll call it latent septic system, and that in failing to do their job somehow led to the inducement of the plaintiff to purchase this property.

Plaintiff has proved the facts that need to be proved under controlling law. The motion judge exceeded the court's role by disregarding the settled authority. The case law requires sellers and seller-brokers to refrain from making affirmative, factual representations unless they are true and accurate. The plaintiff is under no obligation

to prove more than this. The motion judge's rulings were incorrect.

III

BECAUSE THE HOME INSPECTOR'S PROFESSIONAL NEGLIGENCE IS DOCUMENTED, AND ADMITTED, THE GRANT OF SUMMARY JUDGMENT WAS PLAINLY CONTRARY TO SETTLED LAW AND THE ISSUE SHOULD BE TRIED TO A JURY [Pa905-41; T4:]

The central issue concerning defendant Don Lehach is whether he was negligent and not whether he breached some esoteric standard of care. Est. of Chin v. St. Barnabas Med. Ctr., 734 A.2d 778, 785-86 (N.J. 1999). This is because his report, at 16, already states that he inspected the sewer and "Septic System" and confirmed the municipal sewer and confirmed the absence of a "septic system."

To establish a cause of action in negligence, a plaintiff must prove: "(1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty by defendant; and (3) and injury to plaintiff proximately caused by defendant's breach." Endre v. Arnold, 300 N.J. Super. 136, 142, 692 A.2d 97 (App. Div.), certif. denied, 150 N.J. 27, 695 A.2d 670 (1997). Generally, negligence is not presumed, and the burden of proving negligence rests on the plaintiff. Rocco v. N.J. Transit Rail Operations, Inc., 330 N.J. Super. 320, 338, 749 A.2d 868 (App. Div. 2000).

The existence of the duty is a given fact since that it what the home inspector was hired to perform. Breach of the duty is also a given reality since the report clearly states that the house was connected to "municipal sewer" and it was, in fact,

not. The home inspector is the last in line to prevent a home buyer's loss from a defect that could be ascertained.

Since defendant's own report addressed the issue of septic/sewer it is reasonably included in the duty of care, for his factual statements to be predicated upon actual observations. He breached that duty by stating something that was not factually correct. The breach resulted in plaintiff's financial injury.

Curiously, during both of the prior summary judgment motions by defendant Lisa Clemmons and later by defendant brokers, the Court granted relief in part based upon the observation that plaintiffs had retained their own home inspection service and therefore there was no reliance upon the other defendants. In the 4-14-23 transcript, T2:17-21, the motion judge observed:

> In addition, there was a home inspection done by the purchaser through Mr. Don Lehach of Assurance Inspection Service, which again indicated a public sewer system and no evidence of an abandoned and/or operational septic system.

In the May 15, 2023 transcript, T3:23-24, the motion judge squarely held that the home inspector should have discovered the facts correctly:

> So at the end of the day there are simply no facts that I can provide to give inference to the opposing party which I'm required to do under Brill and under the rule whereby a cause of action can be sustained against the seller's broker or agent. Simply nothing before me. <u>This case is a matter of what the seller knew or should have known and what the inspector knew or should have known or should have discovered during the course of the inspection</u>. I indicated that there may be other parties that may or may not have been included in this action that have not been included, but that ship has sailed as well.

> So what we're left with here is whether or not the seller somehow knew or should have known and whether the should be liable and whether the inspector knew, should have known or should have discovered this problem during the course of the inspection.

(Emphasis added.)

Since the inspector failed to discover the facts, but the report stated otherwise, the Court should deny dismissal.

The home inspector should not be held accountable alone, or the long line of Supreme Court cases discussed under Point I will be eviscerated. The motion judge's decisions should be reversed in their entirety.

IV

BECAUSE THE HOME INSPECTOR'S ACTS ARE NOT SUBJECT TO THE AFFIDAVIT OF MERIT ACT, AND IN ANY EVENT WERE WELL WITHIN "COMMON KNOWLEDGE," EXPERT OPINION SHOULD BE WAIVED [Pa76-105; Pa194-221; T1:]

Plaintiff filed a motion to waive the Affidavit of Merit Act requirement, Pa76-105, and that was resolved on consent. Plaintiff subsequently moved to declare that the conduct of defendant Don Lehach's negligence, as a home inspector, concerning his failure to distinguish between a septic system and a municipal sewer connection as being within the common knowledge exception. Initially, the motion judge "denied without prejudice" plaintiff's motion for such declaration. Pa 230. Ultimately, the motion judge granted summary judgment, Pa942, holding in essence

that an expert was required. T4:22-23.

Both defendant Don Lehach and the motion judge were wrong about the need for expert testimony. Every lay person knows or reasonably would know, if explained, what a septic system is, and what a municipal sewer connection. The case does not deal with whether a septic system was properly installed using the required equipment according to code specifications; or whether a municipal sewer connection was properly constructed or defectively installed. The question in this case is whether a home inspector whose report stated that the property was connected to "municipal sewer" but was not, and in fact was still a septic system, had been correctly or incorrectly inspected. This fact is subject to any lay person's knowledge based upon the facts and admissions presented. No numbers of experts can change the factual reality that the property was not connected to a municipal sewer when it is connected to a live septic system. Indeed, none of the defendants have stated or proved that a house can be connected to both a septic system and a municipal sewer when it says "municipal sewer."

Because the facts, coupled with the admissions, are easily presented to the jury and can rationally be perceived by the jury, the motion judge erred by holding that expert testimony was required. This is particularly problematic in that plaintiff's witnesses included the buyer's broker, who would have testified as to the foregoing facts as facts. See T3:18 ("And we have the buyer's broker in a deposition saying that

that fact should have been disclosed and it was not. . . . She is a fact witness but she will testify in that vein. It's already in the deposition testimony.")

If simple factual yes or no issues become "expert" contests, the common knowledge rule would be eviscerated and would be pointless. Our situation is as clear as a surgeon amputating the wrong arm only to state in the patient chart that the correct arm was amputated and the surgery was successful; it has nothing to do with whether the surgeon did it "professionally." The only question is was it was correct, not whether it was done professionally or in accordance with some esoteric standard of care.

The motion judge's ruling was clearly wrong.

V

BECAUSE THE SELLER AND SELLER-BROKER DEFENDANTS' FAILED TO ATTEND THEIR DEPOSITIONS, THE LAW DIVISION ERRED IN PROCEEDING WITH SUMMARY JUDGMENT PRACTICE BEFORE THE CLOSE OF DISCOVERY [Pa409-548; Pa730-779]

Courts have consistently held that it is inappropriate to grant summary judgment where discovery is incomplete. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988); see Empire Mutual Insurance Co. v. Melberg, 67 N.J. 139, 142 (1975) (holding summary judgment premature because discovery had not yet commenced); D'Alia v. Allied Signal Corp., 260 N.J. Super. 1, 12 (App. Div. 1992) (holding summary judgment premature because discovery incomplete). In Velantzas,

our Supreme Court found it "especially inappropriate" (emphasis added) to grant summary judgment when discovery is incomplete. 109 N.J. at 193.

Numerous courts, following Velantzas, have held that summary judgment is denied when discovery has not been completed. See, e.g., Standridge v. Ramey, 323 N.J. Super. 538, 547 (App. Div. 1999) (holding summary judgment should not be granted sua sponte when discovery incomplete); Scott v. Salerno, 297 N.J. Super. 437, 447 (App. Div. 1997), cert. denied, 149 N.J. 409 (1997) (same): J. Josephson. Inc. v. Crum & Forster Insurance Company, 293 N.J. Super. 170, 210 (App. Div. 1996) (denying summary judgment because of incomplete discovery); Hermann Forwarding Co. v. Pappas Ins. Co., 273 N.J. Super. 54, 64 (App. Div. 1994) (denying summary judgment where critical issues were undeveloped before trial court, discovery was incomplete, interrogatories were unanswered and depositions had not begun).

Even "[w]hen 'critical facts are peculiarly within the moving party's knowledge,' it is especially inappropriate to grant summary judgment when discovery is incomplete." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988) (quoting Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981)); see Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2001). A party opposing summary judgment based on incomplete discovery should describe "'with some degree of particularity[,] the likelihood that further discovery will supply the

missing elements of the cause of action or defense.'" Wellington, supra, 359 N.J. Super, at 496 (quoting Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977)). The party requesting discovery "must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete." Trinity Church, supra, 394 N.J. Super, at 166.

Defendant Don Lehach was produced for depositions but the other defendants were not produced despite notices having been served. Their depositions would have established (1) defendants have never inquired, investigated or ascertained whether the "sewer system" was municipal, septic or cesspool and therefore their affirmative representations that it was "Municipal/Sewer" and "No/Septic System" were, simultaneously, fraudulent disclosure as to a non-existent municipal sewer, and fraudulent concealment as to the "active septic system" found by plaintiff, removed at plaintiff's expense, and the sewer "re-connected" with the municipal sewer line at the curb. Depositions will also establish (2) that defendants have no proof as to the actual installation of a municipal sewer connection and the removal of an actual septic system, as this existed through 2020.

Plaintiff served deposition notices and served follow up requests. The Law Division should have deferred summary judgment motions until discovery was properly closed.

CONCLUSION

For the reasons stated above, the Panel should reverse the dismissal Orders appealed by Appellants/Plaintiffs and remand this matter to the Law Division for prompt trial by a jury.

Dated: July 10, 2024

Respectfully submitted,

/s/ Michael Kimm

Michael S. Kimm
KIMM LAW FIRM
Attorneys for Appellant-Plaintiff

JAMES PARK, PLAINTIFF, v. LISA A. CLEMMONS, AS EXECUTRIX OF THE ESTATE OF PATRICIA ANN HALLIGAN, ESTATE OF PATRICIA ANN HALLIGAN, TERRIE O'CONNOR REALTORS, MALEEN CREPP, PATRICIA MCKENNA, DON LEHACH DBA ASSURANCE INSPECTION SERVICE, DEFENDANTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1440-23 CIVIL ACTION APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY DOCKET NO. BER-L-5217-20 SAT BELOW: Hon. David N. Nasta, J.S.C.

DEFENDANT-RESPONDENT, LISA CLEMMONS' BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPEAL

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PRELIMINARY STATEMENT

The trial court properly dismissed Plaintiff-Appellant's, James Park's Complaint against Defendant/Respondent, Lisa Clemmons, as discovery did not uncover facts or documents establishing Ms. Clemmons made any material, knowing, or fraudulent statements. Plaintiff's appeal must be denied.

Plaintiff purchased the residential property located at 618 Sloat Place in River Vale, New Jersey from the Estate of Patricia Ann Halligan ("Estate") in 2014. Ms. Clemmons facilitated the sale in her role as the executrix for the Estate. **Ms. Clemmons was not the homeowner** nor did she possess an individual ownership interest in the property.

As part of the sale process, Ms. Clemmons signed a Seller's Disclosure Statement on the Estate's behalf indicating the property was connected to the municipal sewer system and the seller was "not aware" of the existence of any septic system or sewage tank. The Plaintiff alleges these assertions were fraudulent as he discovered a septic tank on the property in 2020, six years after purchase.

The Seller's Disclosure Statement serves as the sole basis for Plaintiff's case against Ms. Clemmons. During the more-than-two-year discovery period, Plaintiff failed to uncover any facts establishing the statements within the

Seller's Disclosure Statement were fraudulent in 2014 either in a general sense or in a manner sufficient to pierce Ms. Clemmons executrix status.

In that regard, as Ms. Clemmons was not the homeowner, and due to her legal status as executrix, to hold Ms. Clemmons personally liable, the Plaintiff needed to establish Ms. Clemmons' statements lacked good faith and were more than an honest mistake. To prevail, Plaintiff needed to establish Ms. Clemmons' statements amounted to actual fraud. Nothing shows Ms. Clemmons lacked good faith or perpetrated an actual fraud in signing the Seller's Disclosure Statement.

In fact, all documents created prior to the 2014 sale support the Seller's Disclosure Statement. Most significantly, the Plaintiff's own home inspector issued a report confirming the property was connected to the municipal sewer system. Moreover, this report did not include any mention of a septic tank. Additionally and significantly, Ms. Clemmons obtained a Home Appraisal Report in 2013 stating that the home was connected to municipal sewer. Even the broker's home listing on New Jersey Multiple Listing Service ("NJMLS") showed the home being connected to the municipal sewer. Pre-sale documents dating back to 1974 further support the Seller's Disclosure Statement.

Even post-sale documents created in 2020 confirm the information contained in the Seller's Disclosure Statement. Specifically, Plaintiff retained a company

to perform sewer system work and that company drafted a work order indicating that the line was "replaced," not that an entirely new sewage line was installed.

Discovery revealed that Ms. Clemmons had every reason to believe the accuracy of the information contained in the Seller's Disclosure Statement.

On the other hand, no testimony establishes Ms. Clemmons made any knowing, fraudulent statement or otherwise engaged in "actual fraud." Both the Plaintiff and his wife admitted they had no first-hand knowledge regarding any fraud perpetrated by Ms. Clemmons.

Ultimately, the Plaintiff failed to vault the substantially high bar necessary to hold Ms. Clemmons personally liable. Even viewing the underlying facts in a light most favorable to the Plaintiff, the trial court properly granted Ms. Clemmons' motion for summary judgment as nothing shows Ms. Clemmons lacked good faith or committed actual fraud.

PROCEDURAL HISTORY

Plaintiff filed his Complaint on September 4, 2020. (Pa000001-Pa000023). Ms. Clemmons filed her Answer on October 26, 2020. (Pa000029-Pa00044). Discovery proceeded for more than 2 years (814 days total) with the final discovery end date falling on January 18, 2023. (Pa000234-Pa000241).

Ms. Clemmons filed her motion for summary judgment on February 16, 2023. (Pa000268-Pa000396). Plaintiff filed a cross-motion to suppress Ms. Clemmons' Answer for failure to attend her deposition on March 21, 2023. (Pa000409-Pa000522). The Court granted Ms. Clemmons' motion for summary judgment on April 14, 2023 (Pa000724). The trial court denied plaintiff's cross motion to strike Ms. Clemmons' Answer on April 14, 2023 (Pa000726).

COUNTERSTATEMENT OF FACTS

Plaintiff purchased a home at 618 Sloat Place, River Vale, New Jersey on or about September 5, 2014. See Plaintiff's Complaint, Pa000006-Pa000022. Defendant/Respondent, Estate of Patricia Ann Halligan ("the Estate") was the owner and seller of the home at 618 Sloat Place. See Plaintiff's Complaint, Pa000006-Pa000022, ¶2-¶3. Ms. Clemmons was executrix of the Estate of Patricia Ann Halligan. See Plaintiff's Complaint, Pa000006-Pa000022, ¶2. Defendant Terrie O'Connor Realtors was the broker of record for the seller. See Plaintiff's Complaint, Pa000006-Pa000022, ¶4.

The NJMLS listing listed "sewer/municipal" stating that the house was connected to the municipal sewer system. See Plaintiff's Complaint, Pa000006-Pa000022, ¶**10.** The seller disclosure statement stated that the sewer system was municipal. See Plaintiff's Complaint, Pa000006-Pa000022, ¶**12.**

Defendant Don Lehach served as Plaintiff's hired home inspection service, under the business name Assurance Home Inspections. See Plaintiff's Complaint, Pa000006-Pa000022, ¶7. Defendant Don Lehach's inspection report stated that the home appeared to be connected to the municipal sewer system. See Plaintiff's Complaint, Pa000006-Pa000022, ¶**15.**

A septic system was later discovered. Plaintiff's Complaint alleges that due to material misrepresentations, the septic system at the property had not been maintained, cleaned, adjusted, or otherwise cared for in almost six years. See Plaintiff's Complaint, Pa000006-Pa000022, ¶**19.** Plaintiff's Complaint alleges that Defendant Clemmons made knowingly false statements on at least two occasions regarding a material fact. See Plaintiff's Complaint, Pa000006-Pa000022, ¶**54.** Plaintiff further alleges Defendant Clemmons engaged in unconscionable business practices by making knowing, deliberate, and willful false statements. See Plaintiff's Complaint, Pa000006-Pa000022, ¶ **55.**

Ms. Clemmons signed a Seller's Disclosure Statement indicating its purpose was to disclose, **to the best of Seller's knowledge**, the condition of the

Property…" See Seller's Disclosure Statement, Pa000485-Pa000491 at Pa000486. (emphasis added). The Disclosure Statement further provides that a seller "is under an obligation to disclose any **known material defects** in the property" and cautions that "[a]ll prospective buyers of the Property…to carefully inspect the Property and to carefully inspect the surrounding area for any off-site conditions that may adversely affect the Property." See Seller's Disclosure Statement, Pa000486 (emphasis added). Moreover, this Disclosure Statement is not intended to be a substitute for prospective buyer's hiring of qualified experts to inspect the property." See Seller's Disclosure Statement, Pa000486.

In signing the Disclosure Statement, Ms. Clemmons acknowledged the information was "accurate and complete to the best of Sellers knowledge, but is not a warranty as to the condition of the Property…" See Seller's Disclosure Statement, Pa000490. In signing the Seller's Disclosure Statement, the Plaintiff acknowledged that "this Disclosure Statement is not a warranty by Seller and that it is [Plaintiff's] responsibility to satisfy himself or herself as to the condition of the Property." See Seller's Disclosure Statement, Pa000491. The Seller's Disclosure Statement asks "are you aware of any abandoned septic Systems or Cesspools on your property?" to which Defendant Clemmons

accurately checked "No." See Seller's Disclosure Statement, Pa000487, line 121, question 39.

An application was submitted to the municipality for sewer line connection at 618 Sloat Place, River Vale, NJ. See 1974 Application and Certificate of Approval for Sewer Line Connection, Pa000332-Pa000333. The installation of the municipal sewer was approved by the municipality on October 29, 1974. See October 29, 1974 Certificate of Approval and Board of Health House Sewer Connection Permit, Pa000335.

As part of the purchase process, the Plaintiff obtained a home inspection report prepared by Don Lehach at time of sale of the home indicated there was a municipal sewer line. See July 31, 2014 Home Inspection Report, Pa000347-Pa000395.

Likewise, as part of the sale process, Ms. Clemmons had the home appraised prior to the sale to James Park. See May 4, 2013 Home Appraisal Report, Pa000397-Pa000407. The appraisal report states that the home was connected to municipal sewer. See May 4, 2013 Home Appraisal Report, Pa000397-Pa000407**,** page 3.

The broker listed the property with NJMLS showing the property connected to the municipal sewer system. See NJMLS, Inc. Cross Property Custom Report, Pa0000483.

Plaintiff produced documentation from a contractor he hired in 2020, which state the sewer line was to be replaced. See 2020 Sewer Replacement Documentation, Pa000337-Pa000345. There is no indication in the documents produced by Plaintiff that a new sewer line connection was installed. See 2020 Sewer Replacement Documentation, Pa000337-Pa000345.

During discovery, Plaintiff's spouse, Sue Lee testified that she never had any conversations with anyone affiliated with Terrie O'Connor Realtors. See Sue Lee Deposition Transcript, Pa000291-Pa000297, 19:14-20:3. Ms. Lee did not sign the agreement of sale. See Sue Lee Deposition Transcript, Pa000291-Pa000297, 28:13-24. Ms. Lee could not recall any facts that showed Terrie O'Connor intentionally represented that the property was connected to a municipal sewer. See Sue Lee Deposition Transcript, Pa000291-Pa000297, 52:17-24. Ms. Lee understood that Lisa Clemmons was the executrix of the estate that sold the home. See Sue Lee Deposition Transcript, Pa000291-Pa000297, 71:16-19. Ms. Lee did not have knowledge of any facts to show that Lisa Clemmons personally owned or lived in the home purchased by Plaintiffs. See Sue Lee Deposition Transcript, Pa000291-Pa000297, 71:16-72:4. Plaintiff Sue Lee never had any conversations with Lisa Clemmons. See Sue Lee Deposition Transcript, Pa000291-Pa000297, 72:5-7. Ms. Lee did not have knowledge of any facts to show that Lisa Clemmons personally knew about the

condition of the sewer system. See Sue Lee Deposition Transcript, Pa000291-Pa000297, 72:8-15.

Mr. James Park's testified that it was his assumption at the time that he purchased the property at 618 Sloat Place that the property was connected to municipal sewer. See James Park Deposition Transcript, Pa000299-Pa000317, 25:10-13. Mr. Park denied having an assumption before purchasing the property that he would be charged a fee for use of the municipal sewer. See James Park Deposition Transcript, Pa000299-Pa000317, 31:25-32:9. Mr. Park admits he did not read the entire agreement of sale of the property before signing. See James Park Deposition Transcript, Pa000299-Pa000317, 37:14-22. James Park believes he asked the seller to replace or repair the leaking sewer lines based on the inspection report indicating that there was corrosion to existing sewer lines which may need repair or replacement. See James Park Deposition Transcript, Pa000299-Pa000317, 42:18-44:2. James Park never had any substantive conversations with the seller's agent, Patricia McKenna of Terrie O'Connor's Realty. See James Park Deposition Transcript, Pa000299-Pa000317, 45:18-46:3. Plaintiff James Park denies ever having a conversation with anyone regarding the sewer system. See James Park Deposition Transcript, Pa000299-Pa000317, 46:8-10. James Park could not provide any facts or evidence showing that Terrie O'Connor Realtors knew that the property was not connected to a

municipal sewer. See James Park Deposition Transcript, Pa000299-Pa000317, 65:18-66-7. As of the date of the Plaintiff's deposition, he has never received a sewer bill from the township. See James Park Deposition Transcript, Pa000299-Pa000317, 76:7-14. Lisa Clemmons did not attend the closing of the property. See James Park Deposition Transcript, Pa000299-Pa000317, 77:23-25. There was no apparent physical manifestation of the existence of a septic system on the property prior to the septic system being dug up from underground. See Eckell Cert., **Exhibit C**, page 85:6-23. Mr. Park had no basis to believe that Lisa Clemmons, as executrix, had reason not to rely on the inspector's report and permitting regarding the existence of a sewer line. See James Park Deposition Transcript, Pa000299-Pa000317, 99:3-10. Mr. Park could not deny that his hired contractor replaced a sewer line, rather than installed a sewer line. See James Park Deposition Transcript, Pa000299-Pa000317, 96:19-97:7; 99: 22-100:13.

Plaintiff's Realtor, Jihee Choi testified indicating he never spoke personally with Lisa Clemmons. See Jihee Choi Deposition Transcript, Pa000319-Pa000323, 30:24-31:1

Plaintiff's realtor did not perform any independent inquiries into the nature of the sewer system. See Jihee Choi Deposition Transcript, Pa000319-Pa000323, 21:10-23. Plaintiff's realtor did not recall finding any manhole covering or other access ports for underground utilities during her viewing of

the property prior to sale. See Jihee Choi Deposition Transcript, Pa000319-Pa000323, 28:2-29:8. Ms. Choi never had a conversation with the seller's agent regarding sewage facilities at the property. See Jihee Choi Deposition Transcript, Pa000319-Pa000323, 43:9-12. Ms. Choi never had a conversation with the Plaintiffs about the sewage facilities at the property prior to their purchase of the home. See Jihee Choi Deposition Transcript, Pa000319-Pa000323, 43:24-44:2.

Although Ms. Clemmons was never deposed in this case, she provided Certified Answers to Interrogatories indicating she was under the belief that the home was connected to the municipal sewer system based upon her living at the property as a child, from age 4 to 26. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #2.

There is no evidence of the decedent's prior payments to maintain a septic system. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #2. Municipal taxes were paid by both the decedent and Ms. Clemmons as the executrix, with the belief that sewer charges were included. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #2. Lisa Clemmons had no knowledge of sewer or septic clogging or overflowing at any time. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #3. Lisa Clemmons did not own

the home. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #5. The home was owned by the Estate of Patricia Halligan at the time of sale to James Park. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #5.

LEGAL ARGUMENT

A party moving for summary judgment is entitled to judgment as a matter of law if "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. . . . R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-29 (1995). When evaluating whether summary judgment is appropriate, "[t]he Court must consider whether the competent evidential materials presented, viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Davis v. Devereux Foundation, 209 N.J. 269, 286 (2012) (citing Brill, 142 N.J. at 540). "A dispute of fact is genuine if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefore, could sustain a judgment in favor of the non-moving party." Brill, 142 N.J. at 538. Granting summary judgment is appropriate when no genuine issues of material fact arise.

The New Jersey Supreme Court holds that the non-moving party may only defeat a motion for summary judgment by submitting "competent evidential materials beyond mere speculation or fanciful arguments." Hoffman v.

Asseenontv.com, Inc., 404 N.J. Super. 415, 426 (App Div. 2009) (citations and internal quotation marks omitted). Courts review the evidence in the light most favorable to the non-movant. The motion for summary judgment should be granted if the disputes the non-movant claims pertain to issues of fact that are insubstantial or immaterial. The essence of this analysis is whether the evidence provides adequate disagreement to require submission of the case to the jury, or whether it is so one-sided that one party should prevail as a matter of law. Brill, 142 N.J. at 540 citing Anderson v. Liberty Lobby, 477 U.S. 242, 251-52 (1986); see also Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954) (declaring that "fanciful, frivolous, gauzy or merely suspicious" facts in opposition will not defeat a motion for summary judgment).

A motion for summary judgment should only be denied where there exists a genuine issue as to a challenged material fact. Brill, 142 N.J. at 530. The non-moving party "cannot defeat a motion for summary judgment merely by pointing to any facture in dispute." Id. at 529. "Facts which are of an insubstantial nature will not prevent courts from granting a motion for summary judgment. Id. at 530. The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533 citing Anderson, 477 U.S. at 251-252 (1986).

Pursuant to New Jersey Supreme Court, "trial courts should not hesitate to use summary judgment procedures where appropriate to bring [non-meritorious] actions to a speedy end." Maressa v. New Jersey Monthly, 89 N.J. 176, 196, cert. denied, 459 U.S. 907 (1982).

For all the reasons here and analyzed below, Ms. Clemmons respectfully submits that there are no genuine issues of material fact that adequately prove any fraudulent or intentional misrepresentations on her behalf, and therefore the trial court properly granted Ms. Clemmons' motion for summary judgment.

I. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT AGAINST MS. CLEMMONS, AS NO EVIDENCE SHOWS MS. CLEMMONS FRAUDULENTLY OR PURPOSELY MISREPRESENTED THE CONDITION OF THE SEWER

Before addressing Plaintiff's legal argument pertaining to Ms. Clemmons, it cannot be overlooked that the first line of Point I in Plaintiff's merits brief improperly asserts that Ms. Clemmons was the property's "seller." (Pb11-Pb12). This is not a correct statement. As Plaintiff acknowledges in his Complaint, the Estate was the owner and seller of the property. See Plaintiff's Complaint, Pa000006-Pa000022, ¶2-¶3. Ms. Clemmons was not the homeowner or seller; she was merely the executrix of the Estate. See Plaintiff's Complaint, Pa000006-Pa000022, ¶2.

That said, no facts or evidence support Plaintiff's assertion that Ms. Clemmons "made a flagrantly false representation in the Seller's Disclosure

form stating that the house was connected to 'municipal sewer' and not to 'septic system.'" See Pb11-Pb12. Rather, all documents, testimony, and discovery conclusively support the information contained in the Seller's Disclosure Statement at the time of sale.

Initially, the stated purpose of the seller's disclosure "is to disclose, **to the best of Seller's knowledge**, the condition of the Property…" See Seller's Disclosure Statement, Pa000486 (emphasis added). The Disclosure Statement further provides that a seller "is under an obligation to disclose any **known material defects** in the property" and cautions that "[a]ll prospective buyers of the Property…to carefully inspect the Property and to carefully inspect the surrounding area for any off-site conditions that may adversely affect the Property." See Seller's Disclosure Statement, Pa000486 (emphasis added). Moreover, the Disclosure Statement was not intended to be a substitute for prospective buyer's hiring of qualified experts to inspect the property. See Seller's Disclosure Statement, Pa000486.

In signing the Disclosure Statement, Ms. Clemmons acknowledged the information was "accurate and complete to the best of Sellers knowledge, but **is not a warranty** as to the condition of the Property…" See Seller's Disclosure Statement, Pa000490. In signing the Seller's Disclosure Statement, the Plaintiff acknowledged that "this Disclosure Statement **is not a warranty** by Seller and

that it is [Plaintiff's] responsibility to satisfy himself or herself as to the condition of the Property." See Seller's Disclosure Statement, Pa000491.

Viewing the facts of this case through the lens of the Seller's Disclosure Statement's purpose and acknowledgments, all documents, even those provided by Plaintiffs, conclusively show Ms. Clemmons had a good-faith basis for believing, to the best of her knowledge, the accuracy of the Seller's Disclosure Statement. Certainly, nothing shows Ms. Clemmons had knowledge of any facts contrary to the Seller's Disclosure Statement.

Most significantly, the Plaintiff's own home inspector's report confirmed the home was connected to the municipal sewer system. See Plaintiff's Complaint, Pa000006-Pa000022, ¶15.

Next, both the appraisal and broker listing concluded the home was connected to municipal sewer. Specifically, Ms. Clemmons had the home appraised prior to the sale to James Park. See May 4, 2013 Home Appraisal Report, Pa000397-Pa000407. The appraisal report states that the home was connected to municipal sewer. See May 4, 2013 Home Appraisal Report, Pa000397-Pa000407**,** page 3. The broker listed the property with NJMLS showing the property connected to the municipal sewer system. See NJMLS, Inc. Cross Property Custom Report, Pa0000483.

In fact, documents pre-dating the sale by decades support the conclusion that the property was connected to a municipal sewer. Specifically, pre-sale documents show that an application was filed and granted for the home to be connected to municipal sewer lines in 1974 and that same was completed at that time. See 1974 Application and Certificate of Approval for Sewer Line Connection, Pa000332-Pa000333; October 29, 1974 Certificate of Approval and Board of Health House Sewer Connection Permit, Pa000335.

Finally, documents produced by Plaintiff show that the sewer line was *replaced* upon their purchase of the property, rather than installed for the first time. See 2020 Sewer Replacement Documentation, Pa000337-Pa000345.

Next, the Plaintiff never deposed Ms. Clemmons. As such, no testimony exists showing Ms. Clemmons knew about the septic system on the property or otherwise made a fraudulent misrepresentations within the Seller's Disclosure Statement. Rather, Ms. Clemmons certified via answers to interrogatories that upon her belief, the home **was** connected to the municipal sewer system, which was supported by the fact that she lived in the home as a child from ages 4 to 26 and was never given any indication as to the use of a septic system. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #2.

Further, as Executrix, Ms. Clemmons paid municipal taxes which she believed included sewer charges. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #2. The fact that she never received a separate sewer bill would not raise concern, as to this day James Park denies ever receiving a separate sewer bill, although the septic tank has been physically removed from the property. See James Park Deposition Transcript, Pa000299-Pa000317, 76:7-14. Additionally, there is no evidence of any payments regarding septic tank maintenance on behalf of the deceased owner (Patricia Halligan) that have been uncovered. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #2.

Even Plaintiff admitted in his deposition testimony that Lisa Clemmons reasonably relied on the variety of documentation and the inspector's report stating that the home was connected to a municipal sewer. See James Park Deposition Transcript, Pa000299-Pa000317, 99:3-10. Further, Plaintiff's wife, Sue Lee, testified that she did not have knowledge of any facts to show that Lisa Clemmons personally knew about the condition of the sewer system. See Sue Lee Deposition Transcript, Pa000291-Pa000297, 72:8-15.

Viewing these facts in a light most favorable to Plaintiff, the trial court properly determined that no rational fact finder could determine Ms. Clemmons fraudulently or knowingly misrepresented the property's condition. At best, this

was human error on behalf of several different people and entities based upon their reliance on a paper trail indicating the existence of a sewer system. In no way does such error rise to fraudulent or intentional misrepresentation.

The trial court properly determined that no genuine issue of material fact existed to establish Ms. Clemmons made fraudulent misrepresentation regarding any alleged knowledge as to the existence of a municipal sewer connection. Summary judgment was properly granted and the Plaintiff failed to show any facts that warrant overturning the trial court's order dismissing Plaintiff's Complaint against Ms. Clemmons with prejudice.

II. PLAINTIFF FAILED TO ESTABLISH FRAUDULENT BEHAVIOR BY CLEAR AND CONVINCING EVIDENCE SUFFICIENT TO PIERCE THE ESTATE'S VEIL AND HOLD THE EXECUTRIX, MS. CLEMMONS PERSONALLY LIABLE

In New Jersey, executors acting in good faith within the scope of their powers and with ordinary care, prudence, and diligence will not be held personally liable for loss resulting from their mere errors in judgment. In re Estate of Pettigrew, 115 N.J. Eq. 401 (1934). "The only legitimate inquiry to be made is did the executors act in good faith and as the ordinarily prudent and cautious person would have under similar circumstances." Id. at 407. "If they did, then the mere fact that they were mistaken or erred in the exercise of their honest judgment cannot be invoked or relied upon for the purpose of subjecting them to liability for any resultant loss." Id.; see also Heisler v. Sharp, 44 N.J.

Eq. 167, 172 (1888). (an executor may do anything within the scope of her powers without risk of personal liability if she exercised due care).

As the Court held in In re Paterson Nat'l Bank:

> All that the law exacted of our trustee in the administration of its stewardship was an obligation of faithfulness to the cestuis and a duty to exercise ordinary care, prudence and diligence. So long as it acted in good faith, with ordinary care, caution and discretion and within the scope of its powers, our trustee cannot, and will not, be held liable for the consequence of its mere mistakes, even if such there were, resulting from mere errors of judgment and not proceeding from any fraud, gross carelessness or indifference to duty on its part.
>
> 125 N.J. Eq. 73, 76 (1939).

Plaintiff cannot dispute that Ms. Clemmons was the executrix of the estate that sold the home and not the homeowner. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #5. Plaintiff also cannot dispute that Patricia Halligan owned the home before her death. See Ms. Clemmons Certified Answers to Interrogatories, Pa000325-Pa000330, Response #5. As Ms. Clemmons was conclusively an executor, the Plaintiff had a very high bar to vault to pierce Ms. Clemmons' legal status as executrix of the Estate and find her personally liable. Plaintiff utterly failed to prove his case.

Discovery revealed that Lisa Clemmons acted with good faith and with ordinary care, caution, and discretion. Discovery revealed the following in support of Ms. Clemmons' good faith:

- The Plaintiff's own home inspector's report confirmed the home was connected to the municipal sewer system. See Plaintiff's Complaint, Pa000006-Pa000022, ¶15; See July 31, 2014 Home Inspection Report, Pa000347-Pa000395.
- Ms. Clemmons had the home appraised prior to the sale to James Park. See May 4, 2013 Home Appraisal Report, Pa000397-Pa000407. The appraisal report states that the home was connected to municipal sewer. See May 4, 2013 Home Appraisal Report, Pa000397-Pa000407**,** page 3.
- The broker listed the property with NJMLS showing the property connected to the municipal sewer system. See NJMLS, Inc. Cross Property Custom Report, Pa0000483.
- Pre-sale documents show that an application was filed and granted for the home to be connected to municipal sewer lines in 1974 and that same was completed at that time. See 1974 Application and Certificate of Approval for Sewer Line Connection, Pa000332-Pa000333; October

29, 1974 Certificate of Approval and Board of Health House Sewer Connection Permit, Pa000335.

No facts or documents exist showing that Ms. Clemmons acted in bad faith or made any sort of misrepresentation regarding the condition of the property. Ms. Clemmons had every reason to believe that there was indeed a sewer line attached to the property and no reason to believe a septic tank existed on the property.

Based upon the evidence viewed most favorably to the Plaintiff, it remains indisputable that Lisa Clemmons as an individual did not knowingly defraud the Plaintiff. At most, it was a *mutual* mistake, which does not rise to the level of fraudulent behavior that is required to find an executrix personally liable. As such, the trial court properly dismissed Plaintiff's Complaint against Ms. Clemmons.

III. ANY INCOMPLETE DISCOVERY WAS A RESULT OF PLAINTIFF'S LACK OF DUE DILIGENCE

Incomplete discovery will not automatically defeat summary judgment. See Badiali v. New Jersey Mfrs. Ins., 220 N.J. 544, 555, 563 (2015). This is especially true where the opposing party did not seek the outstanding discovery within the discovery period and did not request an extension of the discovery end date. See Schettino v, Roizman Development, 310 N.J. Super. 159, 165 (App. Div. 1998).

Plaintiffs never raised the issue of incomplete discovery until March 21, 2023, after the discovery end date including 800+ days of discovery. Even when Plaintiff finally raised the issue, the Plaintiff did not move to re-open discovery or extend the discovery end date. Rather, Plaintiff sought to strike Ms. Clemmons' Answer for failure to appear for her deposition. While Ms. Clemmons did not appear for a deposition, this was due solely to Plaintiff's lack of due diligence.

Ms. Clemmons never refused to appear for a deposition. Plaintiff was promptly informed, at each juncture, when deposition dates did not work for counsel but Plaintiff neglected to timely provide other dates. Plaintiff made no further attempts to schedule the depositions. In fact, Plaintiff never indicated that he was prejudiced by any adjournments until responding to Defendants' Motion for Summary Judgment. As a result, Plaintiff surrendered his right to depose Ms. Clemmons.

Discovery lapsed on January 18, 2023, without Plaintiff ever re-noticing any of the defendants' depositions. This should either be considered a tactical decision or a lack of due diligence.

As the alleged "incomplete" discovery is a result of Plaintiff's failure to pursue discovery before the discovery end date and the Plaintiff never moved to

reopen or otherwise extend discovery, the trial court did err in granting Ms. Clemmons' Motion for summary judgment.

CONCLUSION

The trial court properly granted Ms. Clemmons' Motion for Summary Judgment and Plaintiff did not cite facts or law sufficient to overturn the trial court's finding. Plaintiff's appeal must be denied.

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLP

By: 

_____

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Attorneys for Defendant / Respondent, Lisa Clemmons

JAMES PARK, Plaintiff/Appellant vs. LISA A. CLEMMONS, as EXECUTRIX OF THE ESTATE OF PATRICIA ANN HALLIGAN, ESTATE OF PATRICIA ANN HALLIGAN, TERRIE O'CONNOR REALTORS, MALEEN CREPP, PATRICIA MCKENNA, DON LEHACH dba ASSURANCE INSPECTION SERVICE, Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001440-23 CIVIL ACTION On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L- 5217-20 Sat Below: Hon. David V. Nasta, J.S.C.

OPPOSITION BRIEF ON BEHALF OF DEFENDANT/RESPONDENT, DON LEHACH dba ASSURANCE HOME INSPECTIONS

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PRELIMINARY STATEMENT

Plaintiff/Appellant appeals from several Orders entered by the Law Division, including Orders for Summary Judgment entered in favor of several Defendants, including this Defendant, Don Lehach dba Assurance Home Inspections.

Just as this Defendant took no position of the Summary Judgment Motions filed by the other Defendants below, he takes no position on Plaintiff's appeal from those Orders.

Defendant/Respondent, Don Lehach dba Assurance Home Inspections ("Lehach" or "Assurance"), submits this Brief in Opposition to Plaintiff's appeal of the Orders of August 11, 2022 denying Plaintiff's motion to "waive Affidavit of Merit", (Pa230), and August 25, 2023 granting Summary Judgment in favor of this Defendant, (Pa942).

Therefore, we will address only Plaintiff's mischaracterizations of the record on the Lehach Summary Judgment Motion and Plaintiff's arguments at Points III and IV of his Brief.

STATEMENT OF THE CASE

Plaintiff's Complaint (Pa1) alleges, in pertinent part, that he purchased a home in River Vale, New Jersey in reliance upon representations by all Defendants that the home was connected to the municipal sewer system, and that it, in fact, was serviced by a private septic system; not the municipal sewer.

The claims against this Defendant are set forth at Count 3 – "Violation of the NJ Consumer Fraud Act . . ." and Count 6 – "Breach of Agreement and Covenant of Good Faith . . ." (Pa17 and Pa20).

In his Complaint, Plaintiff makes several factual allegations which he was simply unable to prove with any evidence. For instance, ". . . Defendant rendered a home inspection report that affirmatively stated falsely that the sewer system was municipal. (¶46, Pa18). Also, the Complaint alleges that the home was not, in fact, connected to the municipal sewer system, but to a private septic system. However, Plaintiff could only offer evidence that the septic system (tank) remained in place after the home was connected to the municipal sewer decades earlier; and not that the septic system was actually functional or that the home was not connected to the municipal sewer.

In entering the Order Plaintiff appeals, (Pa942) the Court entered Summary Judgment in favor of Defendant, Lehach/Assurance, based on the four (4) year Statute of Repose set forth in N.J.S.A. 45:8-61, et seq.

There are, however, other bases for the entry of Summary Judgment which will be set forth herein.

STATEMENT OF FACTS

Plaintiff purchased the home which is the subject of this litigation in 2014 (Pa6). Prior to the purchase he retained Defendant, Lehach, to perform an inspection of the home and entered an Agreement for same. (Pa816).

The Agreement (Pa816) provided in ¶3, *inter alia*, that

- N.J.A.C. 13:40-15.16(c) (the New Jersey Home Inspector Advisory Committee Administrative Code) would define the standard of duty and conditions, limitation and exclusions of the inspection;
- That systems, items and conditions which are not within the scope of the building inspection include, but are not limited to . . . underground storage tanks, . . . concealed or private secured systems;
- That the client understands that these systems, items and conditions are accepted (sic) from this inspection;
- That any general comments about these systems . . . are informal only and do not constitute an inspection; and
- That client agrees to notify inspector at least seventy-two (72) hours prior to repairing or replacing any such system or component.

Defendant issued his Home Inspection Report on July 31, 2014. It contained the following comment on page 16: "**Septic System:** The home appeared to be connected to the municipal sewer system" at pg. 16. (Pa47).

The Complaint alleges that approximately six (6) years after closing he experienced a backup of waste water and discovered that the home was not connected to the sewer but was serviced by a septic system.

Pre-trial discovery and the record on the Summary Judgment revealed the following critical undisputed facts:

1. Plaintiff testified that he did not rely on the inspection report in purchasing the house. He had always just assumed that it was connected to the municipal sewer. (Pa791; Pa828 -29 - Dep. of Park 23:10 – 25:13).

2. The septic system was hidden and not discoverable without digging up the front yard. (Pa781-92; Pa-839 – 840 - Dep. of Park 68:9 – 69:24).

3. The only backup Plaintiff experienced was a bathroom tub drain on the second floor of the home. (Pa792; Pa840 - Dep. of Park 69:25 – 72:21).

4. Plaintiff has no reason to disagree with the comment in the Inspection Report that the home "appeared to be connected to the municipal sewer." (Pa793; Pa843 - Dep. of Park 83:15-25).

5. Plaintiff did not expect Defendant to dig up the front yard to discovery the septic system, and there were no external manifestations of the septic tank above ground or in the house. (Pa793; Pa844 – Dep. of Park 85:2-25).

6. Plaintiff did not call the inspector seventy-two (72) hours before making the repair. (Pa794; Pa845-46 - Dep. of Park 91:18 – 92:3).

7. Plaintiff acknowledged the Inspection Agreement contained a two (2) year limitation for actions.

8. Public Records of the Township of River Vale show that the previous owner applied for a permit to connect the home to the public sewer in 1974; that the permit was issued and the connection was approved. (Pa880-82).

9. The Public Record also shows that the permit applied for by the Plaintiff in 2020, and the work performed and approved by the Township was the replacement of the existing sewer line from the house to the curb. (Pa883-889).

10. Plaintiff offered no evidence that the septic was working and that there was no public sewer connection at the time of his purchase, other than photos showing the old tank was in place in 2020.

LEGAL ARGUMENT

POINT I

PLAINTIFF'S CLAIM IS TIME BARRED

a. The Statute of Repose

The Trial Court correctly concluded that Plaintiff's Complaint is time barred. In his Appellate Brief, Plaintiff never addresses the statute on which the trial judge relied in entering judgment.

N.J.S.A. 45:8-76.1 provides that actions against licensed home inspectors in New Jersey for errors or omissions in the performance of a home inspection "shall be commenced within four years of the date of the home inspection."

This is not a Statute of Limitations to which the discovery rule might apply. Rather it is a statute of repose. While the terms are sometimes used interchangeably, they are not the same thing. The main distinguishing characteristic is that a Statute of Repose has a fixed beginning and end of the time during which an action can be brought. Cumberland County Board of Chosen Freeholders v. Vitetta Group, P.C., 431 N.J. Super. 596, 606 (App. Div. 2013). A Statute of Limitations begins to run when the Plaintiff suffers harm or when he discovers, (or should discover) he has been harmed. The starting point for a Statute of Repose, however is a fixed point in time, often long before the harm has occurred. Id.

The starting point for the period during which a home inspector may be sued is "the date of the home inspection." N.J.S.A. 45:8-76.1.

The date of the filing of the Complaint (September 4, 2020) is more than four (4) years after the date of the home inspection (July 31, 2014). The Complaint is, therefore time-barred.

b. The Contractual Limitation

The motion judge granted summary judgment based on the Statute of Repose, discussed above, and did not address several other grounds advanced for the entry of judgment. Even if this court were to find merit in Appellant's position, the entry of Judgment was appropriate for several other reasons argued below, but not addressed in the Statement of Reasons attached to the Order (Pa942). One such reason is that Plaintiff's Complaint is also barred by the contractual limitation to which Plaintiff agreed when he hired Lehach to perform the inspection. (Pa816)

The Agreement between the parties contained the following language: "Further, any legal action must be brought within 2 years of the date of the inspection or will be deemed waived and forever barred." (Pa819). Although N.J.S.A. 45:8-76.1 provides for a four-year (4) period from the date of the inspection within which an action must be brought, the parties are free to agree amongst themselves to a shorter limitation period, as long as there is no public policy or statutory provision prohibiting it, and the limitation is reasonable. See,

Eagle Fire Prot. Corp. v. First Indem. of Am. Ins. Co., 145 N.J. 345, 355-56 (1996) (finding a one-year limitation on suit in a construction bond contract both reasonable and enforceable) (citing Weinroth v. New Jersey Mfrs. Ass'n Fire Ins. Co., 117 N.J.L. 436, 438 (E. & A.1936) (finding the same limitation enforceable in an insurance contract reasonable and enforceable); Ribeira & Lourenco Concrete Constr. Co, v. Jackson Health Care Ass'n., 231 N.J. Super. 16, 22-23 (App. Div.1989), aff'd o.b., 118 N.J. 419 (1990) (finding the same limitation in a labor and material payment bond contract reasonable and enforceable); A.J. Tenwood Assocs. v. Orange Senior Citizens Housing Co., 200 N.J. Super. 515, 523-24 (App. Div.), certif. denied, 101 N.J. 325 (1985) (finding the same limitation in a construction contract reasonable and enforceable); Staehle v. American Employers' Ins. Co., 103 N.J. Super. 152, 154 (App.Div.1968) (finding the same limitation in a home owner's insurance policy contract reasonable and enforceable); See also, Mirra v. Holland America Line, 331 N.J. Super. 86, 91 (App. Div. 2000) (finding a limitations period within a cruise ship ticket of 180 days enforceable).

Because this action was commenced more than six (6) years after the home inspection was conducted, it is barred by the parties' agreement that any such action must be brought within two (2) years of the date of the inspection.

POINT II

THE DEFENDANT HOME INSPECTOR WAS UNDER NO OBLIGATION TO DETECT THE SEPTIC SYSTEM

The Inspection Agreement (Pa818 - 819) provides, among other things, that:

> 2. The inspector will perform a visual inspection and prepare a written report of the apparent condition of the readily accessible installed systems and components of the property existing at the time of the inspection. Latent and concealed defects and deficiencies are excluded from the inspection.
>
> Systems, items, and conditions which are not within the scope of the building inspection include, but are not limited to: radon, formaldehyde, lead paint, asbestos, toxic or flammable materials, other environmental hazards; pest infestation; security and fire protection systems; household appliances; humidifiers; paint, wallpaper and other treatments to windows, interior walls, ceilings and floors; recreational equipment or facilities; underground storage tanks, energy efficiency measurements; concealed or private security systems; water wells; heating systems, accessories; solar heating systems; sprinkling systems; water softener; central vacuum systems; telephone, intercom or cable TV system; antenna, lighting arrestors, trees or plants; governing codes, ordinances, statutes and covenants. Client understands that these systems, items and conditions are accepted (sic) from this inspection. Any general comments about these systems, items and conditions in the remarks section of the written report are informal only and DO NOT represent an inspection.

"Readily accessible installed systems and components" are defined as "only those systems and components where Inspector is not required to remove personal

items, furniture, equipment, soil, snow or other items which obstruct access or visibility."

Plaintiff's testimony was clear that even though he was doing lawn maintenance in the area directly above the septic tank for many years, there was no sign or evidence of the presence of a septic system to be seen. (Statement of Undisputed Material Facts, ¶ 6, 12. Pa789 – 795; Pa828 – 829; Pa843).

The septic system was not, therefore, a "readily accessible system or component."

POINT III

PLAINTIFF CANNOT MAKE OUT A *PRIMA FACIE* CASE WITHOUT THE BENEFIT OF EXPERT OPINION TESTIMONY

At the close of discovery, Plaintiff had not identified any proposed expert witness who would explain to a lay jury how a home inspector should have discovered that the property was being serviced by a septic system (if, indeed, it was) without digging up the yard, or that a septic system is a "readily accessible installed system and component of the property existing at the time of the inspection," and not a latent or concealed defect or deficiency … excluded from the inspection." Nor has Plaintiff identified any proposed expert who would explain to a lay juror what the generally accepted professional standard of care is

or what Defendant Lehach did or failed to do that was a deviation from the professional standard.

Summary Judgement is appropriate where, as here, there is a lack of expert opinion evidence to support Plaintiff's claim. Defendant is a licensed professional whose work and judgment are subject to professional standards which are beyond the ken of the average lay juror. Davis v Brickman Landscaping, 219 N.J. 395 (2014); Kaplan v. Skoloff & Wolff, P.C., 339 N.J. Super. 97 (App. Div. 2001).

Appellant argues that the "common knowledge" exception spares him the obligation to support his claim with expert testimony. The common knowledge exception, however, has no place in this matter.

The standard of care of a licensed professional such as a home inspector is not within common knowledge. A lay juror is not qualified to know whether or how a licensed home inspector is to determine whether a residence is connected to a septic system or a municipal sewer system, or even whether or not the standard of care requires the licensed professional to make that determination. It is not within a juror's common knowledge to determine whether or not the statement by the home inspector that the home "appears to be connected to the municipal sewer system," is a breach of the standard of care, or an affirmative representation upon which the professional's client is entitled to rely, in the face of advice contained within the inspection

agreement that the inspection only includes "readily accessible systems and components", and in the face of the client's own representation that the property is connected to a municipal sewer system. Plaintiff, himself, acknowledged that he no expectation that the home inspector would dig up the yard of the residence to make a conclusive determination. (Pa844).

Without expert testimony to explain what the professional standards of care are for a licensed home inspector, or that Defendant Lehach's work for the Plaintiff deviated from those standards and caused harm, Plaintiff could not make a *prima facie* case. Summary Judgment, therefore, was appropriate.

POINT IV

PLAINTIFF CANNOT MAKE OUT A *PRIMA FACIE* CASE OF CONSUMER FRAUD

Count III of the Complaint alleges that this defendant violated the Consumer Fraud Act, N.J.S.A. 56:8-2, because of the following statement contained in the inspection report: "Septic System: The home appeared to be connected to the municipal sewer system." Plaintiff claims this was a "knowing, deliberate, willful or recklessly indifferent false statement, that the sewer was municipal rather than septic system, and by failing to warn Plaintiff that a septic system required periodic maintenance and potential repairs at the homeowner's expense, he engaged in an unconscionable business practice… ." (Pa1; Count III, ¶ 49).

Plaintiff's CFA claim fails for a number of reasons, the first of which is that the allegedly false statement was not false, at all. Plaintiff takes a sentence fragment and claims that the fragment is false. The entire statement, however, is not false. The home did appear to be connected to the municipal sewer system, as acknowledged by Plaintiff, himself. There were no visible, physical indications that the home was serviced by a septic system. (See Pa789; SOUMF, ¶6 and 12; Pa839 – 840; Pa844)

In fact, the overwhelming evidence is that the home was connected to the municipal system in 1974, that the existing septic tank was abandoned and not removed, and that Plaintiff's sewer main needed to be replaced after about forty-five (4) years of service. (Pa872; Pa880-892; SOUMF ¶ 17-23.)

Plaintiff suggests in his Complaint that Defendant engaged in an unconscionable practice by failing to discover the septic system, because his business card says that "Septic Inspections" was a service that was offered. Plaintiff, however, did not request a septic inspection (perhaps because he was told affirmatively by the seller and the realtor that the home was connected to the sewer.) Rather, Plaintiff contracted for a home inspection and report … "for the purpose of ascertaining the present physical condition of the premises and/or equipment through a non-destructive visual inspection. The report covers only those portions of the subject property that can be visually inspected and does not

include any portion not actually seen or capable of being seen, i.e., behind ceiling tiles, wall coverings, floor coverings, etc." (Pa799; Inspector's Statement Ex. 2).

Plaintiff agreed that the inspection would be conducted in accordance with N.J.A.C. 13:40-15.16 which provides that a home inspector is not required to, *inter alia*, "Identify concealed conditions or latent defects" (Id. at (b)(4); "identify the presence of, or determine the effectiveness of, any system installed or method utilized to control or remove suspected hazardous substances" (Id. at (b)(14); and most importantly, "determine whether water supply and waste disposal systems are public or private." (Id. at (b)(18).

Plaintiff did not contract Defendant to conduct a "septic inspection" and he did not expect Defendant to tear up the front yard to determine if there was one. (Pa844).

This case is not remotely similar to Shaw v. Shand, 460 N.J. Super. 592 (App. Div. 2019) in which the Appellate Division rejected the application of the "Learned Professional" exception to the CFA to licensed home inspectors. There, the Defendant's report said that "This structure appears to be very well built utilizing quality materials and professional workmanship. It is in need of only typical maintenance and upgrading." (Id. at 601). In fact, however, the house was in poor condition with a leaky roof at the end of its useful life, had a deck/porch which collapsed as the Plaintiffs were moving in and had leaking and rotten

widows and sliding doors. The Defendant home inspector acknowledged having observed problems that he did not include in his report.

Here, there is no such evidence, nor is there any evidence at all that Defendant intentionally made a false statement of a material fact in his report, or that he received any benefit from having done so.

The Consumer Fraud Act declares that:

> The act, use or employment by any person of any commercial practice that is unconscionable or abusive, 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 or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; N.J.S.A. § 56:8-2 (Lexis Nexis, Lexis Advance through New Jersey 220th Second Annual Session, L. 2023, c. 64 and J.R. 10)

Plaintiff has failed to put forth any evidence that the "misrepresentation" he alleges if, indeed it was one, was "unconscionable or abusive, 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." N.J.S.A. 56:8-2. Plaintiff's mere allegation is insufficient to defeat Summary Judgment. Brill v. Guardian Life, 142 N.J. 520 (1995).

Plaintiff's Consumer Fraud claim (Count III) therefore, was appropriately dismissed with prejudice.

POINT V

PLAINTIFF'S BREACH OF AGREEMENT AND COVENANT OF GOOD FAITH CLAIMS (COUNT VI) ARE UNSUPPORTED BY ANY EVIDENCE AND SHOULD BE DISMISSED

The Agreement between the Plaintiff Agreement to inspect the septic system or to uncover a septic system which remained in the front yard of the home. The Agreement made clear that it was for an inspection of "the readily accessible installed systems and components" which are defined as "only those systems and components where Inspector is not required to remove personal items, furniture, equipment, soil, snow or other items which obstruct access or visibility." (Emphasis supplied.)

The regulations governing the conduct of home inspections specifically say that a Home Inspector is not required to determine whether a waste disposal system is public or private. N.J.A.C. 13:40-15.16(b)(18).

Plaintiff, having been told by his seller and realtor that the property was connected to the public sewer (as it clearly was), seeks to hold this Defendant liable for the cost of routine maintenance (the replacement of a forty-five (45) year old sewer main). However, Defendant was under no obligation either by contract

or by regulation to uncover the septic system in the front yard of the home, whether it was functional or abandoned.

Summary Judgment dismissing Count VI was, therefore, appropriately granted.

POINT VI

IN THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT SUMMARY JUDGMENT IS APPROPRIATE

Rule 4:46-2(c) provides that summary judgment should only be entered if "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment as a matter of law." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Of course, the Plaintiff, in opposing the motion, is entitled to have the facts and all legitimate inferences to be drawn from them viewed most favorably to the Plaintiff. Judson v. Peoples Bank of Westfield, 17 N.J. 67, 73-75 (1954).

The Rule defines an issue of fact as "genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion together with all legitimate inferences therefrom favoring the non-moving party, would require the submission of the issue to the trier of fact." R.4:46-2(c).

Here, it is undisputed that Plaintiff's claim is time barred both by the Statute of Repose N.J.S.A. 45:8-76.1 (4 years) and by the contractual limitation contained

in the Agreement between the parties (2 years.) The date of the inspection was June 23, 2014. The Complaint was filed more than six years later, on September 4, 2020. It is respectfully submitted, therefore, that Summary Judgment was appropriately granted.

Further, Plaintiff has not come forward with evidence of what the home inspector did or failed to do which caused him damage, except that the Plaintiff had a septic system on his property which was not detected by Defendant. That fact, alone, is not sufficient for Plaintiff to carry his burden of proof. What a licensed home inspector is required to do, and how he is required to do it, are not common knowledge. A lay jury cannot be expected to know what the professional standard of care of a licensed home inspector is and whether this Defendant deviated from that standard. Plaintiff, to sustain his burden of proof must come forward with expert opinion testimony to establish that the professional standard of care required defendant to detect the septic system (it does not), and how. Kaplan v. Skoloff & Wolff, P.C., supra. Summary Judgment is the appropriate disposition if Plaintiff cannot support his claim with admissible expert opinion testimony. Kaplan, supra at 104.

Additionally, Plaintiff cannot sustain his burden of proving a violation of the Consumer Fraud Act. The entire statement, of which Plaintiff offers only a fragment to argue there was a misrepresentation, is not, in fact a misrepresentation.

The property did appear to be serviced by the municipal sewer system, as Plaintiff himself conceded. Further, the overwhelming evidence is that the property was, in fact, serviced by the municipal sewer system since 1974 at which time the septic system was abandoned in place. The public record shows that the work Plaintiff commissioned in 2020 was to replace the sewer main which had been installed about 45 years earlier and to add cleanouts. Plaintiff has no evidence of an unconscionable commercial practice. It is submitted respectfully that Summary Judgment dismissing Plaintiff's CFA claim is in order.

Plaintiff's allegation of a Breach of Agreement and of the Covenant of Good Faith and Fair Dealing should also be dismissed on Summary Judgment. Defendant did not agree to discover the inaccessible septic system and his Agreement and the Regulations specifically provide he has no obligation to have done so. Plaintiff has acknowledged that he did not expect Defendant to dig up his yard to determine if the property was serviced by the public sewer, and has offered no other evidence or even suggestion how else it might have been discovered.

CONCLUSION

For the reasons hereinabove set forth, it is respectfully submitted that Summary Judgment dismissing all claims against Defendant Don Lehach dba Assurance Home Inspections with prejudice should be affirmed.

Plaintiff argues that because the motion judge accepted his statement that he relied on the Home Inspector's statement that the home was connected to the public sewer, and so determined that there was no reliance on the earlier statements of the seller and realtor, he should not suffer summary judgment as to the home inspector. Plaintiff's misrepresentation of facts to the motion judge on other Defendants' motions, does not make the statements true, and does not create a cause of action against this Defendant. The claim against this Defendant was still brought outside the Statute of Repose; The claim is still unsupported by expert opinion; the report still does not say affirmatively that there was a public sewer connection; the inspector still had no obligation to inspect for a septic system; The statement in the report that the home "appears" to be connected to the sewer is still true; and there is still no evidence that the home was not, in fact, connected to the public sewer.

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Don Lehach d/b/a Assurance Home
Inspections

By: /s/ Thomas D. Flinn
THOMAS D. FLINN

Dated: October 2, 2024

JAMES PARK Plaintiff/ Appellant, vs. LISA A. CLEMMONS, as Executrix of the Estate of Patricia Ann Halligan, ESTATE OF PATRICIA ANN HALLIGAN, TERRIE O'CONNOR REALTORS, MALEEN CREPP, PATRICIA MCKENNA, DON LEHACH dba ASSURANCE INSPECTION SERVICE Defendants/ Respondents,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1440-23 CIVIL ACTION TRIAL COURT DOCKET NO: BER-L-5217-20 SAT BELOW: HON. DAVID N. NASTA, J.S.C.

BRIEF SUBMITTED ON BEHALF OF DEFENDANTS-RESPONDENTS, TERRIE O'CONNOR REALTORS AND PATRICIA MCKENNA

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This brief is submitted on behalf of Defendants/Respondents Terconn, Inc. d/b/a Terrie O'Connor realtors and Patricia McKenna (hereinafter collectively, "Terconn") in opposition to an appeal filed by Plaintiff-Appellant James Park ("Park" or "Plaintiff").

I. PRELIMINARY STATEMENT

This case arises from Plaintiff's purchase of property located at 618 Sloat Place, Riverdale, New Jersey 07675 ("Property") on July 24, 2014. Terrie O'Connor Realtors and real estate agent Patricia McKenna ("McKenna") acted as the listing broker/agent for the seller, Lisa Clemmons ("Seller"). Plaintiff claims that agent McKenna misrepresented in the MLS listing that the Property was connected to the municipal sewer. Plaintiff claims that this misrepresentation constitutes a violation of the New Jersey Consumer Fraud Act ("CFA"), common law fraud and misrepresentation, breach of contract and breach of the covenant of good faith and fair dealing. (Pa1)

Park's claim that McKenna made an affirmative misrepresentation that the Property was connected to the municipal sewer is simply incorrect. Municipal records indicate that the Property was connected to the municipal sewer in 1975. The contractor who was hired to repair a backed-up sink filed a permit and a work order in 2020 stating that he was "replacing sewer main and

two cleanouts from foundation to curb." Moreover, all the parties who have knowledge of the Property including the Seller and the home inspector retained by the Plaintiffs have all stated that they believed that the house was connected to the municipal sewer. Plaintiff has no facts which contradict the record evidence in this case that the house was connected to the municipal sewer. As set forth below the trial court correctly granted Terconn's Motion for Summary Judgement in this matter.

Terconn moved for Summary Judgment as:

- Park could present no facts that Park made any material misrepresentations under the CFA as the record evidence indicates that the Property was connected to the municipal sewer and Park's deposition testimony makes clear that Terconn's listing the Property as connected to the municipal sewer was not material to the Plaintiff's purchase of the Property;

- Terconn is exempt from liability for treble damages and attorney's fees under the Safe Harbor provision of the CFA;

- Plaintiff has no facts that Terconn was aware that its representation in the MLS that the Property was connected to the municipal sewer was false and, as such, Plaintiff cannot support his claim that Terconn is liable for common law fraud; and

- Plaintiff had no contract with Terconn and, as such, has no cognizable claims for breach of contract or breach of the covenant of good faith and fair dealing.

The trial Court appropriately granted Summary Judgment.

II. CONCISE PROCEDURAL HISTORY

Park filed a complaint on September 4, 2020. (Pa1) On December 4, 2020, defendants Terrie O'Connor Realtors and Patricia McKenna filed an Answer to the complaint. (Pa59)

On May 12, 2023, the trial court entered an Order granting summary judgment in favor of defendants Terrie O'Connor and McKenna. (Pa781) Oral argument was held on the same date.

III. CONCISE STATEMENT OF MATERIAL FACTS

Terconn listed the property at 618 Sloat Place, Riverdale, New Jersey 07675 ("Property") on or about July 14, 2014. (Pa604) Terconn listed the Property as being connected to the municipal sewer. (Pa604)

Prior to listing the Property, Terconn listing agent Patricia McKenna ("McKenna") was told by the Seller, Lisa Clemmons ("Seller") that the Property was connected to the municipal sewer. *See* (Terconn's Answers to Plaintiff's Interrogatories, Nos. 46 and 54, Pa623, 626) Prior to listing the Property, Ms. McKenna also received a Seller's Property Condition Disclosure Statement ("Seller's Disclosure") that was completed and signed by the Seller. (Pa629) The Seller represented in the Seller's Disclosure that the Property was serviced by the Public Sewer. (Seller's Disclosure, No. 35, Pa 630) In accordance with the New Jersey Real Estate Regulations, Ms. McKenna performed a visual inspection of the Property prior to preparation of the MLS

listing. (Defendant Terconn's Answer to Plaintiff's Interrogatories, No 41, Pa 621)

After listing the Property, Ms. McKenna provided the Seller's Disclosure to the Plaintiff's agent, Jihee Choi. (Jihee Choi's dep., 43:17-20, Pa 473). Ms. Choi testified that she reviewed the Seller's Disclosure with the Plaintiff. (Choi dep. at 43:21-23, Pa 473).

The Plaintiff entered into a Contract of Sale with the Seller for the purchase of the Property on July 24, 2014. (Pa 636) Under the terms of the Contract of Sale, the Plaintiff had the right to have the Property inspected and evaluated by a qualified property inspector. (Contract of Sale, ¶20 (c), Pa640).

The Plaintiff retained Assurance Homes Inspections property inspector Don Lehach to conduct an inspection of the Property. (James Park dep., 38:22-39:4, Pa423). Mr. Lehach prepared a home inspection report dated July 31, 2014. (Pa647). The Inspection Report states that **"[t]he sanitary waste for the home was provided through the public sewer system."** (Pa657) The Inspection Report also states:

> **Septic System: The home appeared to be connected to the municipal sewer system.**

(Pa664)

Plaintiff testified that he read the inspection report and reviewed it with his real estate agent. (Plaintiff's dep., 40:11-14, Pa423). Plaintiff testified that

"the inspection [report] showed that there's really nothing to worry about as far as [the] sewer system is concerned." (Plaintiff's dep., 24:24-25:2, Pa419)

In response to Terconn's Interrogatory to Plaintiff as to whether Plaintiff contended that the defendants knowingly concealed or suppressed material information regarding the property or additions at the property with the intent that Plaintiff would rely upon same in purchasing the property, Plaintiff responded as follows:

> Yes. Defendants knowingly provided false information as the "municipal sewer connection" in their listing sheet.

(Plaintiff's Answer to Interrogatory No. 46, Pa691)

When asked at his deposition if Park had any facts that Terrie O' Connor Realtors knew that the representation in its listing that the Property was connected to a municipal sewer was false, Plaintiff responded: "I don't know." (Plaintiff's dep., 65:13-66:7, Pa430)

When pressed further as to whether Plaintiff had any facts that Terconn knew its representation was false, Plaintiff responded:

> I'm thinking maybe two years ago I had some sort of evidence. Now I don't know how I came up with this answer.

(Plaintiff's dep. 65:18-23, Pa430)

Produced in discovery was an "Application for House Sewer Connection—Permit" from October 25, 1974 from the Township of River Vale

Board of Health. (Pa332-333) The permit indicates that 45 feet of pipe and two clean outs were to be installed at the Property. (Pa332) The applicant checked "no" as to whether the "septic tank [was] to be emptied and filled with earth." (Pa332) The permit application permit was signed by the owner Richard B. Halligan and the contractor Lombardi. (Pa332) On October 28, 1974, the River Vale Board of Health issued a House Sewer Connection Permit and a Certificate of Approval for House Sewer Connection on October 29, 1974. (Pa335)

In response to an OPRA request to River Vale Township, the Township produced a November 11, 2020 certificate of approval and Construction Permit to Park's contractor for work described as "SEWER LINE – REPLACE MAIN & 2 CLEAN OUTS." (Pa339, 340) The Township also produced a permit application for work that the contractor described as "replace main sewer in front of house from foundation to curb." (Pa342)

At his deposition, Plaintiff admitted that his contractor prepared a Construction Permit application which contained a description of work stating "Sewer Line – ***Replace*** Main & 2 Clean Outs." (James Park dep., 97:19-98:8, Pa438). Plaintiff further admitted that he had "no idea" why the application for the permit was to "***replace*** main sewer … from foundation to curb" rather than to ***install*** the sewer line from foundation to curb. (James Park dep.,

99:22-100:2, Pa438)

IV. LEGAL ARGUMENT

A. THE TRIAL COURT CORRECTLY GRANTED TERCONN'S MOTION FOR SUMMARY JUDGMENT DISMISSING PARK'S CLAIMS UNDER THE NEW JERSEY CONSUMER FRAUD ACT

The Legislature enacted the Consumer Fraud Act (the "CFA") in 1960 to address rampant consumer complaints about fraudulent practices in the marketplace and to deter such conduct by merchants. Thiedemann v. Mercedes Benz USA, LLC, 183 N.J. 234, 245 (2005) citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 11, 860 A.2d 435 (2004) (citing Cox v. Sears Roebuck & Co., 138 N.J. 2, 21 (1994)). As explained in Cox, supra, the CFA sets forth three general categories of unlawful acts: (1) affirmative acts; (2) knowing omissions; and (3) regulatory violations. Thiedemann v. Mercedes Benz USA, LLC, 183 N.J. 234, 245 (2005). As a prerequisite to the right to bring a private action, a Plaintiff must be able to demonstrate that "he or she suffered an 'ascertainable loss ... as a result of' the unlawful conduct." See N.J.S.A. 56:8-19 and Thiedemann supra.

Affirmative acts pursuant to the CFA consist of "any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation." N.J.S.A. 56:8-2. Thiedemann,183 N.J. 234, 245 (2005). Knowing omissions involve the "knowing concealment, suppression or

omission of any material fact." Miller v. American Family Publishers, 284 N.J. Super. 67, 75, 663 A.2d 643, 651 (Ch. Div. 1995). The basis for regulatory violations under the CFA is found in either specific-situation statutes or administrative regulations enacted to interpret the Act itself. See N.J.S.A. 56:8-4; Barry v. Arrow Pontiac Inc., 100 N.J. 57, 70 (1985). Such statutes and regulations define specific conduct that is prohibited by law. Id.

Plaintiff alleges CFA violations as to Terconn for making affirmative misrepresentations in the listing that the Property was connected to the municipal sewer. As set forth below, Plaintiff has no facts supporting an affirmative misrepresentation made by Terconn.

1. Park Cannot Prove Any Affirmative Misrepresentation.

The CFA defines the following practices as unlawful affirmative acts/unconscionable commercial practices: 1) fraud; 2) deception; 3) false promise; 4) false pretense; and 5) misrepresentation. N.J.S.A. 56:8-2; Thiedemann (Supra). To demonstrate an affirmative act, a Plaintiff must demonstrate that the wrongdoer's actions are one of the prohibited actions under N.J.S.A. 56:8-2.

In Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590 (App. Div. 1990) the Appellate Division explained the distinction between affirmative acts and omissions stating:

> N.J.S.A. 56:8-2 thus creates two categories of prohibited acts. The first category (unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation) consists of affirmative acts, and the second category (concealment, suppression or omission of any material fact) consists of acts of omission. The Supreme Court indicated in Fenwick v. Kay American Jeep, Inc., 72 N.J. 372, 378 (1977) that those kinds of consumer fraud consisting of affirmative acts do not require a showing of "intent."
>
> The capacity to mislead is the prime ingredient of deception or an unconscionable commercial practice. Intent is not an essential element. Chattin, 243 N.J. Super. 590, 598.

In this case, Plaintiff simply has no facts that demonstrate that McKenna's statement in the listing that the Property was misleading or an affirmative misrepresentation. The record evidence in this matter is that the Property has been connected to the municipal sewer since 1974. The record evidence also demonstrates that when Park hired a contractor to repair a stopped up bathroom drain, he "***replace[ed]*** [the]main sewer … from foundation to curb" which clearly suggests that he was not installing a new connection to the sewer. Park candidly admitted that he had "no idea" why the application for the permit was to "***replace*** main sewer … from foundation to curb" rather than to ***install*** the sewer line from foundation to curb. (James Park dep., 99:22-100:2, Pa438) .

Park simply has no facts that demonstrate that McKenna's listing the Property as connected to the municipal sewer was false or misleading. The

overwhelming evidence is to the contrary. In addition to the township records discussed above, the Seller completed a Seller's disclosure that the Property was connected to the municipal sewer. Plaintiff' home inspector also stated in his report that the "[t]he sanitary waste for the home was provided through the public sewer system." Plaintiff has the burden of proof on the issue of whether Terconn made a false statement. In view of the record evidence, plaintiff has no facts proving that Terconn's listing was incorrect. Under these circumstances, Park cannot prove that Terconn made an affirmative misrepresentation and the trial court's grant of summary judgment dismissing the CFA claim was correctly granted.

In his appeal brief, Park argues that the basis for the trial court's granting summary judgment was incorrect as the court improperly considered what Terconn knew or should have known through the exercise of due diligence and improperly considered McKenna' intent with respect to her representation in the listing that the Property was connected to the municipal sewer. (App. Br. at 18). Even if this is the case, it well-established case law that a party may only challenge the propriety of the judgment and not the reasoning underlying the court's decision. Bandler v. Melillo, 443 N.J. Super. 203, 209 (App. Div. 2014). In Bandler, supra., the Court held:

> It is well established that because an appeal questions the propriety of action in the trial court, the rationale underlying the action is not

> independently appealable. Therefore, a party may challenge only the propriety of the judgment entered by the trial court, not the reasoning underlying the court's decision. In other words, a party satisfied with or not aggrieved by an action may not complain on appeal about the reasons cited for the action. That rule applies even if the trial court's reasoning is incorrect.

Bandler, 433 N.J. Super. at 209.

Under Bandler, this Court is not bound by the reasons for the lower court's order granting summary judgment. It is respectfully submitted that for the reasons stated in this brief, that the trial court correctly granted summary judgment.

Moreover, it should be noted that the trial court below acknowledged in its opinion that there were municipal records which supported the fact that the Property was connected to the municipal sewer. In his opinion, Trial Judge David Nasta recognized that "the public authority in and of itself lists that this property is connected to a sewer system." (May 12, 2023 Transcript of Motion for Summary Judgment, 22:2-4)

Under these circumstances, the Court correctly granted Terconn's Motion for Summary Judgment dismissing Park's CFA claim.

2. Park Cannot Prove Terconn Made A Material Misrepresentation of Fact In Violation of the CFA

While intent is not required to prove an affirmative misrepresentation under the CFA, the law is clear that not every erroneous statement is an

affirmative misrepresentation prohibited by the CFA. See Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607. To constitute an affirmative misrepresentation, the statement must be: a statement of fact made contemporaneously with the formation of the bargain; material to the transaction; made to induce the buyer to make the purchase; and found to be false. Id. In the context of the CFA, a statement is material if:

> The Statement is made at the time the bargain is struck and not thereafter; a reasonable person would attach importance to it in determining a choice of action; and the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, even though a reasonable person would not so regard it. Cole v. Laughrey Funeral Homes, 376 N.J. Super. 135, 144 (App. Div. 2005); Ji v. Palmer, 333 N.J. Super. 451, 462 (App. Div. 2000) (Citing Restatement (Second) of Torts § 538(2) (1977).

See also Cole v. Laughrey Funeral Homes, 376 N.J. Super. 135, 144 (App. Div. 2005) (holding that in the context of the CFA, a statement is material if "[t]he Statement is made at the time the bargain is struck and not thereafter; a reasonable person would attach importance to it in determining a choice of action; and the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, even though a reasonable person would not so regard it.")

Plaintiff's deposition testimony makes clear that Terconn's listing of the

Property as being connected to the municipal sewer was not material to the Plaintiff's purchase of the Property as the Plaintiff did not rely on the accuracy of Terconn's representation in the listing that the Property was connected to the municipal sewer. Plaintiff testified that he had the home inspection because he did not necessarily "trust whatever information is provided as far as the [listing] is concerned [,]" however, "the inspection showed that there's really nothing to worry about as far as sewer system is concerned." (James Park dep., 24:4-25-2, Pa419) In view of the Plaintiff's admission that that he retained a home inspector, in part, to confirm the accuracy of the Terconn listing, they have no credible argument that the listing was material to their purchase of the Property. As such, the alleged affirmative misrepresentation made by Terconn is not actionable because it was not material to Park's purchase of the Property and the trial court correctly dismissed Park's claim.

3. Treble Damages and Counsel Fees Are Precluded as to McKenna Pursuant to the CFA's Safe Harbor Provision

In this case, Park cannot maintain his claim that he is entitled to punitive damages or counsel fees under the CFA as Park obtained an inspection report from a licensed home inspector and Terconn obtained a Seller's Property Condition Disclosure Statement from the Seller which was provided to the Plaintiff. The CFA provides an exemption to treble damages and counsel fees

to real estate professionals under these circumstances pursuant to the safe harbor provision at N.J.S.A. 56:8-19.1 More specifically, N.J.S.A. 56:8-19.1 states:

> **…** there shall be no right of recovery of punitive damages, attorney fees, or both, … against a real estate broker, broker-salesperson or salesperson licensed under NJ.S.A. 45:15-1 et seq. for the communication of any false, misleading or deceptive information provided to the real estate broker, broker-salesperson…[if he or she]
>
> > a. Had no actual knowledge of the false, misleading or deceptive character of the information; and
> >
> > b. Made a reasonable and diligent inquiry to ascertain whether the information is of a false, misleading or deceptive character. For purposes of this section, communications by a real estate broker, broker-salesperson or salesperson which shall be deemed to satisfy the requirements of a "reasonable and diligent inquiry" include, but shall not be limited to, communications which disclose information:
> >
> > ***(1) provided in a report or upon a representation by a person, licensed or certified by the State of New Jersey, including, but not limited to, an appraiser, home inspector, plumber or electrical contractor, of a particular physical condition pertaining to the real estate derived from inspection of the real estate by that person;***
> >
> > ***
> >
> > ***(3) that the real estate broker, broker-salesperson, or***

> ***salesperson obtained from the seller in a property condition disclosure statement, which form shall comply with regulations promulgated by the director in consultation with the New Jersey Real Estate Commission, provided that the real estate broker, broker-salesperson, or salesperson informed the buyer that the seller is the source of the information and that, prior to making that communication to the buyer, the real estate broker, broker-salesperson, or salesperson visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller. …***

N.J.S.A. 56:8-19.1 (emphasis added).[1]

The CFA's exemption of punitive damages was recognized by the New Jersey Appellate Division in its unpublished opinion, Isaac v. Jeneby stating, "A real estate salesperson may claim exemption from an award of trebled damages and attorneys' fees under the CFA pursuant to N.J.S.A. 56:8-19.1… ." Isaac v. Jeneby, 2006 N.J. Super. Unpub. LEXIS 2971, at *7 (App. Div. July 18, 2006).[2]

In this instance, Terconn is exempt from a claim for treble damages and attorney's fees under the Safe Harbor provision of the CFA. As required under the Safe Harbor provision, Terconn had no actual knowledge of the "false,

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[1] The Legislature has recently amended this Safe Harbor provision in November 2021 and expanded it, providing that there shall be "[n]o cause of action" under the Consumer Fraud Act provided that the same elements are met. While this provision was made prospectively effective in January 2022, the Legislature intends to preclude claims for treble damages and counsel fees in circumstances wherein the licensee had no knowledge and the condition complained of is clear. *See* NJSA 56:8-19.1.

[2] As an unpublished opinion, Isaac v. Jeneby is being cited for its persuasive rather than precedential value. (*See* Isaac v. Jeneby, Pa717)

misleading or deceptive character" of the Seller's representations that the Property was connected to the municipal sewer. In certified answers to Plaintiff's Interrogatories, Terconn stated that agent McKenna was told by the Seller that the Property was connected to the municipal sewer. More importantly, Plaintiff admitted at his deposition that he has no facts that Terconn knew that its representation in the MLS listing that the Property was connected to the municipal sewer was false.

Further, through 1.) the Plaintiff's inspection report stating that the Property "appeared to be connected to the municipal sewer", and 2.) Ms. McKenna providing a Seller's Disclosure statement in which the Seller stated that the Property was serviced by a "Public Sewer", Terconn is deemed under the Safe Harbor Provision to have "made a reasonable and diligent inquiry" to ascertain whether the Seller's representation was false, misleading or deceptive.

The crux of the Plaintiff's claim against Terconn is that it misrepresented in the MLS listing that the Property was connected to the municipal sewer. Here, Terconn secured a seller's property condition disclosure statement by the Seller. Further, the Plaintiff retained a licensed home inspector to conduct an independent investigation of the Property conditions, specifically of the type of sewer system servicing the Property.

This is the precise type of "reasonable and diligent inquiry" by a licensed professional to determine whether information provided by a real estate agent was "of a false, misleading or deceptive character" that is contemplated by the Safe Harbor provision of the CFA. Under these circumstances, Terconn has no liability for treble damages or attorney's fees in the event that the Plaintiff is otherwise able to maintain a cause of action under the CFA against Terconn.

B. THE TRIAL COURT CORRECTLY GRANTED TERCONN'S MOTION FOR SUMMARY JUDGMENT DISMISSING PARK'S CLAIMS FOR COMMON LAW FRAUD

To prevail upon a common law fraud claim, a plaintiff must show by clear and convincing evidence that the defendant (1) made a material misrepresentation of a fact; (2) with knowledge of its falsity; (3) intending that the representation be relied upon; (4) which resulted in reasonable reliance; and that (5) plaintiff suffered damages. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 175 (2006). The plaintiff must prove each element by "clear and convincing evidence." Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989), certif. denied, 121 N.J. 607, 583 A.2d 309 (1990); 539 Absecon Boulevard, L.L.C. Shan Enterprises Limited Partnership, 406 N.J. Super. 242 (App. Div. 2009).

For all the reasons set forth above relative to Parks' claims under the CFA, Park cannot meet his burden of proof as to the elements of fraud. As

stated above, the Plaintiff's claims of fraud fail as a matter of law for the simple reason that Park testified that he has no facts showing that Terconn was aware that the Property was not connected to the municipal sewer. Terconn's unrebutted certified statement in answer to Plaintiff's interrogatories is that agent McKenna was told by the Seller that the Property was connected to the municipal sewer. Terconn made no intentional misrepresentations concerning Property conditions and Plaintiff has no facts to demonstrate that Terconn intentionally omitted any information that the Property was not connected to the municipal sewer.

Further, as the Plaintiff hired his own inspector to investigate whether the Property was connected to the municipal sewer, the Plaintiff cannot prove by clear and convincing evidence that Terconn's listing of the Property was material to the Plaintiff's purchase of the Property, much less that Plaintiff justifiably relied on Terconn's representations to their detriment. Indeed, it was Plaintiff's testimony that the expert's inspection confirmed that the Plaintiff had "nothing to worry about" with respect to the municipal sewer that was believed to be servicing the Property.

For all the reasons set forth above in discussing Plaintiffs' claims under the CFA, Plaintiff likewise is unable to meet the heightened burden of "clear

and convincing evidence" in order to prove fraud and this claim must be dismissed.

C. THE TRIAL COURT CORRECTLY GRANTED TERCONN'S MOTION FOR SUMMARY JUDGMENT DISMISSING PARK'S CLAIM FOR BREACH OF CONTRACT

In this case, Terconn and agent McKenna were the listing broker/agent for the Seller and had no contract with the Plaintiff. As such, the Court correctly granted Terconn's Motion for Summary Judgment and dismissed Plaintiff's claim of breach of contract as a matter of law.

D. THE TRIAL COURT CORRECTLY GRANTED TERCONN'S MOTION FOR SUMMARY JUDGMENT DISMISSING PARK'S CLAIMS FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

In New Jersey, a covenant of good faith and fair dealing is contained in all ***contracts***, and mandates that "neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the ***contract***." Seiden v. Summit Bank, 348 N.J. Super. 243, (App. Div. 2002) quoting Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997). (emphasis added) Case law is clear that the covenant of good faith and fair dealing is implied in all contracts and, as such, the covenant cannot be breached in the absence of a contract. In this case, Terconn and McKenna were the listing broker/agent for the Seller and had no contract with the

Plaintiff. Plaintiff's claim for breach of the covenant of good faith and fair dealing was correctly dismissed by the trial court.

E. PLAINTIFF'S ASSERTION THAT THE COURT IMPROPERLY PROCEEDED WITH SUMMARY JUDGMENT BEFORE THE CLOSE OF DISCOVERY IS FACTUALY INCORRECT

Plaintiff incorrectly argues that the Court improperly granted summary judgment before the close of discovery. Plaintiff's argument is based on the misguided notion that Terconn and other witnesses failed to appear for properly noticed depositions. Plaintiff filed a Cross Motion to Suppress Terconn's Answer or Compel Depositions which was properly denied by the Trial Court. (Pa728, 780) Terconn's stated in its Answer in Opposition to the Motion that Terconn never refused to appear for depositions, never received a deposition notice from Plaintiff's counsel or given any other advance notice that he intended to proceed with the deposition of Terconn. (*See* Exhibit "D" to Terconn's Opposition, Pa589) Terconn is not aware that Plaintiff ever moved to extend discovery if he felt that he needed to depose Terconn's witnesses. The trial court correctly granted Summary Judgment.

F. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT

The New Jersey Supreme Court in Brill v. Guardian Life Ins. Co. of American, 142 N.J. 520(1995) reviewed the summary judgment standard as

previously set forth in Judson v. People's Bank and Trust Company, 17 N.J. 67 (1954), and brought the New Jersey summary judgment analysis into agreement with the federal court standard. Based upon the summary judgment standard as enunciated in Brill, Rooney is entitled to summary judgment.

The Brill court stated that consistent with the national trend, when deciding a summary judgment motion under R. 4:46-2, the trial courts are required to engage in the same type of evaluation, analysis or sifting of evidential materials as required by R. 4:37-2(b)(directed verdict) in light of the burden of persuasion that applies when the matter goes to trial. Brill, 142 N.J. at 539-540. This new standard requires a determination by the Judge as to whether there exists a "genuine issue" of material fact that precludes summary judgment. The judge is to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, presents a genuine issue of material fact. Id., 142 N.J. at 540. The analytical process used by the motion judge is the same as for a directed verdict, namely, whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Id.

Summary Judgment is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of

the merits in the pleadings, depositions and admissions on file, together with affidavits submitted on the motion, clearly show not to be present any genuine material fact requiring disposition at trial. Brill, 142 N.J. at 530 (citing Ledley v. William Penn Life Ins. Co., 138 N.J. 627 (1995). Bare conclusions in the pleadings without factual support and tendered affidavits will not defeat a meritorious application for summary judgment. Milacci v. Mato Realty Co., Inc., 217 N.J. Super 297, 300(App. Div. 1987). Based on these standards, there are no issues of material fact to support Plaintiff's allegations under the New Jersey Consumer Fraud Act, common law fraud, breach of contract, breach of the covenant of good faith and fair dealing or any other theory and summary judgment is proper.

V. CONCLUSION

For all the reasons set forth herein, it is respectfully requested that this Court affirm the trial court's entry of summary judgment and deny the appeal filed by the Plaintiff.

Respectfully submitted,

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