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HARBOR FRONT DEVELOPMENT, LLC Plaintiff v. CLEAR SKIES TITLE AGENCY; RYAN M. MULHOLLAND; AND KEVIN J. MULHOLLAND, Defendants v. EYAL SHAY AND HARBORFRONT VILLAS HOMEOWNERS' ASSOCIATION Third Party Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002025-23 On Appeal From the Superior Court Of New Jersey, Chancery Division, Union County DOCKET BELOW: UNN-C-006-23 SAT BELOW: Hon. Robert J. Mega, P.J. Ch.

THE MULHOLLAND DEFENDANTS' BRIEF IN SUPPORT OF APPEAL

On the Brief:

Avrin Slatkin, Esq.

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PRELIMINARY STATEMENT

Defendants Ryan Mulholland and Kevin Mulholland ("the Mulhollands") appeal from two Summary Judgment Orders entered by the Trial Court on January 5, 2024 (Da1, Da21), and from a February 21, 2024 Order (Da41) denying reconsideration thereof. These Orders granted equitable and monetary relief against the Mulhollands in spite of identifying material factual disputes which, on a properly applied summary judgment standard, mandate the opposite result.

The Orders on appeal unwind a previously-recorded residential real estate transaction, on which the Mulhollands are buyers, by rescinding the recorded deed (Da22). They authorize Plaintiff/Seller Harbor Front Development LLC ("HFD") to retain 10% of the purchase price pursuant to a contractual liquidated damages clause (Da1, Da2). The Trial Court found a question of fact as to whether the Mulhollands fully performed contract obligations (Da13, Da33), but disregarded that issue in entering relief against non-movants, the Mulhollands. Secondly, whether the Plaintiff had properly terminated the contract was another key question of fact the Trial Court identified (Da13, Da33). But again, this question of material fact was disregarded in the award of relief to HFD.

A third error by the Trial Court was, yet again, its disregard of a question of material fact that the Court itself had identified: The Trial Court found an issue of fact as to the enforceability of the time of the essence notice ("TOE") (Da15, Da16, Da36). However, the Court awarded Plaintiff all remedies associated with breach of an enforceable TOE.

Neither of the two counts of HFD's Complaint assert direct claims against the Mulhollands, although the *ad damnum* clause seeks relief against them (Da 164). They are merely necessary parties. The administration of the disputed closing by Clear Skies Title Agency ("Clear Skies"), the closing agent, is the focus of HFD's Complaint, not actions by the Mulhollands.

The Orders on appeal and their accompanying Statements of Reasons reflect errors of law, which this Court should review *de novo.* It is axiomatic that, on a summary judgment motion and cross-motion on which the Mulhollands are non-movants, questions of fact on breach, contract termination and TOE enforceability must be resolved in their favor. Thus, HFD's right of rescission and entitlement to liquidated damages are, at most, issues for trial. In the absence of summary judgment on breach of contract, and mindful of the fact that such a claim is not even part of the Plaintiff's Complaint, an award for liquidated damages and rescission is unsupported.

The Court found that Clear Skies administered the closing improperly. But that closing did occur. The transfer of title was recorded. Following the initial hearing on Plaintiff's Order to Show Cause, the Court denied HFD's application for preliminary injunctive relief. The Mulhollands were granted full possession of the subject property pending further decision by the Court. They paid taxes and mortgage. They rented the property out. They committed no breach, based on a properly applied summary judgment standard. The draconian relief entered against the Mulhollands is unjustified based on the law or any applicable equitable principles. This case should be about money damages to be awarded against Clear Skies.

Simply because the closing was administered improperly, assuming *arguendo* it was, the fact remains that the Court below did not find any breach by the Mulhollands. Not only was there no breach, but there was no enforceable TOE notice, and termination was not effective, at least on a proper summary judgment standard. Thus, in the context of summary judgment motion practice, the Plaintiff was entitled neither to liquidated damages contractual relief nor to the extreme relief of rescission.

Upon the recognition of these oversights, and the application of the proper summary judgment standard to the disputed facts, these three Orders must be reversed *in toto*.

PROCEDURAL HISTORY

HFD commenced the litigation by Verified Complaint and Order to Show Cause (Da164, Da369), naming Clear Skies and the Mulhollands as Defendants. On the initial application, the Trial Court in large part denied the injunctive relief HFD sought, permitting the Mulhollands to remain in possession of the real estate with full rights of title owners. (Da146, Da 149).[1]

After discovery was taken, summary judgment practice followed. (Da64, Da429, Da780). The Mulhollands moved for summary judgment to dismiss them from the case, and HFD moved for summary judgment against Clear Skies. Id. HFD also cross-moved for summary judgment for relief against the Mulhollands, albeit no separate cause of action against the Mulhollands had been asserted in the Verified Complaint.

The Mulhollands do not appeal from those portions of the Orders granting summary judgment against Clear Skies on liability. It is the award of remedies against the Mulhollands, which the Trial Court ordered upon finding liability by Clear Skies, rather than proceeding to trial on money damages due from Clear Skies, from which the Mulhollands appeal.

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[1] The Mulhollands filed third-party actions against Eyal Shay ("Shay") and Harborfront Villas Homeowners' Association ("HVHA"). Those claims were subsequently dismissed upon settlement with HVHA and with the adjudication of a summary judgment motion as to Shay.

STATEMENT OF FACTS

This case arises out of a disputed residential real estate closing which was administered by Defendant Clear Skies.

The Mulhollands' Statement of Uncontested Material Facts on summary judgment below ("SUF") (Da 418), along with other portions of the motion record sets forth the following:

HFD is a real estate developer which was the seller of a townhouse located in a new development on the Elizabeth, New Jersey waterfront. (Da419, SUF ¶1). HFD claims that Clear Skies completed the disputed closing and disbursed funds without its authorization to do so(Da419,SUF ¶2). The sole defendants are Clear Skies and the Mulhollands. (Da419, SUF ¶3).

The Verified Complaint alleges two counts. (Da164). The first count is for declaratory judgment. Plaintiff asks the Court to declare that Clear Skies' "unauthorized actions" in closing the transaction be declared "null and void," and demands a rollback of the closing. (Id. at. ¶60). Count Two of the Complaint is titled "Breach of Fiduciary Duty – Against Title Agent." (Id. at. ¶61-69) . Plaintiff alleges, *inter alia*, that Clear Skies owed Harbor Front a fiduciary duty, which it violated by not adhering to the Plaintiff's closing conditions and by repudiating HFD's direction to not proceed with closing. Id. at. Count Two.

Count Two does not implicate the Mulhollands, except in that it seeks injunctive relief related to their property, and thus there is no substantive cause of action against the Mulhollands which Plaintiffs must prove at trial. The Mulhollands are in the case as interested parties, as titleholders in the townhouse that was subject to the disputed transaction. HFD asserted no count for breach of contract, tortious interference, breach of duty of good faith and fair dealing, or alleging any other substantive cause of action, against the Mulhollands.

The Mulhollands had no role in determining how the closing was administered (Da421, SUF ¶17). They and their attorney were not copied on the closing instructions from Seller's Attorney that, Seller alleges, Clear Skies failed to observe. (Da421, SUF ¶18). The Seller's principal himself signed a closing disclosure authorizing the disbursement of funds in accordance with the closing statement provided by Clear Skies in advance of closing. (Da421, SUF ¶19). That closing disclosure stated:

> Acknowledgement
> We/I have carefully reviewed the ALTA Settlement Statement and find it to be a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction and further certify that I have received a copy of the ALTA Settlement Statement. We/I authorize Clear Skies Title Agency to cause the funds to be disbursed in accordance with this statement.

The seller sent the title agency documents in escrow, signed the settlement statement and made no other objections to the closing aside from declining a request from the Mulhollands' lender, Paramount Residential Mortgage Group's ("PRMG"), that HFD sign a buydown agreement, which request was later withdrawn. (Da421, SUF ¶20).

In any event, the Buyers had no duty to the Seller other than to fulfill their contractual obligation to meet the terms and conditions of the Purchase Agreement ("PA"), which they did. (Da420, SUF ¶ 7). The closing process was administered by the title company, Clear Skies. (Da421, SUF ¶21). Ryan Mulholland appeared at the Clear Skies closing office in Jersey City, as he was instructed to do, and signed the papers with which he was presented. (Da421, SUF ¶ 22). The funds for closing were paid by the Mulhollands and PRMG. (Da421, SUF ¶23). Clear Skies released those funds to the Seller. (Da422, SUF ¶24). Ryan Mulholland was told, by the Seller, that he was to receive the keys to the property, but the Seller refused and reneged, in spite of the fact that it had received the payment wire in full, until it was faced with a Court Order compelling it to deliver the keys to the Mulhollands, (Da422, SUF ¶25). Following the closing, the Seller's attorney warned the Mulhollands that they would be considered trespassers if they went to the townhouse, notwithstanding that they had paid for it in full and title had been

recorded. (Da422, SUF ¶ 26). The Seller demanded an additional $50,000. (Da422, SUF ¶27).

The Verified Complaint's only *ad damnum* clause, which follows the second count, seeks both injunctive relief and money damages. It reads as follows:

> WHEREFORE, HFD requests that this Court enter a Declaratory Judgment against Defendants as follows:
> (a) Temporarily, Preliminarily, and Permanently enjoin all Defendants from recording the deed;
> (b) Temporarily, Preliminary [sic], and Permanently enjoin all Defendants from transferring deed to the Property, or taking any other action to impair Plaintiff's rights in the Property;
> (c) Temporarily, Preliminary, [sic] and Permanently enjoin Mulholland from taking possession of the Property;
> (d) Authorizing the Plaintiff to deposit the funds received into Court;
> (e) Declare Title Agent's delivery of the Closing documents to be illegally delivered and accordingly of no force or effect whatsoever;
> (f) Declare the Contract validly terminated;
> (g) Declare the Closing null and void;
> (h) Award HFD liquidated damages "in an amount equal to ten percent (10%) of the total purchase price" pursuant to Paragraph 16 of the Contract; and
> (i) Award any such further relief that this Court deems just and proper.
>
> (Da422, SUF ¶27)

As for the transaction itself, the PA is dated May 1, 2021. It states, in the very first section:

> 1. PURCHASE AND SALE: Seller agrees to sell and convey the Property to Buyer, and Buyer agrees to purchase the Property from Seller, upon the terms and conditions of this Agreement.
> (Da423 SUF ¶29)

¶

The PA provides at Paragraph 2 the following:

> CLOSING OF TITLE: The closing of title shall take place at the location that Seller shall direct, and is tentatively scheduled for the date listed on the cover page (the "Estimated Closing Date"). Seller will provide Buyer with at least ten (10) days written notice of the closing date. When so scheduled, the date and time of closing shall be "OF THE ESSENCE". This means that failure by Buyer to close at the time specified shall be considered a breach and default of this Agreement. If Buyer is unable to or refuses to close on the date and time specified by Seller, at Seller's option, Seller may exercise its rights set forth in Paragraph 16 of this Agreement or have Buyer reimburse Seller at or before closing for Seller's total reasonable carrying and administrative costs for postponing the closing to another time, date or place specified by Seller. Buyer agrees that Seller may cancel any Time of the Essence closing without penalty. Seller reserves the right, at its sole option, to conduct closing (i.e., transfer of title) by mail or electronically. Buyer will pay the balance of the Purchase Price due at closing of title by wire transfer.
> (Da88)

Section 4 of the PA provides:

> 4. TITLE: Upon receipt of the full purchase price at closing, Seller agrees to deliver a "Bargain and Sale Deed with Covenants against Grantor's Acts" ("Deed") conveying good and marketable title, free and clear of all liens and encumbrances…
> (Da423, SUF ¶30)

The PA, at Paragraph 16, provides the Seller the right of termination only upon the Buyer's breach, as follows:

> 16. DEFAULT OF BUYER; LIQUIDATED DAMAGES: If Buyer fails to make payments, violates any of the conditions or covenants or fails, for any reason, to complete the purchase in accordance with this Agreement, or if Buyer shall be declared bankrupt or insolvent or shall make an assignment for the benefit of any creditors, or shall be placed under the control or under the custody of any court, or otherwise breaches this Agreement, Buyer will be in default. If Buyer is in default, this Agreement at the option of Seller, may be terminated, and all deposits made by Buyer in an amount equal to ten percent (10%) of the total purchase price, plus the contract price of any payments for options and extras, shall be retained by Seller as liquidated damages. Liquidated damages are a fixed amount to be paid to Seller which the parties agree will be a reasonable estimate of the damages in the event of Buyer's default, since Seller's actual damages would be difficult to establish. If the deposit monies are less than that liquidated sum and Buyer fails to pay the additional sums after demand, then Seller may institute legal proceedings to recover the remaining amount due. If Seller elects to retain money as liquidated damages, this Agreement shall be of no further effect in which event Seller agrees to return to Buyer all excess money above the described sum previously paid by Buyer, if any. No delay or forbearance by Seller in exercising any right or remedy hereunder shall be deemed to be a waiver thereof
> (Da 423, SUF ¶¶ 29-30).

The PA estimates a closing date of July 15, 2021. (Da424, SUF ¶ 32). The completion date of "July 15th or before" was confirmed by Seller's listing agent by email dated May 24, 2021. (Da424,SUF ¶32). On October 25, 2021, the Seller delayed the closing back to January 15, 2022, purportedly "due to supply chain delays, Hurricane Ida and general market delays due to Covid." (Da424, SUF ¶33). On January 7, 2022, the Seller's listing agent, Meilyn Torres, wrote:

> The units won't be closing until February 15th to the end of the month according to the general contractor...The property is not ready, we need to wait for construction to be completed. Thank you for your understanding.
> (Da 424, SUF ¶ 34)

On February 10, 2022, Ms. Torres wrote:

> As you can see on the attached Page 4 of the PA Seller have [sic] a grace period of 180 days from date of original closing date and in case of force majeure additional extension.
>
> in addition- as the sales agent shared with your client and the seller's attorney as well, the entire industry is suffering from severe shortage and abnormal weather condition on the last few month [sic] that cause delays that we couldn't predict.
>
> Having said that, we are pushing the job and our new estimated dates are still within the 180 days period.
>
> So as for realistic estimated time for construction under the circumstances we are keeping it realistic as we can.

> **The new estimated closing date for D14 Unit is April 15, 2022. Please keep in mind the grace period in case any needed additional extension.** (bold in original)
> (Da424-425, SUF ¶ 35)

On April 6, 2022, the Mulhollands' attorney followed up. He wrote that the Buyers were previously informed in writing that the properties would be ready for closing on April 15, 2022, but that the property was not anywhere close to completion. (Da425, SUF ¶ 36). Counsel requested a realistic date for closing and emphasized that the builder "may be intentionally delaying the project in the hopes that these transactions are cancelled in this environment of ever-increasing real estate prices." (Da 425, SUF ¶ 37). On April 13, 2022, the Seller's attorney responded, "I believe the units are very close to being finished and will be finished and that it makes sense for your clients to wait for delivery." (Da425, SUF ¶ 38). On July 20, 2022, Ashley Furman, who is with PRMG, states that he and his team had reached out to the developer and its listing agents "several times as to the status of the property and have had little or no response." (Da425, SUF ¶39). On August 2, 2022, the Seller's listing agent wrote "Property was not completed yet." (Da425, SUF ¶ 40).

The closing was eventually scheduled for December 20, 2022 by the Buyers' and Seller's real estate attorneys. (Da425, SUF ¶ 41). PRMG presented the seller a proposed "buydown agreement" for signature. (Da425,

SUF ¶42). The Mulhollands did not seek the Seller's signature on the buydown agreement. That was done solely at the initiative of PRMG. (Da 426, SUF ¶ 43). The Seller objected and declined to sign the buydown agreement, presenting an impediment to closing. (Da 426, SUF ¶ 44). All other requirements for closing had been met. (Da426, SUF ¶ 45).

Ultimately, the Buyers closed without the benefit of the buydown agreement lowering the mortgage interest rate. When the buydown agreement no longer was an issue, because the Seller's signature was no longer needed, Clear Skies finalized the closing and disbursed the funds to the Seller (Da426, SUF ¶ 45, 47).

The Seller disputed Clear Skies' authorization to close title, relying on the letter from its Counsel dated November 28, 2022 (Da426, SUF ¶48). Clear Skies then wrote as follows to the Seller's attorney:

> The closing has been finalized. The bank provided us with funding approval. From our settlement standpoint, we received the funds from the bank, funding approval, and signed seller and buyer CD [closing disclosure]. This transaction is deemed closed and the seller is in receipt of his funds.
> (Da426, SUF ¶49)

Clear Skies submitted the title conveying the property for recording on January 13, 2023, and it was duly recorded (Da426-427, SUF ¶50). The Mulhollands commenced paying mortgage and taxes.

Almost simultaneously with the recording of title, and apparently unaware of the recordation, HFD filed an order to show cause application to enjoin the recordation of title and enjoin the Mulhollands from taking possession. (Da427,SUF ¶ 51).

At the oral argument on the Order to Show Cause, the Seller's attorney openly acknowledged that "We are not alleging that we terminated due a time of the essence." (Da428, SUF ¶59, Da377 at 25: 5 – 25:6). The Court engaged in colloquy , questioning Seller's right to terminate. A portion of the transcript reads as follows:

> THE COURT: -- what -- what gave you the unilateral right to exercise I guess either paragraph 16 or paragraph 27 in the contract to set – paragraph 7 [sic] -- I'm sorry, 27 is your notice paragraph, and you're saying -- and my question is --
>
> MR. WEBER: That -- that relates to a breach for a time of the essence for a failure to close, but --
>
> THE COURT: Okay.
>
> MR. WEBER: -- I would dispute that that is not the only reason somebody can terminate a contract. That is --
>
> THE COURT: But -- but --
>
> MR. WEBER: -- one reason someone can terminate --
>
> THE COURT: -- but you're saying --
>
> MR. WEBER: -- a contract.
>
> THE COURT: Okay -- I agree. But you're saying we're going back to the breach of time is of the essence based on the letter that everybody signed that wasn't dated.
>
> MR. WEBER: No, I'm not. I didn't --
>
> ****
>
> MR. WEBER: Our termination letter is based on -- it doesn't say time -- time of the -- we're -- time of the essence don't appear in our termination -- I'm pretty sure they do not

> appear in our -- in our termination letter. It's all about this very strange demand and interaction with the lender demanding that we sign some -- some documents that we were not comfortable signing, and -- and we declared that to be an anticipatory breach of the contract that you are unable to close and therefore we exercise ...
>
> (Da390-391, 23:20 – 26:2)

As is apparent from the above colloquy, as well as Mr. Shay's deposition testimony (see p. 17 below), HFD was groping for an excuse to terminate, in spite of the fact that there was no breach by the Mulhollands. The actual facts are that the purported termination letter most certainly did assert a time of the essence breach, front and center. The purported termination letter states, in the very first sentence detailing the Seller's rationale for its attempt at termination: "You have continuously failed to meet your obligation to close on a timely basis after Seller demonstrated its being ready, willing, and able to close." It later states: "You are in in material default for failing to close up until now." (Da454). There is no other act or omission by the Buyers that is cited.

The purported termination letter goes on to complain that PRMG demanded a buydown agreement. The Contract provides no right of termination to a Seller who, to quote from the above colloquy, objects to a "very strange demand and interaction with the lender demanding that we sign some -- some documents that we were not comfortable signing." That demand

was withdrawn, in any event. Seller received the closing funds and has no cause for complaint, most certainly against the Mulhollands.

At the return date of the Order to Show Cause, on February 17, 2023, the Court substantively denied Plaintiff's application for preliminary restraints and ordered that the Mulhollands be granted possession and be given the keys , thus rejecting the Plaintiff's request to unwind the closing and revoke the recordation of title. (Da 427, SUF ¶ 52).

The Seller, however, notwithstanding the Court's initial Order, continued to refuse the Mulhollands their right to access the property and tried to force Ryan Mulholland to sign an acknowledgment that he is a "temporary possessor" of the property, and a form listing HFD as the "property owner," as a condition of handing over the keys. (Da148, SUF ¶ 53). The Mulhollands were denied membership in the homeowners association, which is under the control of the principal of HFD, so that they would not have garbage pick-up like their neighbors do. (Da427, SUF ¶54).

Rather than abide by the Court's crystal clear ruling on the show cause application, the Plaintiffs filed a second application, this time by notice of motion, to obtain court approval of its continuing efforts, even after the Court largely denied the order to show cause, to deprive the Mulhollands of their ownership rights and privileges. (Da427, SUF ¶ 55). In ruling on that motion ,

again in the Mulhollands' favor, the Court reiterated that the Mulhollands "have the equitable right to act as if they were the fee simple owners of the Property. This provides the Mulhollands with all the rights that come with such a position ... [and] ... shall continue until such time that the Court issues a contrary order." (Da427-428, SUF ¶56).

At his deposition, Plaintiff's principal Eyal Shay, who went to law school in Israel, sought to lay out an imaginative case for breach of contract, which is not even a cause of action raised in the Plaintiff's complaint, based on the Buyers' alleged failure to close. He very frankly acknowledged that he tried to cancel the transaction because he was receiving, what he considered to be, too many harassing emails and phone calls from PRMG. (Da428, SUF ¶ 57).

The Seller sent a purported termination letter to Ryan Mulholland on December 22, 2022, which cites no breach by Buyers aside from the claim of time of the essence that was later retracted. Harbor Front subsequently disavowed that "justification," and in fact repudiated it. (The letter states: "You have continuously failed to meet your obligation to close on a timely basis"; but at the initial hearing, HFD's Counsel stated, "We are not alleging that we terminated due to a time of the essence"). (Da428, SUF ¶¶ 58, 59).

In spite of moving for summary judgment based in part on enforcement of a TOE notice, HFD admits that it had not given authorization to Clear Skies to close the transaction on the purportedly appointed day. HFD itself was, admittedly, not ready, willing and able to close on that day.

In granting HFD's Motion for Summary Judgment against Clear Skies, the Court found that Clear Skies had improperly released closing documents from escrow without having received authorization from Plaintiff to do so. The Court declared on summary judgment that "Clear Skies breached its fiduciary duty owed to Plaintiff and lacked authority to deliver Plaintiff's Closing documents out of escrow, rendering the Closing null and void." (Da

In the Statements of Reasons accompanying the January 5, 2024 Orders, the Court states as follows:

> [A] question of fact exists as to the date upon which Plaintiff provided the Mulhollands with written notice of the December 20, 2022 Closing.
> (Da 15, Da 35)
>
> ...a question of fact exists as to whether Plaintiff provided Defendants with ten days' notice of the Closing and whether the Closing was "of the essence" pursuant to Paragraph 2 of the Agreement.
> (Da 15, Da 36)
>
> Moreover, clear questions of fact exist as to whether Plaintiff properly terminated the Agreement and whether the Mulhollands performed all contractual duties owed to Plaintiff.

(Da 13, Da 36)

The Court, in granting the Plaintiff's Cross-Motion for Summary Judgment against the Mulhollands, Ordered as follows:

> The Court hereby DECLARES that Plaintiff validly terminated the May 1, 2021 Purchase Agreement between Plaintiff and the Mulhollands ("Purchase Agreement") pursuant to Paragraph 2 and Paragraph 16; additionally
>
> The Court hereby DECLARES that pursuant to Paragraph 16 of the Purchase Agreement, Plaintiff is awarded ten percent (10%) of the total purchase price as liquidated damages, or $55,000, which amount shall be due immediately. The Court directs Plaintiff to immediately return the Mulholland Defendants' closing funds ($521,489.85), less $55,000, to the Mulhollands;
> (Da 1 – Da 2)

The Order granting the Plaintiff's Motion for Summary Judgment[2] finds that Clear Skies delivered Plaintiff's closing documents out of escrow without HFD's authorization to do so:

> The Court hereby DECLARES the December 23, 2022 closing for the property located at 14 Harbor Front Terrace, Elizabeth, New Jersey 07206 (the

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[2] The Orders are inconsistent: The Order granting Plaintiff's Motion for Summary Judgment Against Clear Skies (Da 21) directs Plaintiff to deposit all monies received at closing into the Superior Court Trust Account, while the Order granting Plaintiff's Cross-Motion for Summary Judgment (Da1) directs Plaintiff to return those funds to the Mulhollands, less $55,000 which the Plaintiff is awarded as liquidated damages.

> "Property" or "Unit D-14") is hereby null and void; additionally
>
> The Court hereby DECLARES that the recorded deed for the Property (Instrument 25944, recorded at Book 6496, Page 2615 to Page 2620) is hereby rescinded and cancelled; additionally
>
> The Court hereby DIRECTS the Clerk of Union County to remove Instrument 25944, recorded at Book 6496, Page 2615 from the land use records and to record this Order; additionally
>
> The Court hereby DIRECTS Plaintiff to deposit within ten (10) business days the closing funds it received on or about December 23, 2022 ($521,489.85) into the Superior Court Trust Account, where such funds shall be held pending further Order of the Court; and it is further
>
> (cldear 21 – Da 22)

The Mulhollands filed a motion for reconsideration from these Orders, which was denied. (Da41). In its Statement of Reasons addressing the disputed fact regarding the TOE notice, cited in its Summary Judgment Statements of Reasons, the Lower Court stated:

> While the Court initially questioned the fact as to when the time of essence notice was provided, it determined that such a question does not prevent its enforcement of paragraph 2, given, in part, that the Parties mutually agreed to set a Closing date in an addendum which provided that "[i]n all other aspects, the Contract shall remain the same." Here, instead of Plaintiff sending Defendants a unilateral notice to appear, the Parties—all of whom were represented by counsel in the transaction—mutually agreed to set the Closing date for December 20, 2022.

(Da53)

The Lower Court, in denying reconsideration, justified the result on the summary judgment motions with an additional holding that there had been an anticipatory breach of the PA. (Da 54 – Da 55). The Court, in so holding, cited not the Mulhollands' own conduct, but that of their Lender, PRMG, as follows:

> Given that the lender chosen by and acting on behalf of the Mulholland Defendants clearly indicated it would not fund the Property absent Plaintiff agreeing to sign an agreement which Plaintiff was not obligated to sign, the Mulhollands could not render the agreed upon performance. The lender's conduct of (i) threatening legal action against Plaintiff if Plaintiff did not sign the Buydown Agreement, (ii) refusing to fund the purchase price for the Property unless Plaintiff signed the Buydown Agreement, (iii) confirming that "the transaction will go on hold until all parties have signed" the Buydown Agreement, and (iv) sending hostile text messages to Plaintiff regarding the Buydown Agreement serves to further demonstrate that Plaintiff was justified as treating the Mulhollands' failure to fund the purchase price on December 20, 2022 as anticipatory breach. Thus, given that funding of a property's purchase price is clearly a material term of a contract for the sale of same, Plaintiff was clearly entitled to treat the contract as terminated. Id. .
> (Da55)

The Court did not discuss, much less find, any agency relationship between the Lender and the Mulhollands insofar as the Mulhollands' rights under the PA

are concerned (or otherwise). No facts to support any agency relationship an exist in the record (or otherwise).

In the Statement of Reasons denying reconsideration, the Court cited a second additional reason for its summary judgment decisions:

> The Court further takes this opportunity to reiterate that irrespective of whether Defendants believed at the time that Plaintiff's termination letter was effective, Clear Skies still lacked authority to release Plaintiff's Closing Documents and the Mulhollands still went through with the Closing despite acknowledging Plaintiff's position that they would not sign the buydown agreement or otherwise authorize the transaction. Even if the Court did not find the termination letter to be effective, the Closing legally could not and *should no*t have occurred. (emphasis in original (Da 55)

LEGAL ARGUMENT

POINT I
THE ORDERS ON APPEAL HAVE BEEN CERTIFIED AS FINAL AND ARE APPEALABLE AS OF RIGHT

The February 21, 2024 Order provides that it is:

> Certified as final pursuant to R.4:42-2 , as to the issues contained herein, and the issues addressed in the Court's underlying Orders entered on January 5, 2024.

It also provides that:

> [T]his Court's January 5, 2024 Orders granting Plaintiff's Motion for Summary Judgment, Denying

> the Mulholland Defendants' Motion for Summary Judgment, and Granting Plaintiff's Cross Motion for Summary Judgment are herein Certified as Final pursuant to R. 4:42-2, for reasons set forth below.

Thus, the Orders on appeal are certified as final pursuant to New Jersey Court Rule 4:42-2, which permits the certification of an interlocutory judgment as final for the purposes of appeal.

The Orders on appeal have, in effect, been executed upon, as the injunctive relief for which they provide, namely the rollback of the closing that had occurred, and the return of title to Plaintiff, have been effectuated. The liquidated damages component of the award has been retained by the Plaintiff.

New Jersey Court Rule 2:2-3(b)(3) provides that orders properly certified as final under R. 4:42-2 are appealable as of right.

POINT II
THE TRIAL COURT'S RULINGS ARE SUBJECT TO *DE NOVO* REVIEW, AND THIS COURT MUST PROPERLY APPLY THE SUMMARY JUDGMENT STANDARD[3]

Appellate courts review the trial court's grant or denial of a motion for summary judgment *de novo*, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J.

[3] Point X of Defendant's Appeal is, *arguendo*, subject to a plain error standard, as noted therein.

567, 582 (2021). That standard requires the court to "determine whether 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.' " Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (quoting R. 4:46-2(c)).

Accordingly, New Jersey Court Rule 4:46-2 requires the court to determine "whether the competent evidential materials presented, *when viewed in the light most favorable to the non-moving party*, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (emphasis added). A trial court, on summary judgment, is not to usurp the fact-finding role of the jury. See Sons of Thunder v. Borden, Inc., 148 N.J. 396, 415 (1997). "[W]here men of reason and fairness may entertain differing views as to the truth of testimony, whether it be uncontradicted, uncontroverted or even undisputed, evidence of such a character is for the jury." Ibid. (quoting Ferdinand v. Agricultural Ins. Co. of Watertown, 22 N.J. 482, 494 (1956)); see Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399 (App. Div. 2015).

POINT III
THE TRIAL COURT PROPERLY IDENTIFIED QUESTIONS OF MATERIAL FACT ON TERMINATION AND BREACH, LEADING TO REVERSIBLE ERROR, BUT IMPROPERLY DISREGARDED THEM

In the Statements of Reasons accompanying the January 5, 2024 Orders, the Court states as follows:

> Moreover, clear questions of fact exist as to whether Plaintiff properly terminated the Agreement and whether the Mulhollands performed all contractual duties owed to Plaintiff.
> (Da 13, Da33)

This recitation identifies two "clear questions of fact": Did Plaintiff properly terminate the PA? Did the Mulhollands perform all contractual duties? These would be key questions for a fact-finder at trial, requiring consideration of witness credibility and other additional evidence. The Trial Court seemed plainly to acknowledge this.

Having clearly identified those questions of fact, the motion judge was obligated to resolve them in the Mulhollands' favor for the purposes of summary judgment, on HFD's motion and cross-motion. That is, as a jury (or in this case, in Chancery - General Equity, a judge sitting as fact-finder at trial) could find upon hearing testimony at trial that the PA was not properly terminated, and the Mulhollands performed all their contractual duties. These

issues must be resolved in the Mulhollands' favor on summary judgment motion practice.

HFD, the summary judgment movant, is entitled to summary judgment only if the Mulhollands have not demonstrated the existence of a dispute whose resolution in their favor will ultimately entitle HFD to judgment. See Current New Jersey Court Rules, Pressler & Verneiro, comment 2.1 to R. 4:46-2 (Gann 2025). The Court below repeatedly and definitively acknowledged the Mulhollands had established questions of fact, on no fewer than three different material issues, yet entered judgment against them, and in the total absence of a cause of action against them, notwithstanding.

The Order granting Plaintiff's Cross-Motion for Summary Judgment against the Mulhollands provides:

> The Court hereby DECLARES that Plaintiff validly terminated the May 1, 2021 Purchase Agreement between Plaintiff and the Mulhollands ("Purchase Agreement") pursuant to Paragraph 2 and Paragraph 16.

The contradiction is clear: How can the Court, on a summary judgment motion brought by HFD, in a case in which breach of contract had not even been pleaded, and in which the Court had found questions of fact as to whether the PA had been properly terminated, and whether the Muhollands had performed all contract obligations, declare that Plaintiff had validly terminated?

The right of termination under the PA arises only in the event of default, as follows:

> 16. DEFAULT OF BUYER; LIQUIDATED DAMAGES: If Buyer fails to make payments, violates any of the conditions or covenants or fails, for any reason, to complete the purchase in accordance with this Agreement, or if Buyer shall be declared bankrupt or insolvent or shall make an assignment for the benefit of any creditors, or shall be placed under the control or under the custody of any court, or otherwise breaches this Agreement, Buyer will be in default. If Buyer is in default, this Agreement at the option of Seller, may be terminated, and all deposits made by Buyer in an amount equal to ten percent (10%) of the total purchase price, plus the contract price of any payments for options and extras, shall be retained by Seller as liquidated damages. Liquidated damages are a fixed amount to be paid to Seller which the parties agree will be a reasonable estimate of the damages in the event of Buyer's default, since Seller's actual damages would be difficult to establish. If the deposit monies are less than that liquidated sum and Buyer fails to pay the additional sums after demand, then Seller may institute legal proceedings to recover the remaining amount due. If Seller elects to retain money as liquidated damages, this Agreement shall be of no further effect in which event Seller agrees to return to Buyer all excess money above the described sum previously paid by Buyer, if any. No delay or forbearance by Seller in exercising any right or remedy hereunder shall be deemed to be a waiver thereof
> (SUF ¶¶ 29-30).

There is no other contractual provision for termination of the PA. There is no

finding on summary judgment that the Mulhollands were in default, and such a claim was not even pleaded by Plaintiff.

It must be taken, for the purposes of summary judgment motion practice in which the Mulhollands are non-movants, that they were not in breach, as a finder of fact could reasonably so determine. Thus, since the only basis for termination can be breach, and there is a question of fact as to whether the Mulhollands breached, the award of contractual relief on summary judgment is a legal error. Accordingly, rescission and liquidated damages were improperly granted.

POINT IV
THE COURT IGNORED ITS OWN FINDING OF QUESTIONS OF FACT AS TO ENFORCEABILITY OF THE PURPORTED TIME OF THE ESSENCE NOTICE

The Statements of Reasons accompanying both summary judgment orders on appeal state:

> [A] question of fact exists as to the date upon which Plaintiff provided the Mulhollands with written notice of the December 20, 2022 Closing.
> (Da 35)
>
> ...a question of fact exists as to whether Plaintiff provided Defendants with ten days' notice of the Closing and whether the Closing was "of the essence" pursuant to Paragraph 2 of the Agreement.
> (Da16)

Yet, the Court enforced the termination rights that are triggered only upon breach of contract. This contradiction, yet again, is irreconcilable.

A. THERE IS A COMPLETE ABSENCE OF EVIDENCE TO DEMONSTRATE THAT THE PURPORTED TIME OF THE ESSENCE IS ENFORCEABLE

The PA at Section 2 provides that a notice of TOE must be issued on at least ten (10) days written notice of the closing date. A purported TOE executed on December 19, 2022 for a December 20, 2022 closing is ineffective. It is also invalid under the relevant case law, as discussed below.

The undated Contract Addendum which the Lower Court cited as a purported time of the essence ("TOE") notice was fully executed on December 19, 2022 at or about 11:20 a.m., when Plaintiff's principal Eyal Shay became the last of the signatories to execute it electronically, utilizing DocuSign. (Da765, Par. 3). It could not have been finalized and transmitted as an enforceable document prior to its execution. In fact, that Eyal Shay was the last one to sign it suggests that it was not HFD at all that promulgated the Contract Addendum. The Mulhollands' real estate counsel certifies to that chronology (Da765), while the Plaintiff's summary judgment papers notably omit any contrary factual contention. The Certification of Shepherd Federgreen, Esq., Plaintiff's real estate counsel, is deafeningly silent as to the date of the document, and in fact does not certify that it was sent by

Seller/Plaintiff at all. (Da438). The party contending that time is of the essence of the contract has the burden of proof thereon. Safeway Sys., Inc. v. Manuel Bros., 102 R.I. 136 (1967).

The Plaintiff's Statement of Uncontested Facts does not even assert, much less establish, that the Contract Addendum was promulgated by Plaintiff. If anything, the enforceability of the TOE by the Court should have been viewed as an undisputed fact in the Mulhollands' favor. There is no evidence that it was HFD's notice at all. At the very least, these are disputed facts, and the Mulhollands are entitled to the benefit of favorable inferences. The purported TOE enforceability remains an issue for the finder of fact at trial, not appropriate for summary judgment on the papers.

The Contract Addendum which Plaintiff relies upon as the purported TOE reads:

ADDENDUM TO CONTRACT BETWEEN
Ryan Mulholland and Nanci Mulholland
(hereinafter "BUYERS") and
Harbor Front Development, LLC
(hereinafter "SELLER") for property known as
14 Harbor Front Terrace, Elizabeth, NJ 07206.

WHEREAS, Buyer and Seller have previously entered into a Contract of Sale on May 3, 2021 for the property known as
14 Harbor Front Terrace, Elizabeth, NJ 07206.

Now, this contract shall now be amended as follows:

> 1. Nanci Mulholland is removed from the contract.
> 2. Kevin Muholland [sic] shall be added as an additional Buyer.
> 3. The purchase shall be $558,000.
> 4. Seller shall provide buyer with a $8,000 credit for closing costs and prepaid expense.
> 5. Closing shall take place in or before December 20, 2022
>
> In all other respects the Contract shall remain in effect as is.

As recited above (pp. 11-12), HFD had repeatedly delayed the closing, and it was the Mulhollands who waited patiently, desiring the transaction to proceed to closing.

B. THE SUBSTANCE OF THE CONTRACT ADDENDUM DOES NOT QUALIFY IT AS A TIME OF THE ESSENCE NOTICE

The language of the Contract Addendum is insufficient to constitute a TOE notice. For a stated closing date to be considered an essential component of a real estate contract, the real estate contract must clearly establish that the parties understood at the time that a failure to perform on such date, and at a particular hour, would result in the failing party's forfeiture of all rights to enforce its rights under the real estate contract. Marioni v. 94 Broadway, 374 N.J. Super. 588 (App. Div., 2005). In Marioni, the Appellate Division questioned the reasonableness of a time of the essence demand notice because

of "the absence of detail" in the demand and that "contrary to normal practice, [the demand] did not state a time or place for closing. " 374 N.J. Super. 588, 604 (App. Div. 2005). Therefore, "The reasonableness of [Seller's] notice is arguably doubtful since the letter of [its] counsel, contrary to normal practice, did not state a time or place for closing." The Appellate Division further observed:

> Typically, a valid notice, in this context, would use the phrase "time of the essence" and unequivocally state the date for closing, as here, but it would also state a time and place for closing, terms that are absent from Roxy's notice, or else the other party would not know where or when to arrive for closing.

Id.

The Contract Addendum merely states that "closing shall take place in [sic] or before December 20, 2022." Paragraph 2 of the PA requires "ten(10) days written notice of **the** closing date." "In or before December 20, 2022" does not appoint any particular date, so it cannot be **the** closing date as contemplated in the PA. "The Contract Addendum's language demonstrates that the December 20 date was merely a target. Plaintiff never provided a specific date, a specific time, or a place for the closing, and never advised the buyer that time is of the essence.

This fact is particularly significant, as there had been repeated postponements of closing, by the Seller, in the past. The Mulhollands were

advised by Plaintiff's agent that "the units won't be closing until February 15th to the end of the month" on January 7, 2022. On February 10, 2022, they were told, "The new estimated closing date for D14 Unit is April 15, 2022." On April 13, 2022, Plaintiff's real estate attorney wrote, "I believe the units are very close to being finished and will be finished and it makes sense for your clients to wait for delivery." On October 3, 2022 the Plaintiff's agent wrote, "The Developer will provide closing docs by October 15th and moving date by end of the month for all D units. " All of these dates came and went with the Plaintiff repeatedly delaying the closing. In light of those repeated delays, in addition to the fact that the Contract Addendum is unspecific as to date and fails to include a time or place of closing or any notice that it is time of the essence, it would be unreasonable to expect a buyer such as the Mulhollands to read the Contract Addendum as conveying time of the essence.

There is no time and place for the closing set forth in the Contract Addendum, and thus it is not an enforceable TOE. The failure to set forth a specific time for the closing renders an attempted TOE notice invalid. See Elm Land Co., Inc. v. Glasser, 69 N.J.Super. 290 (App.Div.1961). There was no reason for Buyers to understand that December 20, 2022 was a "drop dead" date.

C. THE PURPORTED TIME OF THE ESSENCE IS NOT REASONABLE IN LIGHT OF THE SELLER'S REPEATED

DELAYS AND FAILURES TO CLOSE.

A TOE date selected must be reasonable based on all facts and circumstances. See Ridge Chevrolet Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149, 156 (App. Div. 1990). Choosing a TOE date one day following the notice of same is not reasonable. A party to a transaction must be given reasonable opportunity to resolve obstacles to closing, such as a defect in title. Paradiso v. Mazejy, 3 N.J. 110, 115 (1949). By immediately attempting to cancel the transaction, following repeated delays on the part of the Plaintiff, amounting to over 17 months from the initial contractual anticipated closing of July 15, 2021, it was unreasonable of HFD to cancel the transaction and not provide the buyers any opportunity to address the perceived obstacle. "[W]hen one of the parties seeks to impose a day on the other, he must act in good faith and reasonably under all the circumstances." Caldwell Bldg. & Loan Ass'n v. Henry, 120 N.J. Eq. 425, 428 (Ch. 1936). In fact, the perceived obstacle was addressed. The Mulhollands chose not to utilize the buydown proposal, and therefore the Seller's signature became unnecessary, enabling Clear Skies to complete the closing of the transaction.

The Appellate Division in Marioni v. 94 Broadway, 374 N.J. Super. 588 (App. Div., 2005) held that the court must assess the "delay that preceded the

[TOE] notice as well as the prejudice to the noticing party by any further delay beyond the date for closing contained in the notice." Id.

> The reasonableness of a contracting party's attempt to set a time of the essence closing date must be weighed against the time that had elapsed since the formation of the contract and any deleterious effect that may befall the noticing party as a result of future events beyond the chosen closing date. In other words, the court must assess the delay that preceded the time of essence notice as well as the prejudice to the noticing party by any further delay beyond the date for closing contained in the notice.
> Id.

Plaintiff has cited no prejudice in the fact that the funds were disbursed on December 23, 2023, three days after the December 20 date in the Contract Addendum. There is none.

In Marioni, the delay between the contract date and the seller's return of buyer's deposit for an alleged failure to close was two years three months (August 1998 to November 2020) . The Appellate Division noted that the plaintiff-buyer had been extremely patient during this period while it took defendant-seller two years to evict a tenant, reversing the trial court's dismissal of buyer's claim for specific performance of the transaction as inequitable.

As explained by Professor Pomeroy:

> The right to an equitable remedy ... is never in this sense absolute, and may, therefore, when compared with the legal right, properly and to a limited extent, be called discretionary. That is, in addition to the facts, events, and relations which give rise to the certain and absolute legal right, there may be other facts, circumstances, and incidents which determine the existence of the equitable right, which modify its application, or, perhaps, entirely prevent its exercise. The phrase "within the discretion of the court," is, therefore, employed to contrast the equitable with the legal remedy; within the domain of equity jurisdiction remedies are not, in any true sense, discretionary, but are governed by the established principles and rules which constitute the body of equity jurisprudence. [Pomeroy, Specific Performance of Contracts (3d ed., 1926), § 37 at 115–16.]

For these reasons, when specific performance is sought, the court is required to do more than merely determine whether the contract is valid and enforceable; the court of equity must also "appraise the respective conduct and situation of the parties," Friendship Manor, supra, 244 N.J.Super. at 113, 581 A.2d 893, the clarity of the agreement itself notwithstanding that it may be legally enforceable, Salvatore, supra, 109 N.J.Super. at 90, 262 A.2d 409, and the impact of an order compelling performance, that is, whether such an order is harsh or oppressive to the defendant, Stehr, supra, 40 N.J. at 357, 192 A.2d 569, or whether a denial of specific performance leaves plaintiff with an adequate remedy, Fleischer v. James Drug Stores, Inc., 1 N.J. 138, 146–47, 62 A.2d 383 (1948).

Also, as a consequence of the remedy's equitable underpinnings, the party seeking specific performance

> "must stand in conscientious relation to his adversary; his conduct in the matter must have been fair, just and equitable, not sharp or aiming at unfair advantage." Stehr, supra, 40 N.J. at 357, 192 A.2d 569. This weighing of equitable considerations must represent, in each case, a conscious attempt on the part of the court of equity to render complete justice to both parties regarding their contractual relationship. In short, a court of equity will often direct performance of such a contract because, when there is no excuse for the failure to perform, equity regards and treats as done what, in good conscience, ought to be done. Goodell v. Monroe, 87 N.J. Eq. 328, 335, 100 A. 238 (E. & A.1917).
> Id. at 600-601.

In this case, as in Marioni, the buyer waited patiently while the seller was unable or unwilling to close.

The shorter the notice period given the more difficult it is for the recipient of the notice to accommodate the time of the essence schedule. Farnella v. Brana, 2007 WL 2827554, at *4 (App. Div. 2007). In Farnella, a ten day notice, which appointed 3:00 as the time for closing on the appointed day, was deemed unreasonable. In this case, it was a single day notice that was given, and no time was provided whatsoever.

HFD claims that it terminated the contract before the closing occurred. At the same time, it claims that the closing date was time of the essence. These

contradictory positions are untenable and the claim of breach is barred by estoppel when HFD purports to have canceled the transaction.

The purported termination letter is full of misstatements. The Mulhollands were ready, willing and able to close on the transaction, without seller signing the addendum. In fact, that is what happened. HFD should not be rewarded for its belated attempt to avoid a transaction, and then find justification for the purported termination, on false pretenses. There are abundant questions of fact weighing against such extraordinary relief on a summary judgment standard.

Plaintiff points the finger at the title company and PRMG. The Lender was not even a party to the litigation when summary judgment practice occurred.[4] The Plaintiff's Verified Complaint alleges no breach of contract claim against the Mulhollands. In the absence of such a claim, and when there is no factual basis to counter the conclusion that the Mulhollands performed their contractual obligations in full, there is no legal basis for Plaintiff to divest the Mulhollands of their property ownership rights. The sole relief it is entitled to is money damages from Clear Skies.

[4] PRMG has since been served as a third-party defendant in that portion of the litigation which is proceeding in the trial court.

POINT V
THE LOWER COURT'S "ANTICIPATORY BREACH" REASONING IN THE ORDER DENYING RECONSIDERATION FAILS FOR TWO REASONS

A. THE ANTICIPATORY BREACH ANALYSIS ASSUMES DECEMBER 20 IS TIME OF THE ESSENCE , BUT THE COURT FOUND THAT A MATERIAL FACTUAL DISPUTE EXISTS

The January 4, 2024 Summary Judgment Orders do not refer to anticipatory breach whatsoever. On reconsideration, in a rear guard effort to fortify flawed reasoning, the Trial Court referred to anticipatory breach as an alternative basis for the result it had reached.

As noted above, the Trial Court found questions of fact as to when the purported TOE was served. Thus, its enforceability is a material question of fact. The Court must find questions of fact as to breach, since the elemental first step in finding a breach is an enforceable contractual provision. For the same reasons the Trial Court's grant of summary judgment is misaligned with these findings of questions of material fact, the anticipatory breach reasoning on reconsideration is also misaligned with the Court's finding. The buyer cannot anticipatorily breach a TOE notice that is not enforceable.

The disconnect is clear by juxtaposing the first statement below , quoted from the Trial Court's Statement of Reasons on reconsideration, with the Court's factual findings on summary judgment:

> The Mulhollands clearly could not meet their obligation to fund the purchase price on December 20, 2022.(Da54)

> Moreover, clear questions of fact exist as to whether Plaintiff properly terminated the Agreement and whether the Mulhollands performed all contractual duties owed to Plaintiff.
> (Da13, Da33)

> [A] question of fact exists as to the date upon which Plaintiff provided the Mulhollands with written notice of the December 20, 2022 Closing.
> (Da15, Da35)

> ...a question of fact exists as to whether Plaintiff provided Defendants with ten days' notice of the Closing and whether the Closing was "of the essence" pursuant to Paragraph 2 of the Agreement.
> (Da16, Da36)

As noted in Points III and IV above, taking all disputed facts in the light most favorable to the non-movant Mulhollands, the Court found that the enforceability of the December 20th date was a material issue (for trial). Therefore, there is no obligation to fund the purchase price by December 20, 2022, as that date was not TOE.

Secondly, the belligerent conduct attributed to the Mulhollands' lender does not establish that the Mulhollands were unable to fund the purchase price. This was one lender. There is nothing in the record to demonstrate that the

Mulhollands were unable to obtain funding from another lender. Moreover, this lender actually did fund the transaction, and HFD was wired the purchase funds, and therefore to find anticipatory breach when the facts show that there was no actual breach as the events played out defies logic and the record itself. The transaction was funded. If there had been an anticipatory breach at any time, it was cured when the proposed buydown agreement was withdrawn, or when payment was made.

B. THERE IS NO LEGAL BASIS TO RESCIND THE PA AND AWARD CONTRACTUAL LIQUIDATED DAMAGES AGAINST THE MULHOLLANDS BASED ON THE CONDUCT OF THE LENDER

The Trial Court states:

> An anticipatory breach is a definite and unconditional declaration *by a party to an executory contract* – through word or conduct – that he will not or cannot render the agreed upon performance (emphasis added and citations omitted)

PRMG was not a party to the contract. There was no finding of any agency relationship between PRMG and the Mulhollands. This vicarious, attenuated application of the law of anticipatory breach based on the conduct of one that is not a party to a contract is unsupported.

POINT VI
THE REMEDY OF RESCISSION AGAINST THE MULHOLLANDS IS IMPROPER WHEN QUESTIONS OF FACT EXIST AND THE SOLE MALFEASANCE WAS BY CLEAR SKIES

Contract rescission is an equitable remedy and only available in limited circumstances. Walter v. Holiday Inns, Inc., 784 F. Supp. 1159, 1166 (D.N.J. 1992), aff'd, 985 F.2d 1232 (3d Cir. 1993), citing Hilton Hotels Corp. v. Piper Co., 214 N.J.Super. 328 (Ch.Div.1986); Josefowicz v. Porter, 32 N.J.Super. 585 (App.Div.1954). "This remedy, however, is generally only available when the party seeking to rescind can restore the other party to the *status quo*. 17 Am.Jur.2d Contracts, s 512 at 994 (1964)." Medivox Prods., Inc. v. Hoffmann-LaRoche, Inc., 107 N.J. Super. 47, 75–76 (Law. Div. 1969); see also Intertech Assocs., Inc. v. City of Paterson, 255 N.J. Super. 52, 59 (App. Div. 1992) (quoting Hilton Hotels Corp. v. Piper Co., 214 N.J. Super. 328, 336 (Ch. Div. 1986).

The Mulhollands are entitled to the benefit of their bargain. On a summary judgment standard, no breach is attributed to them. The Court cites authority for the proposition that contracts "'may only be rescinded where there is original invalidity, fraud, failure of consideration, **or a material breach' "** citing 17A Am. Jur2d Contracts §539, 567 (emphasis in Trial Court opinion). Yet, how can this provision be applicable on summary judgment when the Trial Court found a question of fact on whether the Mulhollands had fulfilled all contractual duties? The Trial Court misapplied the law on rescission by ignoring questions of fact.

The rescission cases cited by the Lower Court (Da) , Herbtstman v. Eastman Kodak Co., 68 N.J. 1, 9, 342 A.2d 181 (1975); Merchants Indem. Corp. v. Eggleston, 37 N.J. 114, 130, 179 A.2d 505 (1962); Giumarra v. Harrington Heights, 33 N.J.Super. 178, 190, 109 A.2d 695 (App. Div. 1955), aff'd 18 N.J. 548, 114 A.2d 720, are inapposite. Each of them undermine, rather than support, the application of a rescission remedy on the facts of *this* case.

In Herbstman v. Eastman Kodak Co., 68 N.J. 1 (1975), the NJ Supreme Court *denied* rescission and in fact even rejected the plaintiff's right to monetary recovery. In that case, the buyer of a camera sued the manufacturer, alleging breach of implied warranty of merchantability, et al. The Trial Court had dismissed the complaint subject to the right of the plaintiff to return the camera to the defendant for repair, but the appellate division reversed, holding that the buyer was entitled to a refund. The Supreme Court reversed. It pointed out that the focus of analysis must be on the transaction between the buyer and the seller, and the involvement a*nd possible wrongdoing of a third-party is not relevant.*

> Third, New Jersey has not applied the Sales chapter of the Uniform Commercial Code, N.J.S.A. 12:2—101 Et seq., to transactions between a manufacturer and a purchaser of that product from some third person who is not the manufacturer's servant, agent or employee.

> Justice Hall, in Heavner v. Uniroyal, Inc., 63 N.J. 130, 150, 305 A.2d 412 (1973), commented that the Uniform Commercial Code was drawn not having 'anything in mind but a contract between a 'seller' and his immediate 'buyer". Prosser, Law of Torts s 97 at 655 (4th ed. 1971).
> Id. at 9–10

Plaintiffs attempt to utilize the wrongdoing of Clear Skies to obtain draconian form of relief against the Mulhollands is not supported, and in fact is directly undermined, by the Herbstman holding.

In Merchants' Indemnity , the Supreme Court ruled against an insurance carrier on a declaratory judgment coverage action. The case has no bearing on the right of rescission except in the very narrow circumstance of fraud in the inducement (which does not apply here, when the Plaintiff did not even assert a breach of contract by the Mulhollands, much less was there any adjudication and finding of fraud). "When a contract is obtained by fraud, the law grants the injured party a choice. He may rescind or affirm. If he rescinds, he must return what he received, here the premium for covering the Thunderbird," Merchants Indem. Corp. v. Eggleston, 37 N.J. 114, 130, 179 A.2d 505, 513 (1962) . This does nothing to support the Plaintiff's right to rescind the contract in the absence of any misrepresentation or fraud in the inducement of the PA.

In Giumarra, the Court awarded money damages on a failed real estate transaction, not specific performance. The Mulhollands have been asserting from the start that this case is about money damages. Giumarra supports this position. Giumarra v. Harrington Heights, 33 N.J. Super. 178, 190, 109 A.2d 695, 701 (App. Div. 1954), aff'd, 18 N.J. 548, 114 A.2d 720 (1955)

The Court in this case based its remedy of rescission on Clear Skies' malfeasance, but Clear Skies not a party to the PA. There are no proofs that Clear Skies was the Mulhollands' servant, agent or employee. It was not. As stated in Herbstman, the Court cannot rescind a party's contract for the alleged misconduct of another.

Rescission cannot be enforced where the other party was not guilty of fraud, undue influence, concealment or bad faith and would not derive any unconscionable advantage from the enforcement of the contract. Levine v. Lafayette Building Corp., 103 N.J.Eq. 121, 142 A. 441 (Ch. 1928), reversed on other grounds, 105 N.J.Eq. 532, 148 A. 772 (E. & A.1929); Dencer v. Erb, 142 N.J.Eq. 422, 60 A.2d 282 (Ch.1948). There has been no finding of any such misconduct on the part of the Mulhollands, and therefore rescission is improper. Money damages against Clear Skies is the appropriate remedy. "Where rescission is prayed for and is warranted by the facts, but cannot be decreed because of the intervening equities of innocent third parties[,] ... the

court may require the wrongdoers to account for their profits so that as nearly as may be the parties will be protected ....." Driscoll v. Burlington–Bristol Bridge Co., 8 N.J. 433, 499, cert. denied, 344 U.S. 838 (1952).

POINT VII
RESCISSION IS NOT A PROPER REMEDY WHEN THE *STATUS QUO ANTE* COULD NOT BE RESTORED AND AN ADEQUATE REMEDY AT LAW EXISTS

A. Return To The Status Quo Ante Is Impossible And Inconsistent With The Court's Own Order

This case commenced by way of Plaintiff's Order to Show Cause. The Mulhollands had not taken possession of the property at the time. Plaintiff believed, at the time of filing, that the deed had not been recorded. There was, under those facts, an appropriate need for declaratory judgment relief to clarify the Parties' rights before occupancy was undertaken. Now it is a year later, however. Ryan Mulholland has rented out the unit. He has paid taxes, and his mortgage. The unit has been lived in. The Mulhollands paid substantial closing costs. The purpose of a declaratory judgment,[5] to avoid the full blown events that create the basis for litigation, is no longer applicable, while money damages are.

Rescission is available only when the parties can be restored to the

[5] Its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. N.J.S.A. 2A:16-51.

status quo ante. In this case, however, the Court authorized HFD to retain liquidated damages, thus the Trial Court itself was preventing a return to the *status quo ante*. In addition, the Mulhollands paid fees to their real estate attorney , paid moving costs and other fees. They were not, by any means, restored to the *status quo ante*. Nonetheless, the Trial Court rescinded the PA. This is another irreconcilable contradiction.

B. Injunctive Relief Is Not Available To Plaintiff When Money Damages Are Available

"[E]quity will leave the parties to a remedy at law if money damages will adequately compensate for the wrong." Bd. of Ed., Borough of Union Beach v. New Jersey Ed. Assn, 53 N.J. 29, 43 (1968). The U.S. Supreme Court has stated, "the necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in Beacon Theatres, the absence of an adequate remedy at law. " Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478, 82 S. Ct. 894, 900, 8 L. Ed. 2d 44 (1962). See also, City of Memphis v. Brown, 87 U.S. 289, 304, 22 L. Ed. 264 (1873) ("Specific performance is never decreed where the party can be otherwise fully compensated."); Babylon Assocs. v. Suffolk Canty., 101 A.D.2d 207, 215, 475 N.Y.S.2d 869, 874 (1984) (Denying the plaintiff's plea for rescission of a contract because the party seeking that relief " has an adequate remedy at law,

namely recovery of money damages which were caused by ...illegal activities.").

At Page 4 of the Statement of Reasons accompanying the Order granting Plaintiff's Cross-Motion for Summary Judgment against the Mulhollands,, repeated also on Page 4 of the Statement of Reasons accompanying the Order granting Plaintiff's Motion for Summary Judgment against Clear Skies(Da 4, Da24), the Court quotes this excerpt from Rego Industries, Inc. v. American Modern Metals Corp., 91 N.J. Super . 447, 453 (App. Div. 1966).

> The purpose of a declaratory judgment proceeding is to provide a means by which rights, obligations and status may be adjudicated in cases involving a controversy that has not yet reached the stage at which either party may seek a coercive remedy. Such proceeding is intended to serve as an instrument of preventive justice, to relieve litigants of the common law rule that no declaration of right may be judicially adjudged until that right has been violated, and to permit adjudication of rights or status without the necessity of a prior breach. **Stated in another way, there is ordinarily no reason to invoke the provisions of the Declaratory Judgments Act where another adequate remedy is available.**
> (emphasis added herein)
> Id. at 452–53,(App. Div. 1966).

Plaintiff has a claim for money damages. It is a developer, and the townhome is a fungible property to be sold. There is no reason to grant declaratory judgment when money damages can make the Plaintiff whole.

The Court entered summary judgment against Clear Skies on Plaintiff's breach of fiduciary duty count. There is no allegation, much less any evidence, that the Mulhollands participated in the breach of fiduciary duty. There is no substantive cause of action whatsoever asserted against the Mulhollands, much less has any wrong been established. Yet, and the Trial Court's remedy overlooks this, the entirety of the sanction for Clear Skies' malfeasance is against the Mulhollands. This hardship is contrary to the law when money damages are available against Clear Skies for any wrong Plaintiff suffered.

Plaintiff claims that the transaction should not have been recorded. It has been damaged in an amount that is measurable by the difference in market price on the date of the contract and a future date of valuation. The Trial Court overlooked the controlling law in entering injunctive relief.

POINT VIII
THE PROPERTY IS NOT UNIQUE TO HFD WHEN IT WAS THE SELLER IN THE TRANSACTION

HFD is a developer. It listed the subject real property for sale. The property is , from HFD's perspective, a commodity, to be converted into cash at closing upon HFD's receipt of the proceeds of sale.

The principal of the uniqueness of real property does not apply to these facts. "Under long established equity principles, a contract for the sale of real property is specifically enforceable by the purchaser." Pruitt v. Graziano, 215

N.J. Super. 330, 331 (App. Div. 1987) . A purchaser is entitled to specific performance because of the uniqueness of the real property to the purchaser. The seller, however, is not entitled to return of the property for the same reason that specific performance of a real estate contract is not a remedy available to a seller: The property is not unique to a vendor, and a vendor can be made whole by money damages. Moreover, Harborfront did not seek specific performance of the Purchase Agreement, but rather the exactly opposite relief: an unsinding of the transaction. This is not specific performance, and the real property is this context, for the seller, is a fungible commodity being sold for cash on the barrel. "This is because, even assuming that each and every parcel of land, house, apartment, condominium, etc., is, in fact, 'unique,' there is nothing "unique" about cash, or more specifically, the cash of potential purchasers." Sexton v. Sewell, 351 Ga. App. 273, 279, 830 S.E.2d 605, 611 (2019).

POINT IX
IN DENYING RECONSIDERATION, THE TRIAL COURT IMPROPERLY MISAPPLIED EQUITABLE PRINCIPLES BY IGNORING QUESTIONS OF FACT

The Trial Court, in denying reconsideration, misapplied equitable principles as a basis for fashioning the injunctive relief it had ordered on summary judgment. It states that "Clear Skies delivered Plaintiff's Closing Documents out of escrow in clear breach of the Parties' agreement." (Da50). Clear Skies was not a party to the PA, and thus could not have breached the PA. If the Trial Court is referring to the Mulhollands as the parties who breached, this statement is inconsistent with the finding of a material question of fact as to breach (see Point III above), which is to be resolved in the Mulhollands' favor on summary judgment. The Trial Court's conclusion that the Closing should not have occurred does not yield the remedy of rescission, in the absence of any contractual basis for termination.

The Trial Court cited to the purported termination letter in denying reconsideration (Da 51, for example) , but it had found a question of fact as to its enforceability. See Point IV above. ("Moreover, clear questions of fact exist as to whether Plaintiff properly terminated the Agreement."). As with the summary judgment disconnect between questions of disputed material facts and the result, the same inconsistencies render the denial of reconsideration

insupportable. A jury may find that HFD breached the PA, by failing to close. The effectiveness of the purported termination is an issue for trial. If the Mulhollands were not in breach, as the Court recognized a fact-finder may conclude, Plaintiff's attempt to cancel the PA would itself be a breach or anticipatory breach. The determination of these question certainly would factor into the equitable considerations. The Trial Court repeatedly disregarded substantial issues of fact in granting HFD's summary judgment relief, and its equitable analysis on reconsideration is permeated by the same inconsistencies, rendering it untenable. The open questions of fact recognized by the Trial Court undercut the Trial Court's conclusion that the Mulhollands and their closing attorney should not have proceeded with closing.

At page 13 of the Statement of Reasons in denying reconsideration, the Trial Court stated that

> While the Court initially questioned the fact as to when the time of the essence notice was provided, it determined that such a question does not prevent its enforcement of paragraph 2, given, in part, that the Parties mutually agreed to set a Closing date in an addendum which provided that "[i]n all other aspects, the contract shall remain the same." Here, instead of Plaintiff sending Defendants a unilateral notice to appear, the Parties – all of whom were represented by counsel in the transaction – mutually agreed to set the Closing date for December 20, 2022. (Da53)

The Trial Court improperly rewrote the Parties' agreement, the PA, by simply removing Paragraph 2's requirements of Time of the Essence. That Paragraph provides that time is of the essence only when so scheduled, by written notice at least ten days in advance. Paragraph 2 of the PA must be read in its entirety, and the provision that reads "If Buyer is unable to or refuses to close on the date and time specified by Seller" clearly and indisputably relates back to the time of the essence requirement in that paragraph. The "date and time specified by Seller" means the date and time specified in an enforceable TOE notice, not simply when a closing is scheduled and the parties show up. Merely appearing at a closing does not transform the closing into TOE.

The malefactor party in this matter is Clear Skies. It was found, on summary judgment, to have improperly closed the transaction. There was no collusion with the Mulhollands, and none was even pleaded. Yet, with all relief being entered against the Mulhollands, and none against Clear Skies, this is not an equitable result.

POINT X
HFD CANNOT ENFORCE A PURPORTED TIME OF THE ESSENCE NOTICE WHEN IT WAS NOT READY TO CLOSE ON THE PURPORTED APPOINTED DATE (Not argued below)

The burden of proof to enforce a TOE is on the proponent of the TOE. Safeway Sys., Inc. v. Manuel Bros., 102 R.I. 136 (1967). The burden of proof on summary judgment is on the movant, or in this case, HFD as the Cross-

Movant on Summary Judgment against the Mulhollands and as the Movant in Summary Judgment against Clear Skies. *See* Namerow v. PediatriCare Assocs., LLC, 461 N.J. Super. 133, 139 (Ch. Div. 2018) ("In order to satisfy its burden of proof on a summary judgment motion, the moving party must show that no genuine issue of material facts exists." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528–29 (1995)).

HFD did not argue below that it was ready, willing and able to close on December 20th (and in fact took the opposite position), and therefore the Mulhollands were not confronted with that point. Thus, the issue was not raised below because of HFD's failure to do so. However, if this Appellate Court is inclined to apply the clear error standard, in any event, that standard for reversal is met.

Appellate review may be had with respect to issues not raised below if there is plain error committed by the trial court. Johnson v. Benjamin Moore & Co., 347 N.J.Super. 71 (App.Div.2002). In this case, the Trial Court erred, and committed plain error, when it ignored HFD's admission that it had not authorized closing on December 20th, but paradoxically sought to enforce a TOE notice against the Mulhollands for that date.

HFD, in its Statement of Facts on the summary judgment motion against Clear Skies, asserts:

4. On November 30, 2022, Plaintiff provided various executed "Closing Documents," including the Deed (signed by Plaintiff) in escrow to Clear Skies under the cover of an "Escrow Closing Letter", dated November 28, 2022. Weber Cert., Exhibit 5 (Email at HFD002187, and Escrow Closing Letter at HFD002256); Ex. 4 at RFA No. 3 (admitting "that Clear Skies received and accepted Plaintiff's Closing Documents on November 30, 2022"); id. at RFA No. 4 (admitting "that Plaintiff's Closing Documents contained [the Escrow Closing Letter] dated November 28, 2022").

5. The Escrow Closing Letter contained the following escrow instructions (the "Closing Conditions"): Seller's Documents are not to be released from escrow unless and until the following terms and conditions ("Closing Conditions") are satisfied: (1) you are in receipt of original copies of each of the Purchaser's Documents, which are properly witnessed and notarized, if required; (2) the Seller and Purchaser have approved and executed the Closing Statement, which may be signed in counterparts, and the parties exchange fully-executed counterparts via email; (3) you are in receipt of the funds, the amounts set forth on the Closing Statement are disbursed and sufficient evidence of same is provided to the undersigned and Shep Federgreen, Esq., via email; and (4) you receive written confirmation by email from the undersigned or Shep Federgreen, Esq. that you are authorized to close the transaction and release Seller's Closing Documents from escrow. [Ex. 5 at HFD002257 (emphasis added); see also Ex. 4 at RFA No. 5 (admitting the above instruction).]

6. The Closing Conditions of the Escrow Closing Letter constituted instructions to Clear Skies as to how Plaintiff would authorize Clear Skies to finalize the closing. See Ex. 3 at 48:16-19 ("Q: Would you agree with me that, that this paragraph that we read are

> instructions UNN-C-000006-23 2023-11-10 20:53:26.135 Pg 3 of 9 Trans ID: CHC2023318314 3 about when the seller will authorize closing; is that what those are? A: Yes."); see also Weber Cert., Exhibit 6 (Clear Skies' Responses to Plaintiff's Interrogatories) ¶ 7 ("Clear Skies received the closing documents. Clear Skies agreed to follow the instructions."); Ex. 4 at RFA No. 6 (admitting "that Clear Skies understood the instructions in the Term Letter"), at RFA No. 7 (admitting "that Clear Skies intended to follow the instructions in the Term Letter").
>
> 7. Clear Skies neither objected to the instructions in the Escrow Closing Letter, nor requested any clarification to the instructions in the Escrow Closing Letter. Ex. 4 at RFA Nos. 9 & 10; see also Ex. 3 at 62:6-8 ("Q: Would you agree with me that these escrow instructions are clear? A: Yes, they are clear.").
>
> 8. **Clear Skies admits that it never received written instructions from Plaintiff to close, as required by the Escrow Closing Letter.** Ex. 3 at 50:22-51:2 (Clear Skies testified that it did "[n]ot explicitly" receive from Plaintiff written confirmation by email that Clear Skies was authorized to close the transaction and release Plaintiff's documents from escrow).
> (Emphasis added) (Da930-Da933)

Clear Skies' and the Mulhollands[6] admitted these facts (Da939 and Da955), and therefore the Trial Court's finding that HFD had not authorized the December 20, 2022 closing (Da12, Da20) is well-supported.

[6] The Mulhollands denied Item 8, but in actuality did not address the statement directly. It was in essence, admitted.

The party seeking enforcement of a time of the essence clause must show that it was ready, willing, and able to perform its contractual obligations on the closing date. *See, for example*, Barlet v. Frazer, 218 N.J. Super. 106, 109 (App. Div. 1987). In this case, however, HFD *admits* that it had not given authorization to Clear Skies to close the transaction. In fact, that position is the central basis of HFD's summary judgment motion against Clear Skies, on which it prevailed. Therefore, it had not "green lighted" the closing, for December 20th or any other date, and it is not entitled to leverage the TOE clause against the Mulhollands, as it was not ready to close on that date. The Court's enforcement of the TOE date against the Mulhollands, and the consequent award of remedies of rescission and liquidated damages, were clear error by the Trial Court that should be reversed.

CONCLUSION

For the foregoing reasons, the Mulholland Defendants' appeal should be granted in its entirety, and those portions of the January 5, 2024 Summary Judgment Orders on appeal should be reversed, and the February 5, 2024 Reconsideration Order also should be reversed.

Respectfully submitted,
BIEBELBERG & MARTIN

October 23, 2024

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HARBOR FRONT DEVELOPMENT, LLC, *Plaintiff*, v. CLEAR SKIES TITLE AGENCY, RYAN M. MULHOLLAND, and KEVIN J. MULHOLLAND, *Defendants*, v. EYAL SHAY AND HARBORFRONT VILLAS HOMEOWNERS' ASSOCIATION, *Third-Party Defendants.*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION On Appeal from the Superior Court of New Jersey, Chancery Division, Union County Docket No. Below UNN-C-006-23 SAT Below: Hon. Robert J. Mega, P.J. Ch.

RESPONDENT'S BRIEF IN OPPOSITION

On the Brief:

Gregory J. Skiff, Esq.

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Plaintiff-respondent Harbor Front Development, LLC ("**HFD**") submits this brief in opposition to defendants-appellants Ryan M. Mulholland's and Kevin J. Mulholland's (collectively, the "**Mulhollands**" or "**Appellants**") brief in support of their appeal from two summary judgment orders entered by the Trial Court on January 5, 2024 (collectively, the "**SJ Orders**"), (*see* Da1 and Da21), and from an order entered by the Trial Court on February 21, 2024 denying reconsideration thereof (the "**Reconsideration Order**") (*see* Da41).

PRELIMINARY STATEMENT

In support of their appeal, the Appellants appear to "hang their hat" on the Trial Court's references to "questions of fact" in his legal analysis. Appellants fail to acknowledge the context in which these references were made and the clearly stated findings of the Trial Court that obviated the need to adjudicate these questions to render a decision as a matter of law. The Trial Court expressly stated as much in its Statement of Reasons for denying reconsideration.

Appellants' specious contention that Respondent failed to assert any claims against the Mulholland's is of no moment. Count One of Respondent's complaint sets forth a claim for declaratory judgment – *i.e.*, that the Title Company lacked authority to deliver Respondent's closing documents out of escrow, rending the "closing" null and void. It is axiomatic that if successful on this claim, the transfer

of title that occurred at the unauthorized closing would be a nullity and Appellants' ownership of the Property void. That is precisely what the Trial Court held.

As set forth more fully below, Appellants fail to recognize that a so-called Time of the Essence Notice was not required with respect to the subject transaction because the Purchase Agreement executed by the parties expressly designated the closing date as Time of the Essence. Accordingly, Appellants' attempt to engage in a "Time-of-the-Essence" analysis as to the validity of a so-called Time of the Essence Notice is misplaced. The Trial Court rightly recognized this in enforcing the "Default" provision in the Purchase Agreement.

As set forth more fully below, the Trial Court properly found that defendant Clear Skies Title Agency (the "**Title Company**") and the Mulhollands' lender, Paramount Residential Mortgage Group (the "**Lender**"), acted on the Mulhollands' behalf.

As set forth more fully below, the Trial Court properly held that the Mulhollands anticipatorily breached the parties' Purchase Agreement and, thus, Plaintiff was entitled to deem the Purchase Agreement terminated.

Accordingly, the Trial Court properly granted summary judgment in favor of HFD and in doing so, returned the parties to the status quo ante – *i.e.*, the parties' positions prior to the improperly conducted closing, transfer of title and recording of title.

For these reasons and the reasons set forth more fully below, the Mulhollands' appeal must be denied in its entirety.

STATEMENT OF RELEVANT FACTS

In support of the SJ Orders, the Trial Court found "**the following facts to be clearly established and undisputed . . .**":

HFD (as seller) and the Mulhollands (as buyer) entered into a Purchase Agreement (the "**Purchase Agreement**"), dated May 1, 2021, for the sale of HFD's real property located at 14 Harbor Front Terrace, Elizabeth, New Jersey 07206 (the "**Property**"). (*See* Da6; Da785.) Shepard Federgreen represented HFD as seller's counsel, and Michael Schonberger represented the Mulhollands as buyer's counsel, with regard to the sale and purchase of the Property. (*See* Da6; Da786.) The Title Company acted as escrow agent for Plaintiff and the Mulhollands for the closing of the Property. (*See* Da6; Da790 at 19:16-23; Da791.)

On November 30, 2022, HFD provided various executed "Closing Documents," including the Deed (signed by HFD) in escrow to the Title Company under the cover of an "Escrow Closing Letter", dated November 28, 2022. (*See* Da6; Da847 at HFD002187 and Escrow Closing Letter at HFD002256); *see also* Da791.) The Escrow Closing Letter contained the following escrow instructions (the "**Closing Conditions**"):

> Seller's Documents are not to be released from escrow unless and until the following terms and conditions ("Closing Conditions") are satisfied: (1) you are in receipt of original copies of each of the Purchaser's Documents, which are properly witnessed and notarized, if required; (2) the Seller and Purchaser have approved and executed the Closing Statement, which may be signed in counterparts, and the parties exchange fully-executed counterparts via email; (3) you are in receipt of the funds, the amounts set forth on the Closing Statement are disbursed and sufficient evidence of same is provided to the undersigned and Shep Federgreen, Esq., via email; and (4) **you receive written confirmation by email from the undersigned or Shep Federgreen, Esq. that you are authorized to close the transaction and release Seller's Closing Documents from escrow.**

(Da6 (emphasis in original); Da847 (emphasis added).)

The Closing Conditions of the Escrow Letter constituted instructions to the Title Company as to how HFD would authorize the Title Company to finalize the closing. (*See* Da6; Da790 at 48:16-19; *see also* Da852 ¶ 7.) The Title Company neither objected to the instructions in the Escrow Closing Letter, nor requested any clarification to the instructions in the Escrow Closing Letter. (*See* Da6-Da7; Da791 at RFA Nos. 9-10.) The Title Company admits that it never received written instructions from HFD to close, as required by the Escrow Closing Letter. (*See* Da7; Da790 at 50:22-51:2.)

On December 20, 2022 (the date of the scheduled Closing), Ashley Rodrigues of the Title Company emailed to HFG (i) a Wire Authorization Form, (ii) a Final Seller Closing Disclosure, (iii) an ALTA Settlement Statement, and (iv)

a "Buydown Agreement." (*See* Da7; Da860.) Plaintiff informed the Title Company and Mr. Schonberger (the Mulhollands' attorney) that "seller will not sign the buy down agreement." (*See* Da7; Da873.) Due to the disagreement between HFD and the Mulhollands (and the Mulhollands' Lender) as to the "Buydown Agreement", the transaction did not close on December 20, 2022, December 21, 2022, or December 22, 2022. (*See* Da7; Da791 at RFA No. 22.) After HFD declined to sign the "Buydown Agreement", the Mulhollands' Lender thereafter on December 21, 2022 and December 22, 2022 (i) threatened legal action against HFD if HFD did not sign the "Buydown Agreement"; (ii) refused to fund the purchase price for the Property unless HFD signed the "Buydown Agreement"; (iii) confirmed that "the transaction will go on hold until all parties have signed" the "Buydown Agreement"; and (iv) sent hostile text messages to HFD regarding the "Buydown Agreement", future litigation, and threats to "lock down that house from being sold to anyone." (*See* Da7; Da852-Da882.)

On December 22, 2022, Mr. Federgreen advised the Title Company that "[a]s you know, we previously delivered to you the $110,000 deposit held pursuant to the contract for the captioned transaction to facilitate the closing. Do not deliver this money and do not take any steps to effectuate a closing of the sale of D-14. Please acknowledge receipt of this email. Thank you." (Da7; Da883.) At its deposition, the Title Company testified it received and understood the instructions

not to close. (*See* Da7; Da790 at 36:1-13.) Additionally on December 22, 2022, the Title Company responded and acknowledged receipt of HFD's advisement and stated: "Confirmed, no funds will be disbursed." (Da7; Da883.) The Title Company testified at its deposition that it confirmed that it understood HFD's directions. (*See* Da7; Da790 at 67:4-19.)

HFD sent the Mulhollands a Termination Letter on December 22, 2022, however the parties dispute its validity and effect. (*See* Da7; Da786.)

On December 22, 2022, HFD served its Termination Letter on the Mulhollands and their Lender. (*See* Da7; Da885.) The Termination alerted the Mulhollands and their Lender that "the [Purchase Agreement] is terminated, effective immediately" because the Mulhollands "failed to meet your obligation to close on a timely basis after Seller demonstrated its being ready, willing, and able to close." (Da7-Da8; Da885 at 1.) In light of the Termination Letter, the Title Company admits that the Closing should not have occurred. (*See* Da8; Da790 at 63:10-64:22.)

On December 23, 2022, Mr. Federgreen emailed Ashley Rodrigues the following: "Just a gentle reminder that at the moment you are not authorized to proceed. Seller has communicated with Buyer, who is fully aware of Seller's position. I did not want my silence to be mistaken for a change in Seller's position." (Da8; Da886.) Ms. Rodrigues did not respond to this email. (*See* Da8.)

Additionally on December 23, 2022, Mr. Schonberger suggested to Mr. Federgreen that the Mulhollands get rid of their Lender so the parties could use one of HFD's lenders and close in January 2023. (*See* Da8; Da924.) On December 23, 2022, Ashley Rodrigues of the Title Company moved forward with the Closing. (*See* Da8; Da922.) The Title Company has since admitted that Ms. Rodrigues made a mistake in allowing the closing to proceed. (*See* Da8; Da790 at 62:6-23; 68:14-15.)

On January 4, 2023, HFD sent the Mulhollands' counsel an email beginning with "CONFIDENTIAL / INADMISSIBLE SETTLEMENT COMMUNICATION / SUBJECT TO NJRE 408," stating that HFD would accept a $50,000 settlement payment from the Mulhollands to avoid the current litigation. (*See* Da8; Da772 ¶ 15.)

On January 10, 2023, the Title Company notified HFD and the Mulhollands that: "As we discussed, we had held off on submitting the deed for recording pending a swift resolution between the parties. At this time, I believe that enough time has elapsed that we have no choice but to submit the instruments for recording. I'm letting you know this as a courtesy." (Da8; Da924.) The Title Company recorded the Property deed with the Union County Clerk on January 13, 2023. (Da8; Da362.)

HFD filed its Verified Complaint against the Title Company and the Mulhollands and asserted claims for breach of fiduciary duty and for a declaratory judgment against the Title Company, declaring the unauthorized closing null, void, and of no force or effect. (*See* Da8.)

During Oral Arguments conducted on December 15, 2023, counsel for the Title Company admitted that it should not have proceeded with the Property's Closing, and that HFD's requested relief of recission might be appropriate. (*See* Da8.)

ARGUMENT

POINT I

LEGAL STANDARD ON MOTION FOR SUMMARY JUDGMENT

Rule 4:46-2 provides that a court should grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits submitted on the motion, reveal that 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. In Brill v. Guardian Life Insurance Company, 142 N.J. 520 (1995), the New Jersey Supreme Court set forth the current standard for Summary Judgment. The Court held that trial courts must determine whether an alleged disputed issue of fact is genuine by determining:

> . . . whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving

> party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of a non-moving party. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. If there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a "genuine issue of material fact" for purposes of Rule 4:46-2.

Id. 142 N.J. at 540 (citations omitted).

A plaintiff's self-serving assertion alone will not create a question of material fact sufficient to defeat a summary judgment motion. Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 225, 232 (App. Div. 1999), certif. den. 163 N.J. 74 (2000) (questions of law dependent upon the operative facts cannot be decided by summary judgment when those facts are in dispute). A motion for summary judgment can be defeated only if the opposition addresses "specific facts" and "concrete evidence" to support a favorable jury verdict. Housel for Housel v. Theadoris, 314 N.J. Super. 597, 604 (App. Div. 1998). Nevertheless, the Court must examine the evidence presented in a light most favorable to the non-moving party. Brill, 142 N.J. at 540.

The Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-53 permits a person to seek a declaratory judgment with respect to contractual or statutory rights.

> A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights,

> status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

N.J.S.A. 2A:16-53.

"When declaratory relief is sought, all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding." N.J.S.A. 2A:16-56. "A declaratory judgment may be either affirmative or negative in form and effect, and shall have the force and effect of a final judgment." N.J.S.A. 2A:16-59.

> Further relief based on a declaratory judgment may be granted whenever necessary or proper, by application to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment to show cause why further relief should not be granted forthwith.

N.J.S.A. 2A:16-60.

"The court may refuse to render or enter a declaratory judgment, when, if rendered or entered, it would not terminate the uncertainty or controversy giving rise to the proceeding." N.J.S.A. 2A:16-61. "Judicial discretion should not be extended to granting declaratory relief where a plaintiff's purpose is so manifest."

Rego Industries, Inc. v. American Modern Metals Corp., 91 N.J. Super. 447, 453 (App. Div. 1966).

> The purpose of a declaratory judgment proceeding is to provide a means by which rights, obligations and status may be adjudicated in cases involving a controversy that has not yet reached the stage at which either party may seek a coercive remedy. Such proceeding is intended to serve as an instrument of preventive justice, to relieve litigants of the common law rule that no declaration of right may be judicially adjudged until that right has been violated, and to permit adjudication of rights or status without the necessity of a prior breach. Stated in another way, there is ordinarily no reason to invoke the provisions of the Declaratory Judgments Act where another adequate remedy is available.

Id. at 452-53.

POINT II

THE TRIAL COURT'S REFERENCE TO "QUESTIONS OF FACT" DID NOT UNDERMINE HIS LATER FINDINGS OF UNDISPUTED FACT PERMITTING DISPOSITION AS A MATTER OF LAW

Appellants' speciously rely on the Trial Court's reference to "questions of fact" in its analysis to suggest that summary judgment was precluded. This oversimplification of the summary judgment standard is misplaced and completely overlooks the Trial Court's explanation set forth in his Statement of Reasons for denying Appellants' motion for reconsideration. Further, Appellants' argument completely disregards the above recited "undisputed facts" the Trial Court found to be relevant to its decision.

Indeed, in the Trial Court's Order denying the Mulholland's motion for summary judgment dismissing Respondent's claims against them, he noted that, "[w]hile numerous questions of unresolved material facts exist in the present matter, **the Court has already found that there are no questions of material fact as to whether [the Title Company] caused the Closing to occur despite lacking the authority to do so. As a result of the aforementioned conclusion, the Court agrees that recission of the Closing is the proper remedy**, meaning that the Mulholland Defendants, as owners of the Property at issue, are necessary parties to this action." (Da13.) Further, the Trial Court noted that:

> the Mulholland Defendants have admitted that they agreed to the Closing being set to occur on December 20, 2022, and there is no dispute that the parties all knew the time and location of the Closing, given that all Parties appeared at Defendant Clear Skies' office on December 20, 2022 for the Closing. Moreover, there is no dispute as to the fact that the Closing did not occur on the scheduled date because Plaintiff refused to sign the buydown agreement proposed by the Mulholland Defendants' lender. . . . Accordingly, as a result of the Mulholland's lender's actions, the Mulhollands were unable to close at the time specified and agreed on by all parties to the transaction.
>
> * * * *
>
> Here, because the Court already found that Plaintiff properly terminated the Agreement as a result of the Mulhollands being unable to close on December 20, 2022, it necessarily follows that Plaintiff is entitled to liquidated damages as set forth in the parties' Purchase Agreement.

(Da15 and Da18.)

The Trial Court rightly stated, in pertinent part, as follows:

> Despite Defendants' contentions that the Court overlooked [these issues], the Court does not view this Certification [of Michael C. Schonberger] as probative, competent evidence, and accordingly did not address same in its January 5, 2024 Order and Opinion. **The date from which Plaintiff's principal allegedly signed the Addendum is wholly irrelevant to the [sic] whether Defendants received ten days' notice of Closing. Notably, paragraph 2 of the Parties' Agreement does not require both Parties to execute an addendum ten days prior to closing.** The Court's decision to not address this Certification in its Summary Judgment Opinion was based on the Court's determination that such evidence did not constitute probative, competent evidence.
>
> * * * *
>
> **While the Court initially questioned the fact as to when the time of essence notice was provided, it determined that such a question does not prevent its enforcement of paragraph 2, given, in part, that the Parties mutually agreed to set a Closing date in an addendum which provided that "[i]n all other aspects, the Contract shall remain the same."** Here, instead of Plaintiff sending Defendants a unilateral notice to appear, the Parties—all of whom were represented by counsel in the transaction—mutually agreed to set the Closing date for December 20, 2022.
>
> * * * *
>
> While the Court appreciates that missing terms such as a time or place of closing can render a TOE notice deficient, the Court is not persuaded that such is the case here. Defendants have not argued that their failure to close on December 20, 2022 was a result of not knowing the time or location of Closing. **In fact, Defendants, through their own actions of appearing at Closing location on the**

mutually agreed upon date of December 20, 2022 supports the Court's finding that the addendum's lack of specificity of date and time are not genuine issues of material fact.

* * * *

The Court found the termination enforceable pursuant to paragraphs 2 and 16 given that the addendum setting forth the date of Closing provided "[i]n all other respects, the Contract shall remain in effect as is." Pl. Exhibit 11 (emphasis added). Given that the Parties, represented by Counsel, mutually agreed on the date of Closing and agreed to otherwise enforce the Contract as written, **the Court found this mutual agreement obviated the need for the ten days' notice.** In the Court's view, this is supported by a plain reading of the Purchase Agreement in conjunction with the mutually agreed on addendum.

* * * *

The Mulhollands clearly could not meet their obligation to fund the purchase price at December 20, 2022 Closing. Moreover, the Mulhollands' lender, acting on Defendants' behalf, clearly and unequivocally indicated—both at and after the December 20, 2022 Closing—that it would not fund the purchase price for the Property without Plaintiff signing the buydown agreement.

* * * *

Given that the lender chosen by and acting on behalf of the Mulholland Defendants clearly indicated it would not fund the Property absent Plaintiff agreeing to sign an agreement which Plaintiff was not obligated to sign, **the Mulhollands could not render the agreed upon performance. The lender's conduct of (i) threatening legal action against Plaintiff if Plaintiff did not sign the Buydown Agreement, (ii) refusing to fund the purchase**

price for the Property unless Plaintiff signed the Buydown Agreement, (iii) confirming that "the transaction will go on hold until all parties have signed" the Buydown Agreement, and (iv) sending hostile text messages to Plaintiff regarding the Buydown Agreement serves to further demonstrate that Plaintiff was justified as treating the Mulhollands' failure to fund the purchase price on December 20, 2022 as anticipatory breach. Thus, given that funding of a property's purchase price is clearly a material term of a contract for the sale of same, Plaintiff was clearly entitled to treat the contract as terminated.

Accordingly, the foregoing reasons demonstrate that Defendants were in breach of the Purchase Agreement for being unable to fund the purchase price at closing, and that Plaintiff properly terminated the Purchase Agreement. While Defendants' Motion for Reconsideration on this issue provided the Court with the opportunity to further elaborate on its finding that Plaintiff properly terminated the agreement, the Court does not view that the prior Order should be vacated pursuant to R. 4:42-2. **The Court further takes this opportunity to reiterate that irrespective of whether Defendants believed at the time that Plaintiff's termination letter was effective, Clear Skies still lacked authority to release Plaintiff's Closing Documents and the Mulhollands still went through with the Closing despite acknowledging Plaintiff's position that they would not sign the buydown agreement or otherwise authorize the transaction. Even if the Court did not find the termination letter to be effective, the Closing legally could not and *should not* have occurred.**

* * * *

Defendants finally argue the Court erred in denying their Motion for Summary Judgment against Plaintiff. In support of this contention, Defendants state that the Mulhollands are innocent third parties. While the Court did not explicitly address whether the Mulhollands were

> innocent parties in the underlying motion, it evaluated such a claim above. ("…**the above facts are sufficient to support a finding that the Mulhollands were not merely innocent third-parties, and that the actions of Defendants and their closing counsel contributed to the unauthorized transaction's occurrence. The Mulhollands' actions and their closing attorney's actions to proceed with the Closing December 23, 2022 in spite of the termination letter and in spite of Mr. Schonberger's emails to Plaintiff's counsel earlier on the day of closing constitute bad faith**.")

(Da52-Da16) (citing Da101; Da15 (citing Da438 ¶7; Da530-45; Da772 ¶7); Fusco v. Bd. of Ed. of the City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002); McMahon v. City of Newark, 195 N.J. 526, 546 (2008) ("We envision no reason these obviously sophisticated parties should not be bound by the covenants into which they freely and voluntarily entered."); Ross Systems v. Linden Dari-Delite, Inc., 35 N.J. 329, 341 (1961) ("An anticipatory breach is a definite and unconditional declaration by a party to an executory contract—through word or conduct—that he will not or cannot render the agreed upon performance.") (citing Holt v. United Security Life Ins. Co., 76 N.J.L. 585 (E. & A. 1909); O'Neill v. Supreme Council Am. L. of Honor, 70 N.J.L. 410 (Sup. Ct. 1904); Dunn & Bradstreet, Inc. v. Wilsonite Products Co., Inc., 130 N.J.L. 24 (Sup. Ct. 1943); Miller & Sons Bakery Co. v. Selikowitz, 8 N.J. Super 118 (App. Div. 1950); 6 Corbin, Contracts § 1253 (1951))) (Emphasis added.)

This Court need look no further than the above well-reasoned explanation for the Trial Court's entry of the SJ Orders, which completely eviscerates Appellants' hair-splitting red-herring arguments raised in support of their motion for reconsideration and again, here, on appeal. The bottom line, as rightly determined by the Trial Court:

(i) the Purchase Agreement made the closing date (once set) "Of the Essence," (Da86 ¶2);

(ii) the 10-day notice period for setting the Time-of-the-Essence closing date was obviated by the mutually agreed upon Addendum signed by the parties through their counsel, which set the closing date for December 20, 2022 and "[i]n all other respects [kept] the [Purchase Agreement] . . . in effect as is," (Da101);

(iii) the Title Company and Appellants lacked authorization to proceed with the Closing after the mutually agreed upon closing date had lapsed and HFD expressly prohibited the transaction to proceed, rendering the closing void *ab initio*, (*see* Da9) ("Regarding Plaintiff's Motion for Summary Judgment as to Count One of its Verified Complaint, **the Court notes that there does not appear to be any unresolved disputes of material facts between Plaintiff Harbor Front and Defendant Clear Skies**. . . . Thus, the Parties agree on all material facts surrounding this motion.");

(iv) HFD properly terminated the Purchase Agreement predicated on Appellants' anticipatory breach (*i.e.*, Appellants' vigorous insistence that HFD sign the "Buydown Agreement" or, among other things, face litigation), (Da55); and

(v) the Appellants acted in bad faith by going forward with the transaction without HFD's authorization to do so, (Da56).

Accordingly, the appeal of Appellants must be denied.

POINT III

A TIME OF THE ESSENCE ANALYSIS WAS NOT NEEDED BECAUSE THE CONTRACT ITSELF DECLARED THE CLOSING TO BE TIME OF THE ESSENCE

As set forth above in Point II, *supra*, Appellants' reliance on whether a Time of the Essence Notice was properly served by Respondent is a slight-of-hand maneuver meant to distract this Court away from the undisputed facts of this case.

Paragraph 2 of the Purchase Agreement declared the closing date, once scheduled, "OF THE ESSENCE," and that, "[t]his means that failure by Buyer to close at the time specified shall be considered a breach and default of this Agreement. If Buyer is unable to or refuses to close on the date and time specified by Seller, at Seller's option, Seller may exercise its rights set forth in Paragraph 16 of this Agreement . . . ." (Da86.) Accordingly, the closing date was made Time of the Essence at the conception and execution of the Purchase Agreement.

Paragraph 16 of the Purchase Agreement states in pertinent part that, "If Buyer is in default, this Agreement at the option of Seller, may be terminated, and all deposits made by Buyer in an amount equal to ten percent (10%) of the total purchase price, plus the contract price of any payments for options and extras, shall be retained by Seller as liquidated damages." (Da86.)

Accordingly, the Trial Court rightly enforced Paragraphs 2 and 16 for the Purchase Agreement, based on his following findings:

> Despite Defendants' contentions that the Court overlooked [these issues], the Court does not view this Certification as probative, competent evidence, and accordingly did not address same in its January 5, 2024 Order and Opinion. **The date from which Plaintiff 's principal allegedly signed the Addendum is wholly irrelevant to the [sic] whether Defendants received ten days' notice of Closing. Notably, paragraph 2 of the Parties' Agreement does not require both Parties to execute an addendum ten days prior to closing.** The Court's decision to not address this Certification in its Summary Judgment Opinion was based on the Court's determination that such evidence did not constitute probative, competent evidence.
>
> * * * *
>
> **While the Court initially questioned the fact as to when the time of essence notice was provided, it determined that such a question does not prevent its enforcement of paragraph 2, given, in part, that the Parties mutually agreed to set a Closing date in an addendum which provided that "[i]n all other aspects, the Contract shall remain the same."** Here, instead of Plaintiff sending Defendants a unilateral notice to appear, the Parties—all of whom were represented by counsel in the transaction—mutually agreed to set the Closing date for December 20, 2022.
>
> * * * *
>
> While the Court appreciates that missing terms such as a time or place of closing can render a TOE notice deficient, the Court is not persuaded that such is the case here. Defendants have not argued that their failure to close on December 20, 2022 was a result of not knowing the time or location of Closing. **In fact, Defendants, through their own actions of appearing at Closing location on the mutually agreed upon date of December 20, 2022 supports the Court's finding that the addendum's lack**

> **of specificity of date and time are not genuine issues of material fact.**
>
> * * * *
>
> The Court found the termination enforceable pursuant to paragraphs 2 and 16 given that the addendum setting forth the date of Closing provided "[i]n all other respects, the Contract shall remain in effect as is." Pl. Exhibit 11 (emphasis added). Given that the Parties, represented by Counsel, mutually agreed on the date of Closing and agreed to otherwise enforce the Contract as written, **the Court found this mutual agreement obviated the need for the ten days' notice.** In the Court's view, this is supported by a plain reading of the Purchase Agreement in conjunction with the mutually agreed on addendum.

(Da52-Da54) (Emphasis added.)

Put another way, the parties agreed in the Purchase Agreement that the closing, once set, was "OF THE ESSENCE". A Time of the Essence Notice was not required. Further obviating the need for such a notice, the parties agreed to the Addendum that set the closing date by mutual agreement of the parties, serving as a modification of the Purchase Agreement to remove altogether the 10-day notice requirement. The Trial Court rightly recognized this crucial construction of the Addendum and its impact on the Purchase Agreement.

Accordingly, the appeal of Appellants must be denied.

POINT IV

THE COURT PROPERLY FOUND THAT APPELLANTS' LENDER AND TITLE COMPANY ACTED ON THEIR BEHALF AND THE MULHOLLANDS WERE NOT INNOCENT THIRD-PARTIES

Appellants' contend that their Lender and the Title Company were not their agents. This is belied by the Trial Court's well-reasoned findings that they did in fact act on behalf of Appellants.

As to the Title Company, the Trial Court held, in relevant part, as follows:

> Here, the undisputed material facts demonstrate that [the Title Company] acted as escrow agent on behalf of both parties to the Property transaction.
>
> * * * *
>
> The parties in this action had a clear and enforceable escrow agreement, where [the Title Company] acted as a fiduciary to Plaintiff and the Mulholland Defendants.
>
> * * * *
>
> Given that there is no genuine dispute of material fact in this matter as to whether Defendant Clear Skies Closed on the transaction and releasing the Closing Documents despite lacking the authorization to do so, Plaintiff is entitled to a declaration that Clear Skies breached its fiduciary duty owed to Plaintiff and lacked authority to deliver Plaintiff's Closing Documents out of escrow, rendering the Closing null and void.

(Da10-Da12.)

As to the Lender, the Trial Court held, in relevant part, as follows:

> the Mulholland's lender, acting on Defendants' behalf, clearly and unequivocally indicated—both at and after the December 20, 2022 Closing—that it would not fund the purchase price for the Property without Plaintiff signing the buydown agreement.
>
> It is undisputed that the Mulhollands' lender (i) threatened legal action against Plaintiff if Plaintiff did not sign the Buydown Agreement, (ii) refused to fund the purchase price for the Property unless Plaintiff signed the Buydown Agreement, (iii) confirmed that "the transaction will go on hold until all parties have signed" the Buydown Agreement, and (iv) sent hostile text messages to Plaintiff regarding the Buydown Agreement, future litigation, and threats to "lock down that house from being sold to anyone."
>
> * * * *
>
> Given that the lender chosen by and acting on behalf of the Mulholland Defendants clearly indicated it would not fund the Property absent Plaintiff agreeing to sign an agreement which Plaintiff was not obligated to sign, the Mulhollands could not render the agreed upon performance.

(Da54-Da55) (citing Da438 ¶ 7; Da530-545; Da772 ¶7.)

Appellant's cannot credibly contend that the Lender did not act on their behalf. They chose the Lender and they contemplated choosing another lender affiliated with Respondent, acknowledging that their chosen lender was tanking the transaction. (Da50 n.1.) And, because of their chosen Lender's demand for the "Buydown Agreement" and their acquiescence to such demand, they failed,

refused and were otherwise unable to close on the mutually agreed upon Time of the Essence closing date.

POINT V

THE COURT PROPERLY RETURNED THE PARTIES TO THE STATUS QUO ANTE

Rescission is an equitable remedy and only available in limited circumstances. Hilton Hotels Corp. v. Piper Co., 214 N.J. Super. 328, 336, 519 A.2d 368 (Ch. Div. 1986). Ordinarily, contracts may only be rescinded where there is original invalidity, fraud, failure of consideration, **or a material breach**. 17A Am. Jur. 2d, Contracts § 539, 567; see Herbtstman v. Eastman Kodak Co., 68 N.J. 1, 9, 342 A.2d 181 (1975); Merchants Indem. Corp. v. Eggleston, 37 N.J. 114, 130, 179 A.2d 505 (1962); Giumarra v. Harrington Heights, 33 N.J. Super. 178, 190, 109 A.2d 695 (App. Div. 1955), aff'd 18 N.J. 548, 114 A.2d 720.

Appellants' contention that the parties could not be returned to the status quo ante is predicated on the position, rejected by the Trial Court, that the Mulhollands were innocent third parties and that specific performance is not a remedy afforded to sellers of real property. This contention fails for two reasons: (i) the Trial Court found that the Mulhollands indeed acted in bad faith and therefore were not innocent third-parties (Da49-Da51; Da56); and (ii) the Trial Court rightly noted that recission is not the same as specific performance because HFD was not seeking to compel the Mulhollands to purchase the Property but, rather, sought a

declaration that the admittedly unauthorized closing should have never taken place in the first instance and it should retain its ownership rights (Da47-Da48).

Accordingly, the status quo ante was to return ownership of the property to HFD and to enforce the default provision of the Purchase Agreement.

Appellants' appeal must be denied in its entirety.

CONCLUSION

For the foregoing reasons, the Mulhollands' appeal should be denied in its entirety and the SJ Orders and Reconsideration Order should be affirmed.

Respectfully submitted,

SKIFF LAW FIRM LLC

Gregory J. Skiff

Dated: March 12, 2025

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HARBOR FRONT DEVELOPMENT, LLC Plaintiff v. CLEAR SKIES TITLE AGENCY; RYAN M. MULHOLLAND; AND KEVIN J. MULHOLLAND, Defendants v. EYAL SHAY AND HARBORFRONT VILLAS HOMEOWNERS' ASSOCIATION Third Party Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002025-23 On Appeal From the Superior Court Of New Jersey, Chancery Division, Union County DOCKET BELOW: UNN-C-006-23 SAT BELOW: Hon. Robert J. Mega, P.J. Ch.

THE MULHOLLAND DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF APPEAL

On the Brief:

Avrin Slatkin, Esq.

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LEGAL ARGUMENT
POINT I
PLAINTIFF FAILS TO RAISE ANY ARGUMENT WHATSOEVER TO KEY POINTS, LEAVING DISPOSITIVE POINTS IN DEFENDANTS' APPEAL BRIEF LARGELY UNOPPOSED

The Mulholland Defendants raised at least three points in their appeal brief which go unanswered in Plaintiff's response. These points are uncontested, and each one, standing alone, is dispositive.

The heading for Point VIII of Defendants' Brief on Appeal reads: "THE PROPERTY IS NOT UNIQUE TO HFD [Harbor Front Development LLC] WHEN IT WAS THE SELLER IN THE TRANSACTION." We refrain from repeating the argument in full, and summarize it as follows: To a developer/seller , a townhome in a development property is fungible; the seller markets the real property precisely to convert its value to cash, to offload it from its inventory. This contrasts with a buyer who is drawn to real property by its unique combination of features, whether that may include the view, the layout, the school system, the location, the size, and too many other features to enumerate (which is precisely why it is unique). From the seller's mercantile perspective, particularly with new construction development housing, there is not a smidgen of uniqueness attributable to real property.

The Trial Court incorrectly felt bound to grant the equitable remedy of rescission, returning title to the seller, when the property was not, in fact,

unique to the seller. Plaintiff's brief does not join the issue. Plaintiff cites no support for the Trial Court's application of the principle of real property uniqueness to a seller. There is none, and the Trial Court misapplied the principle to arrive at the wrong result.

Given that the Defendants' argument is unopposed, the Plaintiff has failed to demonstrate that the Trial Court's reliance on the uniqueness of real property to justify its remedy of rescission **in favor of the seller** was proper. On the *de novo* standard which guides this Appellate Court's review, this is a dispositive point.

The heading for Point VII B of Defendants' Brief on Appeal reads: "Injunctive Relief Is Not Available to Plaintiff When Money Damages Are Available." This point establishes that the Trial Court erred in awarding the extreme equitable relief of rescission against the Mulhollands, who were not found to be malefactors, when adequate money damages were available against the sole malefactor, Clear Skies (which forthrightly admitted its negligence). Plaintiff does not so much as articulate a counterargument. The point is unopposed.

The heading for Point X of the Defendants' Brief on Appeal reads, "HFD [Harbor Front Development, LLC] CANNOT ENFORCE A PURPORTED TIME OF THE ESSENCE NOTICE WHEN IT WAS NOT

READY TO CLOSE ON THE PURPORTED APPOINTED DATE." And again, while we do not repeat that argument in full herein, it can be summarized in a single sentence: A party to a transaction is not entitled to the benefit of time of the essence when that party is not ready, willing and able to close on the appointed date. For example the Appellate Division has upheld a court's holding that real property buyers had breached when they did not appear on a time of the essence closing date o*n which the sellers were ready, willing and able to close*. Krupnick v. Guerriero, 247 N.J. Super. 373, 376 (App. Div. 1990).

Plaintiff admits that it was unwilling to proceed with the closing and emphatically advised the title company that it had not given its authorization. Shepard Federgreen, Esq., Plaintiff's closing attorney, wrote to Clear Skies on December 22, 2022:

> As you know, we previously delivered to you the $110,000 deposit held pursuant to the contract for the captioned transaction to facilitate the closing.
>
> Do not deliver this money and do not take any steps to effectuate a closing fore the sale of D-14.
> (Da 482)

Plaintiff's attempt to cancel the closing, a fact found to be undisputed by the Trial Court, is inconsistent with enforcement of time of the essence.

> When time is made of the essence for the closing of title to real estate, i**t is essential that both parties be**

> **able, ready and willing to perform at the time and place fixed.** If the vendor fails to perform at the time stipulated he must be deemed to have defaulted and cannot retain the deposit moneys paid thereunder.
>
> Brinn v. Mennen Co., 5 N.J. Super. 582, 587 (Ch. Div. 1949), aff'd, 4 N.J. 610, 73 A.2d 541 (1950)

Furthermore, there is no justification for awarding HFD the Defendants' liquidated damages deposit.

> Rather 'the general rule is that he who seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt, and eager to perform the contract on his part." Meidling v. Trefz, 48 N.J.Eq. 638, 23 A. 824, 825 (E. & A.1891); [other citations omitted].
>
> Stamato v. Agamie, 24 N.J. 309, 316, 131 A.2d 745, 748–49 (1957)

The Court's failure to determine that the Seller's attempt to cancel the closing disqualified it from enforcing time of the essence was plain error. N.J. Court Rule 2:10-2 provides that "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court." In this case, the improper enforcement of time of the essence in favor of a seller which itself sought to cancel the closing is foundational, and led to an unjust result.

Plaintiff does not take issue with this crucial point, and cites no factual findings by the Court below, or facts in the record, to suggest that the legal principle does not apply. The argument, which is dispositive in and of itself, is unopposed.

POINT II
THE TRIAL COURT'S REMEDY OF RESCISSION, WHICH ITSELF WAS INCORRECTLY GRANTED, DOES NOT JUSTIFY THE AWARD OF CONTRACT LIQUIDATED DAMAGES

The Plaintiff argues that the Trial Court's findings and holdings on reconsideration explain away inconsistencies in the summary judgment Orders and Opinions. The Court's opinion on reconsideration, however, fails to explain the award of contractual liquidated damages when no breach of contract cause of action had been asserted and no breach of contract had been committed. Even if rescission of the transaction were justified due to Clear Skies' negligence,[1] and that is not the case, it would not follow that Plaintiff is entitled to 10% of the purchase price under the liquidated damages clause of the contract.

---

[1] On the contrary, Plaintiff was obligated to close the transaction given that all terms had been met.

POINT III
PLAINTIFF FAILS TO ADDRESS A KEY POINT RE: TIME OF THE ESSENCE

The Time of the Essence clause in the Purchase Agreement is not self-executing. For time of the essence to apply, the notice of time of the essence must have been served in a specific manner. That is clear from the following language:

> CLOSING OF TITLE: The closing of title shall take place at the location that Seller shall direct, and is tentatively scheduled for the date listed on the cover page (the "Estimated Closing Date"). **Seller will provide Buyer with at least ten (10) days written notice of the closing date. When so scheduled**, the date and time of closing shall be "OF THE ESSENCE".
> (Da A88)

The language in bold above is conveniently omitted from Respondent's Brief on Appeal.

Plaintiff apparently concedes that there is no basis for any finding that the purported TOE notice was properly served, utilizing the summary judgment standard in which all questions of fact are to be resolved in favor of the non-movant. However, Plaintiff fails to recognize the significance of that.

The parties to the PA never agreed that setting a closing date was equivalent to setting a TOE closing date. In fact, the PA draws an

unambiguous distinction between a closing date and a TOE closing date. The Trial Court's failure to recognize that distinction creates a contract different from that to which the parties themselves agreed. It is black letter law that the Court may not draft a contract different than that which the parties themselves agreed upon.

Even if the appointed date were an enforceable time of the essence, and it is not, there was no breach. The Mulhollands were ready, willing and able to close, and it was the Plaintiff which attempted to withdraw (unsuccessfully, due to Clear Skies' actions in effectuating the closing)from the transaction.

POINT IV
THE PLAINTIFF FAILS TO CITE ANY AUTHORITY DEMONSTRATING THAT TIME OF THE ESSENCE CAN BE UTILIZED TO UNWIND A COMPLETED CLOSING

It is the height or irony that Plaintiff relies on a purported time of the essence notice to justify the unwinding of a closing. Time of the essence is a tool to compel closings to occur, and Plaintiff cites no authority to support any other conclusion. The Muhollands appeared at the office of Clear Skies to complete the closing; they were ready, willing and able to close. It was the Plaintiff who backed down from the closing, because, in the words of Eyal Shay:

> Q. Now, at that point, was there a reason you didn't want to proceed with the closing? . . . . And I

need to caution you here, do not·tell me about any communications you had with your ·attorneys.

· A.· · ·At that time, it was, I think, months ·after we sent documents.· I was harassed by different ·people, phone calls, e-mails, contact me in different ·channels, and I expressed my frustration of not ·understanding why in the last minute I don't ·understand the document. · ·I don't understand why they're asking for ·me to give -- everything was bad for me.· They asked ·me to increase but give them a credit.· It's looks ·for me monkey business.· That's surprise, that's what ·we set up in the contract a year ago. · ·In the last minute, they stopped sending me document that I'm becoming to be a party of a ·legal documents in the U.S. that I was not ·generating.· I'm not part of the buyer.· They asked ·me to sign the buy-down agreement. · · · · ·At that time I was overload, harassed and ·I didn't know that guy can make it.· It was a month ·after we sent the document, I think.· So, at that ·time, like, I didn't want to close because it was the month after with all the things I told you about.

Q.· · ·You mentioned you were communicating with ·other -- see if I got that right... ·

MR. WEBER:· Harassed? ·

MR. MANKOFF:· Harassed. ·

Q.· · ·And so, who was harassing you?

A.· · ·The lender guy was calling me the day he ·want me to sign the documents.· The attorney of the ·buyer called me few times and text me.· The agent, ·different, I don't know who was the people, but the most hectic was in between the title and the lender. ·And that was one month after we released the legal ·documents, the closing package. · ·

Q.· · ·Okay.· So, is it fair to say that by that ·point you were just generally uncomfortable with all ·of the communications you were receiving and wanted·to terminate the transaction? ·

A.· · ·Yes.
(Da 209- Da 210 26:6 – 27:23)

On this record, with the Orders on appeal subject to *de novo* appellate review, there is no basis for the equitable relief of rescission or an award of liquidated contract damages to Plaintiff.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Appellate Brief, the Mulholland Defendants' appeal should be granted in its entirety. Those portions of the January 5, 2024 Summary Judgment Orders on appeal should be reversed, and the February 5, 2024 Reconsideration Order also should be reversed.

Respectfully submitted,
BIEBELBERG & MARTIN

AVRIN SLATKIN

MARCH 19, 2025