NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - GENERAL EQUITY
ESSEX COUNTY
DOCKET NO.: ESX-C-178-13

GENDA INDUSTRIES, LLC, and MARTIN LUCIBELLO, SR.,	
Plaintiffs	**O P I N I O N**
vs.	
CROWN BANK,	
Defendant	

Hearing Held: February 12, 2015
Decided: February 18, 2015

Brian Kiernan, Esq. (Kiernan & Strenk)
Attorney for Plaintiffs

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By: David B. Katz, J.S.C.

This case arises out of a complex loan extended to Plaintiff Genda Industries, LLC (hereinafter "Genda" or "Plaintiff") by Defendant Crown Bank (sometimes referred to as "Defendant"), containing of a cross-default/cross-collateralization provision, commonly referred

to as a "dragnet clause." In a previous ruling, the Court discussed the dragnet clause and Defendant's attempts to hold Genda liable for loans executed by the guarantor.

By way of background, Plaintiff Martin Lucibello, Sr. ("Martin Sr."), a retired CPA, owns a 90% interest in Genda and is the managing member thereof. See Certification of Martin Lucibello Sr. ("Martin Sr. Cert."), dated December 8, 2014, at ¶ 1. The remaining 10% interest in Genda is owned by Martin Sr.'s son, Martin Lucibello, Jr. ("Martin Jr."). Id. Genda was formed over 15 years ago for the purpose of building houses in Newark. See Deposition of Martin Sr., at T. 55:2-22, attached to Certification of Douglas A. Stevinson (hereinafter "Stevinson Cert."), as Ex. E. After the completion of that project about 10 years ago, Genda remained, for the most part, a dormant company. See id. at T. 59:2-10.

Martin Sr. is also currently a 50% owner and President of Colonial Concrete Company ("Colonial"), which is in the business of the manufacture, sale, and delivery of ready-mix concrete. Id. at ¶ 2. The other 50% of Colonial is owned by Frank Rizzo. See Martin Sr. Dep. at T. 13:1-5, attached to Stevinson Cert. as Ex. E. Martin Jr. does not have any ownership interest in Colonial, but has worked as a salesman for Colonial for a little over 23 years, and continues to do so to date. Deposition of Martin Jr. (hereinafter "Martin Jr. Dep."), Part 1, at T. 15:6-14, attached to Stevinson Cert as Ex. B.

Martin Jr. was also a member of several business entities involved in construction and development, including but not limited to Greenstar Construction, Broadway Builders, Broadway Partners Development, and Bella Vista Industries, LLC. Sometime in 2005, Martin Jr. also established a car dealership, traded under the name Riverside Audi, in which he owned a 50% interest. See Martin Jr. Dep., Part 1, at T. 25:1-15; T. 27:12-15. To establish and operate Riverside Audi, Martin Jr. borrowed money from Valley National Bank, with Martin Sr. guaranteeing the

loans from Valley. See Martin Jr. Dep., Part 2, at T. 14:18-22, attached to Stevinson Cert. as Ex. C. Martin Sr. and Colonial also lent large sums of money to his son Martin Jr. in connection with Riverside Audi. See Martin Sr. Dep. at T. 31:23-32:1, attached to Stevinson Cert. as Ex. E.

Sometime in 2005, Greenstar, one of Martin Jr.'s construction entities, obtained a $1.67 million loan from Crown Bank, which Martin Jr. personally guaranteed, for the purpose of constructing housing in Elizabeth. See Crown-Greenstar Note, attached to Stevinson Cert. as Ex. G. Martin Sr. was aware that Martin Jr. had taken on this loan from Crown Bank for the Greenstar project. See Martin Sr. Dep. at T. 24:13-22. The original term of the Greenstar loan was one year, but Crown repeatedly extended the maturity date of the loan in an effort to maximize recovery thereon. See Letters from Crown Bank Extending Loan Maturity Date, attached to Stevinson Cert. as Exs. I-J.

At some point after Greenstar obtained the loan from Crown Bank, Riverside Audi defaulted on its loan obligations to Valley Bank. As a result, Martin Jr. decided to voluntarily file for bankruptcy on August 19, 2010. See Voluntarily Petition in Bankruptcy, attached to Stevinson Cert. as Ex. L; see Martin Jr. Dep., Part 1, at T. 129:13-25. Because of Martin Jr.'s deteriorating relationship with Valley Bank, Martin Sr. decided to move his commercial lending relationships from Valley to Crown Bank. Thus, in August of 2011, Martin Sr., in his capacity as President of Colonial, entered into four separate loan agreements with Crown Bank for a mortgage loan on the property in which Colonial conducts its operations. See Martin Sr. Cert. at ¶ 3.

After Martin Jr. filed for bankruptcy, he learned that his elderly neighbors whom he has known since childhood, the Saroldis, suffered significant damage to their home, located at 16 Emerson Street in Cresskill, New Jersey ("Cresskill property"), as a result of a storm. See Martin Jr. Dep., Part 2, at T. at 29:8-25 to 30:14. Martin Jr., through his construction company Bella

Vista, entered into contracts with the Saroldis to rehabilitate the Cresskill property. Id. at T. 31:7-15. However, when the Saroldis' health deteriorated and the property went into foreclosure, Martin Jr. ultimately decided to attempt to purchase the Cresskill property to avoid foreclosure, construct a new home thereon, and eventually sell the property. Id. at T. 39:2-13. Martin Jr. applied to Crown Bank for financing to purchase the Cresskill property and complete the construction, but his loan application was denied given his financial difficulties as well as his difficulties with the Greenstar loan. Id. at T. 39:18-23. However, Crown Bank advised Martin Jr. that it would lend the money only if Martin Sr., or an entity Martin Sr. controlled, was the prime borrower on the loan. See Martin Sr. Dep. at T. 60:1-9.

In January 2013, Martin Sr. and Genda, the entity of which Martin Sr. owned a 90% interest, applied to Crown Bank for a loan in the amount of $500,000 to finance the purchase and construction of the Cresskill property. Bella Vista, Martin Jr.'s construction company, was to be the general contractor for the project. See Loan Approval Document at p. 8, attached to Martin Sr. Cert. as Ex. B. As such, Martin Jr. and another employee of Bella Vista submitted to Crown Bank an original estimated budget for the project. See Martin Jr. Dep., Part 2, at T. 56:7-18. Martin Sr. was not involved in calculating the original budget submitted to Crown Bank, which was estimated to be $295,000. See Martin Sr. Dep. at T. 78:1-6.

On February 26, 2013, Crown Bank approved the loan by providing the Lucibellos with a commitment letter, which identified Martin Sr. and Genda as co-borrowers, and required Martin Jr. to personally guarantee the loan. See Commitment Letter, attached to Martin Sr. Cert. as Ex. A.[1] According to internal bank documents produced by Crown Bank in discovery, the personal

[1] As noted, Martin Jr. had previously filed for bankruptcy protection. The parties have not brought the status of that bankruptcy to the Court's attention, nor have they argued its effect, if any, on the current applications before this Court.

guarantee of Martin Jr. was required as an "abundance of caution only; due to the fact that [Martin Jr.] is the builder/project manager of this project." See Loan Approval Document at p. 7. The commitment letter also indicated that the loan was to be cross-collateralized and cross-defaulted with all existing and/or new Crown Bank credit facilities to borrower *and* guarantor. See Commitment Letter at p. 3 (emphasis added). Further, the commitment letter indicated that $225,000 of the $500,000 loan would be for acquisition of the property, while $275,000 would go towards hard construction costs. Id. at p. 1. Because the purchase price of the property was $451,000, the acquisition of the property was not solely funded by Crown Bank. See Martin Jr. Dep., Part 2, at T. 52:8-25.

When Martin Jr. received the commitment letter, he faxed it to his attorney Pamela Zavari, Esq., so that Ms. Zavari could review and approve the terms of the commitment letter. See Martin Jr. Dep. at T. 47:20-48. The Lucibellos signed the commitment letter on March 1, 2013. See Commitment Letter, attached to Stevinson Cert. as Ex. F.

The closing on the loan from Crown Bank to Genda took place on May 24, 2013, and was attended by, *inter alia*, both Lucibellos and Ms. Zavari. See Martin Jr. Dep., Part 2, at T. 78:1-12. At the closing, Genda and Martin Sr. executed a construction loan agreement with Crown Bank and signed a promissory note and mortgage on behalf of Genda for the principal amount of $500,000. The promissory note contained the following provision:

> CROSS COLLATERAL CROSS DEFAULT PROVISION. All other agreements between Borrower and/or Guarantors and the Bank and/or any of its affiliates or subsidiaries are hereby amended so that a default under any one of those agreements is a default under this agreement. All such agreements are further amended so that the collateral under this agreement secures the obligations now or hereafter outstanding under all other agreements with the Bank and/or its affiliates or subsidiaries and the collateral which serves as security under any other agreement with the Bank and/or its affiliates or subsidiaries secures the Obligations under this agreement. As of today's date, May 24, 2013 existing loans

> with Crown Bank to Colonial Concrete #'s 140002959, 140002960, 14000297 and Stand by letter of credit issued 8/12/11 to Colonial Concrete Co.

See Promissory Note, attached to Martin Sr. Cert. as Ex. B. Martin Sr. signed a personal guaranty of completion and performance. Martin Sr. and Genda also executed an assignment of leases and rents and commercial security agreement. Crown Bank also required Martin Jr. to execute a commercial guaranty at the closing. Id. at ¶ 15.

After the loan closing, Bella Vista continued construction on the Cresskill property. On June 14, 2013, about a month after the closing of the loan, Genda entered into a contract of sale of the property with a Mr. and Mrs. Couch for a purchase price of $877,500.00.[2] Id. at ¶19. At the completion of construction, Genda had ultimately drawn the loan down to $418,708.80, with each draw conditioned upon a bank inspection and audit. See Martin Sr. Cert. at ¶ 18; see Loan Billing Statement, attached to Compl. as Ex. G.

Shortly after the contract of sale between Genda and the Couches was executed, Crown Bank sent a letter to Martin Sr. on July 15, 2013, informing him that he was in default on the Genda note and mortgage as a result of a payment default on a loan from Crown Bank to Greenstar Construction. See July 15, 2013 Letter to Martin Sr., attached to Stevinson Cert. as Ex E. On that same date, Crown Bank sent Martin Jr. a letter advising him that the Greenstar loan had been in default since December 5, 2012. See July 15, 2013 Letter to Martin Jr., attached to Stevinson Cert. as Ex F. Crown Bank asserted that the Genda mortgage served as "cross-collateral" for its loans to Greenstar, and thus the Genda mortgage fell into default as a result of the default of the Greenstar loan. See September 17, 2013 Letter from Mr. Stevinson on behalf of Crown Bank, attached to

[2] The original contract price was $950,000.00, but was subsequently reduced by the parties in consideration of the Couches accepting the home at closing "despite incomplete work to the basement and kitchen." See Amendment to Contract of Sale, attached to Stevinson Cert. as Ex. V.

Stevinson Cert. as Ex. W. As such, Crown Bank argued that in order to effectuate a pay off the Genda loan, the Greenstar loan would have to be paid off as well. See id.

At the time Martin Sr. received the default notice from Crown Bank, Genda had a payment requisition pending at Crown Bank for $60,250.00. Upon receiving the default notice from the bank, however, Genda withdrew the payment requisition. See Payment Requisition Withdrawal, attached to Compl. as Ex. H. When the Lucibellos demanded a payoff letter from Crown Bank, the bank refused to issue it, taking the position that, by reason of the Greenstar default, it was entitled not only to the amount actually borrowed by Genda, but also to the entire net proceeds of the sale of the property to be applied toward payment of the allegedly defaulted Greenstar Loan. See Certification of Patrick B. Kiernan, Esq., dated January 2, 2015, at ¶ 16.

On September 26, 2013 Genda Industries and Martin Sr. commenced this action by order to show cause to compel Crown to issue a payoff statement for the Genda Loan. Crown opposed the order to show cause on the grounds that the underlying loan was cross-collateralized and cross-defaulted with all other loans made by the bank to both the Plaintiffs and Martin Jr. The parties, however, entered into a consent order on November 25, 2013, wherein Crown agreed to provide a loan payoff statement in the principal amount of $418,708.80 and to discharge the mortgage on the property, on the condition that the "net" proceeds from the sale of the property be deposited and maintained in escrow and be released only upon further application to the court. Id.

Crown Bank answered the complaint on October 15, 2013, asserting counterclaims against Plaintiffs for a declaratory judgment that the cross-collateralization provision applied to the Greenstar loan, as well as claims for breach of contract, breach of the covenant of good faith and fair dealing for Plaintiffs' alleged failure to honor the cross-collateralization provision. Crown Bank also asserted a claim for reformation, asserting that the failure to expressly specify the

reference number of the Greenstar loan in the cross-collateralization provision was a mistake that warrants reformation of the loan documents.

On February 20, 2014, Genda closed on the sale of the 16 Emerson Street property to the Couches. Genda paid $419,125.79 of the sales proceeds to Crown Bank, which reflected the entire principal actually borrowed by Genda, plus per diem interest. See Martin Sr. Cert. at ¶ 18. The remaining $443,647.47 was deposited in escrow and held by Plaintiffs' counsel pursuant to the parties' November 25, 2013 consent order, pending final resolution of the matter.

On July 2, 2014 Plaintiffs filed a motion to reduce the escrow to $81,291.20, the amount which represents the difference between the face value of the mortgage, $500,000, and the amount Plaintiffs actually paid to Crown Bank upon the closing of the sale of the property. On August 20, 2014, the return date of that motion, however, the parties agreed to enter into mediation, which ultimately proved unsuccessful. Thus, that motion was heard on October 1, 2014, after discovery had been commenced.

On October 20, 2014, after resolving objections regarding the form of the order, the Court entered an order after carefully considering and weighing the equitable factors before it, and allowed Plaintiffs to recover from the escrow only their out-of-pocket costs and expenses incurred to complete construction of the Cresskill property, so long as the escrow balance was not reduced below $81,291.20 (i.e., the difference between the amount actually borrowed by Plaintiffs, $419,125.79, and $500,000.00, the face value of the mortgage). The order set forth that each withdrawal request was to be presented to Crown Bank, with Crown Bank having seven days to provide its objection to Plaintiffs' counsel in writing. Further, the order provided that if the parties were unable to resolve a contested withdrawal request, Plaintiffs may apply to the Court for a decision on the appropriateness of the withdrawal.

On October 24, 2014, Plaintiffs' counsel then sent to Crown Bank's counsel a letter with seven proposed itemized withdrawals and supporting documents. On November 4, 2014, Crown Bank's counsel sent Plaintiffs' counsel a letter objecting to all seven of Plaintiffs' proposed withdrawals. Thus, on November 13, 2014, Plaintiffs applied to the Court to rule on the appropriateness of Plaintiffs' proposed escrow withdrawals. After conducting a conference call between the parties, the Court requested that Plaintiffs file a formal motion to reduce escrow so that the Court would have a full record before it, which Plaintiffs did on January 7, 2015. That motion was originally made returnable on January 23, 2015. After a subsequent conference call between the parties conducted on January 12, 2015, the parties agreed to adjourn the motion to February 13, 2015.

Plaintiffs also filed a motion to amend the complaint on January 6, 2015, which the Court likewise scheduled for February 13, 2015. Plaintiffs seek to amend the complaint to add a claim under the New Jersey Consumer Fraud Act ("CFA"), alleging that Crown Bank's officers and employees knew of and planned for the default of the Genda loan and concealed those facts from Plaintiffs. As of the date of hereof, the parties have substantially completed discovery, having completed party depositions and exchanged paper discovery.

As to Plaintiffs' proposed escrow withdrawals, Defendant opposes all of the line items submitted by the Plaintiffs on the grounds that either: (1) they were not actually incurred by the Plaintiffs, but were instead incurred by Martin Jr., who is not a party and is bankrupt or (2) they fall outside the parameters of the Court's October 2014 Order. Defendant also cross-moves for the Court to reconsider its October 20, 2014 Order, arguing that discovery has established that the loan transaction was always intended to benefit Martin Jr. Defendant argues that this is evidenced by the fact that the loan to Genda was clearly meant to address Martin Jr.'s failing Greenstar loan,

thus supporting Defendant's argument that the Genda loan was cross-collateralized with the Greenstar loan. According to Defendant, if Plaintiffs are permitted to withdraw escrowed funds, Crown is harmed because it is not able to pay down the Greenstar loan.

The Court conducted extensive oral argument on February 12, 2015 and now issues this Opinion in resolution of the motions pending before the Court.

PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE COMPLAINT

ARGUMENTS

Plaintiffs argue that it learned of the specific facts underlying its proposed CFA claim after conducting discovery. Specifically, Plaintiffs argue that in its interrogatory answers, Crown Bank asserted that the purpose behind making the Genda loan was to pay down the Greenstar Loan. See Kiernan Cert. at ¶ 11. According to Plaintiffs, none of the loan documents contained any reference to this purpose or to the indebtedness of Greenstar to Crown Bank. Id. at ¶ 13.

Plaintiffs also point out that several weeks before closing on the Genda loan, Crown Bank and the FDIC executed an amended consent order under which Crown Bank was required to have an action plan for each "adversely classified borrower" which detailed other repayment sources or collateral and any actions the bank could take to improve its position. Id. at ¶ 24. According to Plaintiffs, the fact that Crown Bank never provided any documents to the FDIC regarding enhancement of the Greenstar loan by virtue of the Genda loan suggests that such was *not* the express purpose of the Genda loan.

Further, Plaintiffs argue that when certain Crown Bank officers were deposed, they testified that they had verbally agreed to a forbearance of the defaulted Greenstar loan for an unspecified period of time. Thus, any declaration of default of the Genda loan by virtue of the

Greenstar loan was fraudulent and wrongful, because the Greenstar loan was not in default due to the forbearance agreement.

Plaintiffs argue that the above facts justify a CFA claim because Plaintiffs and the bank are "persons" as defined by the CFA, and the sale of credit constitutes "merchandise" under the CFA. Plaintiffs also assert that because common law fraud and misrepresentation claims were asserted in the original complaint, no new legal theories would be introduced by the CFA claim. As such, according to Plaintiffs, no new discovery is necessary to defend the CFA claim.

Defendant argues that amending the complaint to allow a CFA claim would be both prejudicial and futile. Defendant asserts that it would be greatly prejudiced if Plaintiffs are permitted to add a CFA claim because party depositions have already been conducted, as well as third party discovery. In addition, trial is currently scheduled for May 2015.[3] According to Defendant, it would have asked more questions dealing with the parties' sophistication and background with commercial finance during the depositions. Also, Defendant points out that the Court had previously partially granted Plaintiffs' motion to quash Crown's subpoena to Valley National Bank, which requested that Valley provide all prior commercial loan transactions with the Lucibellos, by narrowing the documents that Valley was required to supply to Crown. Defendant contends that had the Court known a CFA claim was to be included, it likely would have allowed full disclosure of the Lucibellos' commercial loan transactions with Valley, as their banking sophistication would be in issue with respect to a CFA claim. Further, Defendant suggests that Plaintiffs' request to add a CFA claim is in bad faith, because the facts needed to allege a CFA claim were available to Plaintiffs for a significant amount of time. Thus, according to Defendant,

[3] At a case management conference following oral argument, the Court set new trial dates of June 16 and 17, 2015.

Plaintiffs are only now seeking to add a CFA claim to gain leverage, as the CFA offers the prospect of recovering treble damages and attorneys' fees.

Moreover, Defendant argues that not only would addition of the CFA claim be prejudicial to them, but also that such a claim would be futile. Specifically, Defendant asserts that the CFA aims to protect *consumers*, not sophisticated professionals with equal bargaining power. Thus, because Genda and the Lucibellos were highly experienced with commercial credit transactions, they should not be considered "consumers" for purposes of the CFA. Moreover, Plaintiffs were represented by counsel in connection with the negotiation of the Genda loan. Finally, Defendant argues that Plaintiffs have not specifically addressed what, if any, damages they have suffered as a result of the alleged fraudulent acts of the bank, which is a required element for a CFA claim.

DISCUSSION

Rule 4:9-1 requires leave of court to amend a pleading, but provides that leave "shall be freely given in the interest of justice." However, while leave to amend should be liberally granted, it remains a matter in the court's discretion. See Kernan v. One Washington Park, 154 N.J. 437, 457 (1998). The court must exercise its discretion in accordance with the following two factors: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile. See Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006). As long as the non-moving party will not be prejudiced and amendment would not be futile, a party may seek leave to amend its pleading at any stage of the proceedings. See Franklin Med. Assocs. v. Newark Public Schools, 362 N.J.Super. 494, 506 (App. Div. 2003).

Under the futility prong of the motion to amend analysis, a court must determine whether the amended claim will nonetheless fail, such that "allowing the amendment would be a useless endeavor." Id. Consequently, a motion for leave to amend a complaint is determined by the same standard as a motion to dismiss under R. 4:6-2(e). See Webb v. Witt, 379 N.J.Super. 18, 28 (App. Div. 2005) (citing Maxim Sewage Corp. v. Monmouth Ridings, 273 N.J.Super. 84, 90 (Law Div. 1993)). Accordingly, all of the allegations in the pleading must be accepted as true. Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). Further, leave to amend must be granted without consideration of the ultimate merits of the amendment. See Notte, 185 N.J. at 500-01 (2006).

The New Jersey Consumer Fraud Act, N.J.S.A. 56:8 -1 to -195, was passed in 1960 in order to thwart the progressively prevalent practice of defrauding consumers. See Cox v. Sears Roebuck & Co., 138 N.J. 2, 14-15 (1994). The CFA is intended to protect consumers "by eliminating sharp practices and dealings in the marketing of merchandise and real estate." Channel Cos. v. Britton, 167 N.J.Super. 417, 418 (App.Div.1979). Accordingly, the CFA prohibits:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby. . .

N.J.S.A. 56:8-2. The New Jersey Supreme Court has held that the definition of "merchandise" is broad enough to include the sale of consumer credit. See Lemelledo v. Benefit Mgmt. Corp., 150 N.J. 255, 265 (1997). Further, the CFA defines a "person" who may be a victim of a CFA violation as including "any natural person or his legal representative, partnership, corporation, company, trust, business entity or association, . . ." N.J.S.A. 56:8-1(d). Thus, business entities are not

categorically excluded from coverage under the CFA. See Hundred E. Credit Corp. v. Eric Shuster Corp., 212 N.J.Super. 350, 356 (App. Div. 1986) ("Surely a business entity can be, and frequently is, a consumer in the ordinary meaning of that term."); see also O'Brien v. Cleveland (In re O'Brien), 423 B.R. 477, 488 (Bankr. D.N.J. 2010) ("There is no statutory exception for sophisticated consumers.") However, "notwithstanding a broad and liberal reading of the statute, the CFA does not cover every sale in the marketplace." Papergraphics Intern. Inc. v. Correa, 389 N.J.Super. 8, 13 (App. Div. 2006). Instead, "CFA applicability hinges on the nature of a transaction, requiring a case by case analysis." Id. (citing Hundred E. Credit Corp., 212 N.J.Super. at 356-57)).

In Dreier Co., Inc. v. Unitronix Corp., 218 N.J. Super. 260, 272-73 (App. Div. 1986), the court held that the sale of a computer system "consisting of hardware and 'custom programmed software' for billing, accounts receivable and inventory control" was within the scope of CFA. The court noted that although plaintiff was a business entity, it "had no knowledge or expertise in the computer field and therefore relied upon [Defendants] to provide a system to meet plaintiff's particular needs." Id. at 263-65. The court thus found that the plaintiff was "just as vulnerable to unconscionable business practices as a private consumer." Id. at 273 (citing Hundred East, 212 N.J. Super. at 356-57).

On the other hand, in Princeton Healthcare System v. Netsmart New York Inc., 422 N.J.Super. 427 (App. Div. 2011), the court held that the CFA did not apply "to a negotiated contract between corporations for the installation and implementation of a complex computer software system" that handled medical billing for a healthcare facility. The court explained that the contract for the software system "did not constitute a simple purchase of computer software sold to the public at large." Id. at 473. Instead, the court found that the sale was a "heavily

negotiated contract between two sophisticated corporate entities." Id. at 474. In reaching this conclusion, the court relied on several facts. First, with the assistance of a computer consultant, the plaintiff prepared several requests for proposals with detailed specifications. Thus, the resulting contract "did not provide for simply the installation of a standardized computer software program but rather the design of a custom-made program to satisfy Princeton House's unique needs." Id. Moreover, counsel for both sides as well as plaintiff's computer consultant were active participants in the lengthy negotiations that led to the contract. As such, the transaction was not the type contemplated by the CFA.

Even affording Plaintiffs all favorable inferences, the facts still demonstrate that the amendment of the complaint to add a CFA claim would be futile. There is no dispute that Plaintiffs entered into the subject loan with extensive experience with commercial financing. Martin Sr. was an owner and the President of Colonial, which was involved in several lending transactions throughout its decades of operation. Martin Sr. has a degree in accounting and was a practicing CPA for many years before retiring. Martin. Sr. and Genda were not "unsophisticated buyer[s], suffering a disparity of industry knowledge, victimized after being lured into this purchase through fraudulent, deceptive selling or advertising practices." See Papergraphics, 389 N.J.Super. at 14. Instead, the undisputed facts indicate that the "parties were experienced commercial entities of relatively equal bargaining power which engaged in negotiated contracts." Id.

Further, the loan documents were certainly not standardized or "form" documents. See Stockroom, Inc. v. Dydacomp Dev. Corp., 941 F.Supp. 537 (D.N.J. 2013). Instead, like in Princeton, the loan documents were tailored to the unique and specific needs of the Plaintiffs based on the particular project Genda planned to undertake. That is, the terms of the loan took into account, after negotiation between experienced parties and their counsel, the unique and specific

factors confronting the parties, such as the proposed budget as well as the acquisition costs of the property, in addition to the other projects and loans between at least Martin Sr. and the bank, as evidenced by the cross-collateralization and cross-default provisions. Moreover, these provisions were between and among parties with extension experience in banking, who were all represented by counsel of their choosing. At bottom, this case concerns the differing interpretation of what certain provisions in the loan agreement mean and how they are to be interpreted. Simply put, the issue boils down to whether, after crafting complex documents tied to a specific business opportunity, the dragnet clause was applicable only to Martin Sr. and Genda, on the one hand, or also to Martin Jr. as a guarantor and his various loans, on the other hand. The parties have advanced numerous factual discrepancies in that regard which will be resolved at trial.

As noted above, the court in Lemelledo held that the CFA applies to *consumer* credit. Lemelledo, 150 N.J. at 265. Given the unique, specific, and customized terms of the loan transaction between Plaintiffs and Crown Bank, the Court does not find the loan to fall into the category of "consumer credit" in the ordinary sense. Further, even if the Lemelledo court did not intend to limit CFA coverage *only* to consumer credit, there is ample support for the notion that the CFA does not apply to *all* provisions of credit. Specifically, the New Jersey Supreme Court has acknowledged "a need to place reasonable limits upon the operation of the CFA despite broad statutory language." See Lee v. First Union Nat'l Bank, 199 N.J. 251, 263 (2009). Further, it has been held that the CFA is "pointed to products and services sold to consumers in the *popular sense*." Neveroski v. Blair, 141 N.J.Super. 365, 378 (App. Div. 1976) (emphasis added).[4] The Court finds that leave to amend to add a CFA claim would be futile, because the claim would not

[4] As explained above, the transaction at issue is anything but an extension of credit in the "popular sense."

be sustainable as a matter of law in light of the application of the undisputed facts of this case to the above case law.

Moreover, even if the Court did not consider the addition of a CFA claim to be futile, it would nevertheless be compelled to deny leave to amend based on the significant prejudice that would result to Defendant. Party depositions have been completed, as well as subpoenas of third parties. While Plaintiffs assert that the completed discovery is sufficient to defend against a CFA claim, the Court is not in the position to dictate what information Defendant may need in order to defend against the claim. Defendant correctly argues that it is not up to the Plaintiffs to decide what discovery Defendant would need or desire in defending the belated CFA claim. Moreover, a fair reading of the initial complaint and the accusations asserted by Plaintiffs in their submissions for temporary restraints indicate that all of the facts necessary for a CFA claim were known to Plaintiffs, and yet Plaintiffs only sought to amend to add a new theory that puts into issue Plaintiffs' sophistication and would require extensive additional discovery until after discovery was near if not fully complete. Had Defendant known a CFA claim was to be asserted against it, Defendant would have asked additional questions that focused on the particulars of a CFA claim. For instance, as discussed above, the CFA does not cover transactions between two business entities who are equally sophisticated and experienced. Defendant states that it would have directed additional questions, for example, regarding the parties' sophistication and experience with commercial lending.

The prejudice could not merely be mitigated by requiring Plaintiffs to pay for that additional discovery. Not only would the parties need to be re-deposed on the new issue or theory of liability, but Defendant would have a right to subpoena each and every prior loan transaction involving Martin Sr., Martin Jr., and/or any of their various entities. That process would unduly

delay trial which further prejudices Defendant by delaying its alleged recourse to secured collateral. Indeed, at Plaintiffs' request, the Court struck a carefully balanced approach to the disputed monies in its October 20, 2014 Order, predicated on a trial occurring in the Spring of 2015. If the Court were to now grant Plaintiffs' motion amend, trial would be delayed at least 6 to 9 months, if not longer, when the Court is *not* satisfied that under our notice pleading requirements, Plaintiffs could not have, or should not have, asserted their "new" theory many, many months prior, and certainly before the October 20, 2014 Order. Thus, Defendant would be prejudiced by the addition of a CFA claim.

For the reasons set forth above, Plaintiffs' motion for leave to amend the complaint to add a CFA claim is denied.

DEFENDANT'S CROSS-MOTION FOR RECONSIDERATION OF THE COURT'S OCTOBER 20, 2014

ARGUMENTS

Defendant argues that discovery has made clear that the Genda loan for the construction of the property was intended by Crown and Martin Jr. to be a means of addressing the Greenstar loan. Specifically, Defendant argues that Martin Jr.'s deposition confirms that a meeting was held between him and Mr. Rodrigues, a Crown Bank officer, at which time Mr. Rodrigues stated that he would not extend any new loans to Martin Jr. unless and until he remedied the troubled Greenstar loan. Defendant also argues that it is now clear that the loan, although technically extended to Genda and Martin Sr., was in essence extended to Martin Jr. Defendants point to the

facts that Martin Jr. created the property's construction budget, and Martin Sr. had little to no involvement with the construction or acquisition of the property.

Further, Defendant claims that the depositions of Martin Jr. and Martin Sr. reveal that neither of them read the loan documents before signing them. According to Defendant, had they read the documents, they would have seen the cross-collateralization provision. Defendant argues that if the Court does consider the provision ambiguous, it should consider the objective intentions of the parties. Here, Defendant argues, the parties expressly intended the Genda loan to serve as a workout of the Greenstar loan.

DISCUSSION

Motions for reconsideration are governed by R. 4:49-2, which provides that:

> [a] motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it [and] shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.

Only final orders are subject to the time limits imposed by Rule 4:49-2. See Bender v. Walgreen Eastern Co., Inc., 399 N.J.Super. 584, 593 (App. Div. 2008) (citing Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 256-65 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988)).

"Reconsideration is a matter within the sound discretion of the court, to be exercised in the interest of justice." D'Atria v. D'Atria, 242 N.J. Super. 392, 400 (Ch. Div. 1990). However,

reconsideration is appropriate "only under very narrow circumstances." Fusco v. Bd. of Educ., 349 N.J. Super. 455, 462 (App. Div. 2002). The court should grant a motion for reconsideration in only two situations: (1) when "the Court has expressed its decision based upon a palpably incorrect or irrational basis" or (2) when "it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." D'Atria, 242 N.J. Super. at 401. In other words, a litigant must demonstrate that the court acted in an arbitrary, capricious, or unreasonable manner. Id. A party seeking reconsideration may also bring new evidence to the court's attention, but only if such evidence was not available to it in its initial argument. Cummings v. Bahr, 295 N.J. Super. 374, 388 (App. Div. 1996). At bottom, "a litigant should not seek reconsideration merely because of dissatisfaction with a decision of the court." D'Atria, 242 N.J.Super. at 400.

At the October 1, 2014 oral argument that led to the October 20, 2014 Order, Defendant's main argument was that if the Court were to allow Plaintiffs to reduce the escrow to $81,291.20, the Court would essentially be deciding that the Genda loan was not cross-collateralized with the Greenstar loan. Defendant argued that such a decision would be premature and improper, because discovery would reveal that the parties intended the Genda loan as a workout of the Greenstar loan. According to Defendant, Plaintiffs' argument that the failure to specifically refer to the Greenstar loan by name in the promissory note is a "hypertechnical" view of the loan documents, and that the documents should be interpreted in light of the actual intent of the parties.

At oral argument on the instant motion, Defendant clarified its position that reconsideration is based on the fact that the Court did not have all facts before it prior to issuing its October 20, 2014 Order.

Ultimately, the Court crafted the remedy set forth by the October 20, 2014 Order by balancing the equities. Specifically, the Court found that without the money advanced out-of-pocket by Plaintiffs to get the property sold, the escrow funds would not exist in the first instance, and thus Crown would not even be able to be made whole on the Genda loan, let alone the Greenstar loan. In addition, the Court highlighted that Crown Bank does not dispute that Plaintiffs have advanced monies toward the project, but only disputes the bona fides of the amounts of the advances. Thus, the Court held that because the bank has received money towards the Genda loan, it would be inequitable to deprive Plaintiffs of any return on their investment as a result of the sale of the property. Moreover, the Court held that even if Plaintiffs ultimately proved and withdrew all the costs they incurred, the amount remaining in escrow would still exceed $81,291.20, and thus Crown Bank would still be able to recover more than the $500,000 face value of the loan.

As noted, Defendant argues that after discovery, it has become clear that the Genda project was intended by Crown Bank and Martin Jr. to unquestionably be a means of addressing the Greenstar loan. However, this argument is problematic at this stage of the proceedings because it construes the October 20, 2014 Order to be a decision on the merits. In rendering its decision, the Court was careful to clarify that it was *not* making a decision on the merits, but was merely balancing the equities in light of the fact that the bank had received some money from the sale, while the Plaintiffs had received zero.

In support, Defendant points to the portion of Martin Jr.'s deposition where he discusses several meetings with Mr. Rodrigues, an officer of Crown Bank. According to Defendant, the commitment letter for the Genda loan which referred to cross-collateralization of the loans of the guarantor (Martin Jr.) were a direct result of these prior discussions with Mr. Rodrigues. While Martin Jr. did testify to meetings with Mr. Rodrigues about potential ways to address the Greenstar

loan, such as bringing in replacement obligors on the loan, Martin Jr. did not testify as to any conversation between him and Mr. Rodrigues wherein they discussed using the Cresskill project as a means to address the Greenstar loan. See Martin Jr. Dep., Part 1 at T. 95:4-23; T. 96:5-8; T. 96:25-97:5

Further, in an e-mail to another Crown Bank officer, Mr. Enzo Priolo, Martin Jr. summarizes the means of addressing the Greenstar loan that he discussed with Mr. Rodrigues, but does not mention taking on another project and applying the sale proceeds to the Greenstar loan. See E-Mail Exchange Between Martin Jr. and Mr. Priolo, attached to Stevinson Cert. as Ex. N. Moreover, in his deposition, Martin Jr. testified that at the time he approached Crown Bank for a loan in connection with the Saroldis' property, the Crown Bank officers never discussed that the proceeds of the sale would be used to address the Greenstar situation. See Martin Jr. Dep., Part 2 at T. 42:15-25. Thus, at this stage, this evidence does little to further Defendant's argument that the Genda loan was intended as a workout of the Greenstar loan.

Defendant also contends that through discovery, it has become clear that although the loan for the construction project was in the name of Genda and Martin Sr., the construction project was "always intended to inure to the benefit of Junior as opposed to Senior." See Def.'s Br. at p. 13. Defendant cites to Martin Sr.'s testimony that he did not perform any inspections and was not involved in construction until after the receipt of Crown Bank's default letter. See Martin Sr. Dep. at T. 78:1-22. Defendant also makes much of the fact that Martin Jr. came up with the budget for the project and did most of the work on the project. The Court finds these facts are entirely consistent with the fact that Martin Jr.'s company Bella Vista was the general contractor on the project, and do not, at this stage, conclusively establish the purpose of the Genda loan. Thus, the

Court is not satisfied at this stage in the proceedings that Martin Jr.'s involvement in the project suggests that the proceeds were intended to help Martin Jr. pay down the Greenstar loan.

Defendant similarly cites to several passages from Martin Sr. and Martin Jr.'s depositions that illustrate Martin Sr.'s ongoing commitment to assisting his son through his financial difficulties. For instance, Martin Sr. guaranteed Martin Jr.'s loans with Valley for the auto dealership in which Martin Sr. had no interest. See Martin Sr. Dep. at T. 31:23-32:-1. Also, it became clear upon review of Martin Jr.'s bankruptcy schedule that his father had made several large loans to him throughout the years, for both personal and business purposes. See Schedule of Liabilities in re Martin Lucibello Jr., at Schedule F, attached to Stevinson Cert. as Ex. M; see also, e.g., Martin Sr. Dep. at T. 29:15-24; Martin Jr. Dep., Part 1 at T. 135:1-25; T.137:1-8. Even if the Genda loan was a result of Martin Sr.'s habit of providing financial assistance to his son, the Court cannot speculate that Martin Sr. intended specifically to assist his son *with the Greenstar loan*. That is, it is entirely possible that Martin Sr. believed the project would be lucrative, and therefore advanced the money to allow Martin Jr. to earn a profit.

Finally, Defendant reiterates many of the same arguments offered to the Court in opposition to Plaintiffs' first motion to reduce escrow, namely that the cross-collateral/cross-default provision is not ambiguous because it clearly refers to the existing loans of the borrower *and the guarantor*. However, the Court intentionally did not make a finding on this issue, explaining that doing so would be tantamount to an adjudication on the merits. The Court will similarly reserve its decision on this issue until an adjudication on the merits takes place, with the Court having the opportunity to resolve the factual discrepancies. For the foregoing reasons, the Court will deny Defendant's application for reconsideration of the October 20, 2014 Order. Because the Court will not alter its previous decision allowing Plaintiffs to recover their out-of-

pocket expenses from the escrow, the Court must examine the appropriateness of each of Plaintiffs' proposed withdrawals from the escrow account.

PLAINTIFFS' MOTION TO REDUCE ESCROW

ARGUMENTS

Plaintiffs propose seven escrow withdrawals, each of which Defendant argues is outside the bounds of the Court's October 20, 2014 Order. The Court will outline each proposed withdrawal below, setting forth Plaintiffs' justification for each withdrawal along with Defendant's objection.

WITHDRAWAL 1: $190,041.26

Plaintiffs' Argument

Plaintiffs assert that they paid $190,041.26 for the acquisition of the property from the Saroldis. Specifically, Plaintiffs argue that the purchase price of the property was $451,000.00, 50% of which was paid by Crown Bank, and $48,786.89 of which was paid for with an insurance loss credit. Plaintiffs claim that the remaining amount of the purchase price was borne out of pocket, in addition to $12,266.00 in closing costs and a $562.15 real estate tax adjustment. To substantiate this calculation, Plaintiffs rely on the HUD-1 settlement statement signed by Genda and the Public Guardian on behalf of the Saroldis.

Defendant's Objection

Defendant argues that after it paid $225,000 of the $451,000 required to purchase the property, $142,248.15 came from that portion of Crown's loan dedicated to construction, as Martin

Jr. assigned Bella Vistas payment under the first construction draw for the acquisition of the property, and thus there is no out-of-pocket expense on behalf of Plaintiffs. Defendant relies on the depositions of both Martin Jr. and Martin Sr. to support this argument. Further, Defendant argues that after applying the insurance credit, the balance of the purchase price was funded by Colonial, a non-party, and not by Martin Sr. or Genda. Defendant contends that the fact that Plaintiffs have not provided any cancelled checks, wire confirmations or other evidence of payment corroborates the fact that neither Genda nor Martin Sr. paid anything for the property.

WITHDRAWAL 2: $26,000

Plaintiffs' Argument

Plaintiffs argue that this amount represents a settlement between Genda and the Couches, the purchasers of the property, to compensate for additional unfinished work on the kitchen cabinets. Plaintiffs argue that no aspect of kitchen construction was included in the funding budget of Crown Bank. In support of this proposed withdrawal, Plaintiffs provide a copy of the check from Genda for the purchase of the cabinets in the amount of $26,000.00.

Defendant's Objection

Defendant asserts that this amount was paid as a result of Genda's breach of the contract of sale, which set forth express specifications for the kitchen. Instead of providing the kitchen promised in the contract of sale, Genda provided the Couches with a "bare bones" kitchen using Crown's loan proceeds. As such, Crown's loan funded the construction of the kitchen, albeit one that violated the contract of sale, and thus Plaintiffs should not be able to recover the amount they spent to compensate for the faulty kitchen.

WITHDRAWAL 3: $12,396.24

Plaintiffs' Argument

Plaintiffs argue that they paid this amount in closing costs from the sale to the Couches. Specifically, Plaintiffs argue that they paid $2,623.05 in real estate taxes for the period January 1, 2014 to February 20, 2014; $29.19 in interest on unpaid real estate taxes; $300.00 in recording fees; $8,154.00 in realty transfer fees; $40.00 for a wire fee and; attorney's fee of $1,250.00. Plaintiffs assert that these expenses are all supported by the sale statement.

Defendant's Objection

Defendant argues that closing costs and real estate taxes are not the types of costs the Court meant for Plaintiffs to recover in its October 20, 2014 Order. Moreover, Defendant asserts that Martin Sr. has not provided any proof for his payment of these costs despite being asked to do so during his deposition. Finally, Defendant contends that Genda should not be able to seek reimbursement for interest that accrued on the real estate taxes because Genda failed to pay the taxes on time.

WITHDRAWAL 4: $22,323.20

Plaintiffs' Argument

Plaintiffs argue that this amount relates to the payment requisitions 1 and 2. Plaintiffs claim that Crown Bank audited and inspected the construction work performed and approved same. While Crown Bank made payment on those requisitions, it withheld a 10% retainage and the inspection fees. Plaintiffs assert that the retainage withheld from requisitions 1 and 2 total

$21,523.20, and that the two inspection fees total $800.00. To support the amounts Plaintiffs claim Defendant retained, Plaintiffs rely on the construction loan advance schedule, and to support the amounts Plaintiffs claim Defendant withheld for inspection fees, Plaintiffs rely on the construction loan advance authorization sheets.

Defendant's Objection

Defendant argues that $15,805.35 of the total retainage ($21,523.20) consists of retainage for work performed under the first payment requisition that Martin Jr. directed be used toward the purchase price of the property. Moreover, Defendant asserts that, in any event, Plaintiffs have not provided any proofs showing that Genda ever paid Bella Vista anything for the construction and thus has made no showing of entitlement to the retainage.

Defendant also argues that the $418,708.80 payoff statement took into account and credited back to Plaintiffs the retainage held by Crown Bank. If the bank received payment at the closing for both the loan balance *and* the retainage, Crown Bank would not be entitled to keep the retainage. However, the loan repayment excluded the retainage amounts, and thus Plaintiffs have already been credited for the retainage.

As to the inspection fees, Defendant argues that Plaintiffs have not provided any proof that they actually paid any portion of those fees. Moreover, Defendant claims that these costs exceed the scope of the October 20, 2014 Order and should therefore be denied, even if proofs were submitted.

WITHDRAWAL 5: $60,250.00

Plaintiffs' Argument

Plaintiffs argue that Genda paid this amount to Bella Vista for completed construction because it withdrew its third payment requisition to Crown Bank after the relationship between Plaintiffs and the bank began deteriorating. Plaintiffs argue that, had the dispute between them and the bank not developed, Crown Bank would have advanced the $60,250.00 without objection in light of the fact that it had advanced the full amounts of the first and second payment requisitions.

Defendant's Objection

Defendant takes issue with Plaintiffs' assertion that Crown would have funded the draw request in full because it had previously funded requests 1 and 2. First, Defendant argues that the third draw request exceeded the monies available under the loan, which was limited to $59,768.00. Moreover, Defendant claims that Plaintiffs have not provided any proof that the work was inspected and approved by the bank. Instead, Plaintiffs have only submitted an email confirming that an inspection *occurred*, but have not submitted any evidence that the request was *approved*.

Finally, Defendant points out that Bella Vista did not in fact fully complete the work associated with the third draw period, as evidenced by the reduction in the purchase price and the credit ultimately rendered to the Couches for insufficient work. Further, Plaintiffs have not provided any proof that they actually paid Bella Vista for the work that was subject to the withdrawn third draw request or that the work was actually performed.

WITHDRAWAL 6: $30,000

Plaintiffs' Argument

Plaintiffs argue that it established and funded an "interest escrow" account from which Crown Bank monthly withdrew the interest payments on the construction loan. Plaintiffs claim that it deposited $30,000 in the account, which was eventually depleted entirely by Crown Bank. Plaintiffs assert that interest is appropriately considered a cost of the construction project.

Defendant's Objection

Defendant argues that interest payments required under the loan are not the type of "costs" or "expenses" the parties or the Court contemplated when crafting its October 20, 2014 Order. In any event, Defendant argues that the interest reserve was funded by Colonial, and not by either of the Plaintiffs. Thus, according to Defendant, neither Martin Sr. nor Genda are "out of pocket" for the cost of the interest reserve.

WITHDRAWAL 7: $6,137.00

Plaintiffs' Argument

Plaintiffs argue Genda and Martin Sr. paid all real estate taxes on the project during construction. Plaintiffs claim that the real estate taxes were a "cost" of construction because without payment of the real estate taxes, Genda would have been unable to sell the property or would have lost it in foreclosure. Plaintiffs attached checks issued for the tax payments.

Defendant's Objection

Defendant does not advance a separately enumerated objection to this proposed withdrawal. The Court assumes, however, that Defendant objects to this request on the same basis

it objects to the real estate taxes asserted in withdrawal request 3, i.e., that real estate taxes are not the types of costs the Court meant for Plaintiffs to recover in its October 20, 2014.

DISCUSSION

After considering both parties' positions on each proposed withdrawal, the Court concludes as follows:

WITHDRAWAL 1

The Court finds that there is a significant factual issue regarding the $190,041.26, which Plaintiffs claim they expended out-of-pocket to acquire the property. In their depositions, both Martin Jr. and Martin Sr. testify that roughly $130,000 of the cost of acquiring the property from the Saroldis was funded by assigning Bella Vista's right to payment from Crown Bank for certain construction performed at the property. See Martin Jr. Dep., Part 2, at T. 53:9-19, attached to Stevinson Cert. as Ex. C; Deposition of Martin Sr. at T. 80:22-81:5, attached to Stevinson Cert. as Ex. E. In other words, in addition to the $225,000 Crown Bank put in to acquire the property, it used either $130,000 or $142,248.15 (the figure asserted by Defendant) of the $275,000 earmarked for construction costs towards the cost of acquiring the property. Thus, in any event, at this point, the Court is unable to conclude that the entire $190,000 constitutes an "out-of-pocket" within the purview of the October 20, 2014 Order.

As to the remaining balance, roughly $47,000, both Martin Jr. and Martin Sr. testified in their depositions that those costs were borne by Martin Sr. Specifically, Martin Jr. stated that although he was unsure from exactly what *source* Martin Sr. took the money he put towards the property, he was certain that his father did in fact use his own money to fund the balance of the

acquisition of the property. See Martin Jr. Dep. Part 2, at T. 53:9-15; T. 54: 8-25 to 55:25. Further, Martin Sr. testified that the approximately $47,000 he put into the acquisition of the property came from Colonial because Martin Sr. did not have an account with Crown. See Martin Sr. Dep. at T. 81:17-22. While Martin Sr. subsequently testified that Genda reimbursed all amounts paid by Colonial towards the construction or acquisition of the property, see id. at T. 97:3-9, he was only able to produce two checks at oral argument totaling $140,000 payable to Colonial, without any explanation or accounting records indicating the reason for said payment, leaving the Court to speculate as to whether the remaining $47,000 to acquire the property constitutes an out-of-pocket expenditure within the intendment of the Court's Order of October 20, 2014.

Based on the above, the Court is unable to conclude that the requested withdrawal is an out-of-pocket expenditure within the intention of the October 20, 2014 Order.

WITHDRAWAL 2

Plaintiffs have provided the amended contract of sale, which indicates that Plaintiffs were to pay the Couches an additional $26,000 for unfinished work. See Amended Contract of Sale, attached to Letter from Mr. Kiernan as Ex. B, attached to Martin Sr. Cert. as Ex. G. Plaintiffs have also provided a check from Genda to Brian Couch in the amount of $26,000. Id. Thus, there is no dispute that this amount was in fact paid out-of-pocket by Plaintiffs. However, the Court must resolve the dispute over whether Plaintiffs are entitled to withdraw this amount from the escrow at this time in accordance with the spirit and intent of the October 20, 2014 Order.

Defendant claims that Plaintiffs should not be able to recover this amount from the escrow because Crown Bank paid for the "temporary" kitchen Plaintiffs provided in an effort to close on

the property. However, the fact that Crown funded the construction of the temporary kitchen does not obviate the fact that Plaintiffs did in fact advance $26,000 out-of-pocket in connection with the sale of the property. Thus, the Court finds that this withdrawal is in accordance with the Court's October 20, 2014 Order.

WITHDRAWAL 3

The HUD-1 settlement statement shows that Plaintiffs did in fact pay $12,396.24. See HUD-1 Settlement Statement, attached to Letter from Mr. Kiernan as Ex. B, attached to Martin Sr. Cert. as Ex. G. Defendant does not dispute the amount of the closing costs, but instead takes issue with the fact that Martin Sr. has not provided any proof that the funds came from him as opposed to Colonial. However, Martin Sr. testified that any sums paid by Colonial in connection with the sale of the property were reimbursed by him or by Genda. See Martin Sr. Dep. at T. 97:3-9. This sworn statement, in addition to the itemization of the closing costs in the HUD-1 statement, without contradiction, are sufficient for the Court to determine that the closing costs were born "out-of-pocket" by Plaintiffs.

As to the real estate taxes, the HUD-1 reflects that Plaintiffs paid $2,623.50 in real estate taxes, plus $29.19 in interest. Martin Sr. has certified that both the closing costs and the taxes were paid by Genda. See Martin Sr. Cert. at ¶ 29. Moreover, the Court has not been presented any evidence in support of Defendant's suggestion that the costs were actually incurred by non-party Martin Jr. As such, the Court has no basis to deny Plaintiffs' recovery of $12,396.24 in closing costs and $2,652.69 in real estate taxes.

WITHDRAWAL 4

While Defendant contends that of $15,805.35 of the retainage held by the bank was directed to be used toward the purchase price of the property, it has not provided any evidence to support this assertion. Defendant cites to "Exhibit N" of Mr. Stevinson's certification for this proposition, which appears to be an e-mail exchange between Martin Jr. and certain officers of Crown Bank, dated February 15, 2011. However, the Court does not find anything in this e-mail indicating that part of the retainage was meant to be applied to the purchase price of the Cresskill property. Instead, this e-mail exchange is discussing possible ways Martin Jr. could get out of the Greenstar loan.

Similarly, Defendant cites to Exhibits N and V of Mr. Stevinson's certification in arguing that the $418,708.80 payoff statement took the retainage into account and credited it back to Plaintiffs. However, as discussed above, Exhibit N is an e-mail exchange having nothing to do with retainage or the loan payoff. Likewise, Exhibit V does not touch on the subject of the retainage or the payoff statement. Instead, Exhibit V is an e-mail from Richard D. Kelly, Esq., counsel to the Couches, to Mr. Kiernan, discussing the $72,500 reduction in the original sales price as a result of the escrow set up by the Court's November 25, 2013 Order. Because Defendant has not provided the Court with any competent evidence to contradict Martin Sr.'s sworn statement that he was not reimbursed for 10% of the work completed under payment requisitions 1 and 2, the Court will allow Plaintiffs to withdrawal $15,805.35 representing retainage held by the bank.

WITHDRAWAL 5

Defendant objects to withdrawal 5 on the grounds that the bank probably would not have approved the payment request, as it exceeded the amount remaining on the loan. However, this argument is misplaced. Regardless of whether the *bank* would have ultimately approved the

payment request or not is irrelevant. What is significant for purposes of a withdrawal under the Court's October 20, 2014 order is whether the Plaintiffs paid this amount out-of-pocket.

The Court does, however, find that reimbursement for the full $60,250.00 is unjustified. There is ample evidence in the record indicating that Plaintiffs did not fully complete the work that the third payment requisition was intended to fund. For instance, the Couches were given a credit specifically for the unfinished work to their home. See Amended Contract of Sale. Moreover, Plaintiffs have not provided, in their depositions or through documentary evidence, any indication of what amount was in fact paid to Bella Vista for the work done. Thus, because the Court is unable to determine what amount, if any, was actually paid to Bella Vista by Plaintiffs, it must deny this withdrawal request at this time.

WITHDRAWAL 6

Plaintiffs have provided documentation that the interest reserve was set up by Genda. See Interest Account Statement, attached to Letter from Mr. Kiernan as Ex. E, attached to Martin Sr. Cert. as Ex. G. However, Martin Sr. testified that while Genda set up the interest reserve required under the loan, the funds actually came from Colonial. See Martin Sr. Dep. at T. 81:23-82:4. At one point in his deposition, Martin Sr. did testify that he reimbursed Colonial for some expenses Colonial funded. See id. at T. 97:3-13. However, it is unclear whether Martin Sr. was referring only to those funds advanced by Colonial for construction or closing of the property, or any and all funds advanced by Colonial, including the interest reserve. As such, the Court is unable to

determine to a reasonable certainty whether Genda reimbursed Colonial for the funds it advanced for the interest reserve, and will therefore deny this proposed withdrawal.

At oral argument, two checks were presented to the Court by Plaintiffs which purportedly evidenced Martin Sr.'s payment to Colonial of $140,000. However, there is no support or accounting records indicating the bases of these payments to Colonial, or showing any connection to the construction of the Cresskill property, let alone reimbursement by Martin Sr. for monies lent by Colonial. As such, the Court at this time concludes that the transaction relative to the interest were not incurred out-of-pocket by Plaintiffs within the purview of the October 20, 2014 Order.

WITHDRAWAL 7

Plaintiffs have provided checks indicating payments made by Genda to the Borough of Cresskill for real estate taxes while construction of the property was ongoing. Defendant has not objected to the amount or legitimacy of these payments, but has only argued that real estate taxes are not the types of costs the Court meant for Plaintiffs to recover in its October 20, 2014. The Court finds that such tax payments are the type of out-of-pocket expenses that the Court contemplated Plaintiffs could recover. Thus, based on the above, the Court will permit Plaintiffs to withdrawal $6,137.00 they spent on real estate taxes on the Cresskill property while construction was ongoing.

CONCLUSION

For the reasons set forth above, the Court will allow Plaintiffs to withdrawal a total of $66,856.44 from the escrow, representing the total of all proposed withdrawals except 1, 5 and 6. The Court will deny Defendant's cross-motion for reconsideration. The Court will also deny Plaintiffs' motion to amend the complaint. An Order accompanies this opinion.

SO ORDERED.

Dated: February _____, 2015

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Hon. David B. Katz