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VILLAGE SQUARE MADISON AVENUE, LLC, Plaintiff, vs. TD BANK, N.A., Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-7441-13** Civil Action **OPINION**

Argued: **February 5, 2016**
Decided: **February 5, 2016**

Honorable Robert C. Wilson, J.S.C.

Charles Hellman, Esq., appearing for the Plaintiff, Village Square Madison Ave., LLC, (from the law offices of Guarino & Co.).

Michael S. Zullo, Esq. and Lynne E. Evans, Esq., appearing for the Defendant, TD Bank, N.A., (Lynne E. Evans, Esq. and Alexander D. Bono, Esq. on brief) (from the law offices of Duane Morris LLP).

FACTUAL BACKGROUND

THIS MATTER arises out of a contractual dispute between the Plaintiff, Village Square Madison Ave., LLC (hereinafter "Plaintiff" or "Village Square") and the Defendant, TD Bank, N.A. (hereinafter "Defendant" or "TD Bank"). The Plaintiff alleges that the Defendant breached an agreement concerning the lease of property located at 597 Peirmont Road, Closter, New Jersey (hereinafter the "Property"). The events that precipitated this litigation are not in great dispute.

A. Termination of Lease.

In December 2010, Village Square executed the Real Owners' Agreement. The Agreement provided for the sale of the Property owned by Raymond Losito and Rosemary O'Connors

(hereinafter the "Owners"). In accordance with the first addendum to the Real Owners' Agreement, Village Square was obligated to either purchase the Property from the Owners or enter into a lease with the Owners. Village Square intended to construct a bank on the Property, the construction of which was contingent on obtaining certain municipal zoning and financial approvals. Even if such approvals could not be obtained and a bank could not be constructed, Village Square remained obligated to the owners to fulfill its contractual obligations associated with the purchase or lease the premises. While Village Square's goal was to obtain the approvals and construct a bank on the premises, there was a known possible risk that such approvals could not be obtained. Village Square never finalized the final lease and/or purchase of the Property.

In a second addendum to the Agreement, Village Square and the Owners agreed that the Owners would themselves enter into a lease of the Property with TD Bank and then assign the lease to Village Square. Village Square only possessed the rights of an assignee of the Lease. On June 29, 2011, such a lease with TD Bank was executed (hereinafter the "Lease"). The Lease and development of the Property were contingent upon TD Bank obtaining all necessary permits and approvals to the build the branch. Specifically, Section 12.2 of the Lease provided, in part:

> This Lease is contingent upon Tenant,…obtaining all necessary permits and approvals,…to demolish all existing improvements on the Premises, operate a financial services institution,…and construct the New Building…including, without limitation, site plan approval, zoning and rezoning approvals, variances[.]

(See Zullo Cert. in Supp. Of Def.'s Mot. For Summ. J., Ex. G, Lease § 12.2). In addition, the lease provided TD Bank the right to the terminate the Lease if at any time prior to the date of approval or any extensions thereof, TD Bank determined in its sole judgment that it would be unable to obtain all necessary approvals. TD Bank conferred with the Closter Zoning Board (hereinafter the "Zoning Board") for almost two years to obtain necessary approvals to construct the bank branch on the Property. By October 2012, the Zoning Board still had not provided TD

Bank the necessary approvals. In fact, a date for the vote was never definitively agreed upon, as the parties were still finalizing the development plans. On October 17, 2012, TD Bank withdrew its application and terminated the Lease. TD Bank timely advised the Owners that it was exercising its right to terminate because it determined that it would be unable to obtain all of the required approvals in accordance with the provisions of Section 12.2 of the Lease.

Village Square claims that TD Bank withdrew its application in bad faith. Village Square contends that TD Bank's speculation that it would not receive the approvals was unfounded, as the Zoning Board was set to vote on its application the same day, October 17, 2012. Joseph Rotonde, a principal of Village Square, claimed he had "privately" polled the Zoning Board members and determined that there were sufficient "yes" votes to obtain the approvals and conveyed this information to TD Bank's legal counsel. Village Square thereby argues that TD Bank's bad faith breach of the Lease hindered Village Square in its purchase and/or lease of the Property, and speculates that had TD Bank allowed its application to be voted on and approved by the Zoning Board, Village Square would have purchased the property. The crux of Village Square's claim is twofold: that TD Bank did not render a detailed "judgment" explaining or clarifying its reasons for termination, which constitutes bad faith, and that TD Bank should have postponed termination until sometime after the hypothetical vote was scheduled to take place, despite the express terms of the Lease. (See Rotonde Cert. in Opp. To Def.'s Mot. For Summ. J., Ex. C).

B. Contractual Provisions Governing Carrying Costs Associated with Lease.

The Lease unambiguously and expressly allocated responsibility for all carrying costs for the Property while zoning approvals were sought, and allowed the Landlord to keep any payments if TD Bank exercised its rights. Specifically, Section 4.3 of the Lease provided that:

Carrying Costs Charges.

> Notwithstanding anything to the contrary contained herein, Tenant covenants and agrees to pay to Landlord a portion of Landlord's carrying costs with respect to the Premises in the amount of Eight Thousand and 00/100 ($8,000.00) Dollars per month (the "Carrying Cost Charges"), for the period commencing on the date that is five (5) months after the Effective Date (as defined in Section 11.18 below) and ending on the earlier of the Rent Commencement Date or the date this Lease is terminated by Tenant pursuant to a termination right hereunder (the "Carrying Cost Period")…In the event Tenant obtains the Approvals (as defined in Section 12.2 herein), then from and after the Rent Commencement Date, Tenant shall receive a monthly credit against Fixed Rent in the amount of $8,000.00 until the aggregate Carrying Cost Charges previously paid by Tenant have been applied to Fixed Rent due hereunder. In the event this Lease is terminated by Tenant, Tenant shall not be entitled to any reimbursement of the Carrying Cost Charges previously paid to Landlord.

(See Zullo Cert., Ex. G, Lease § 4.3). TD Bank paid Village Square the $8,000.00 per month Carrying Cost Charges from November 2011 through October 2012, aggregating to $88,533.33. Village Square argues that it should not be responsible for any portion of the Carrying Cost Charges, totaling approximately $344,639.00, because TD Bank beached the Lease.

C. Contractual Provisions Governing Limitation on Recoverable Damages.

The Lease expressly limited damages recoverable by the Landlord, excluding any consequential or speculative damages, or any remedy involving acceleration of any of the fixed or additional rents payable under the Lease. Specifically, Section 10.3 provides that:

Damages.

> Notwithstanding anything to the contrary contained in this Lease, in no event shall Landlord or Tenant have the right to receive punitive or other similar measures of damages against the other nor shall Landlord be entitled to receive any consequential or speculative damages or any remedy that involves or entails confession of judgment or acceleration of any Fixed Rent or Additional Rent payable by Tenant in the future pursuant to this Lease, and each party hereby irrevocably waives, for itself and its successors and assigns, its right to seek or receive any such measure of damages or remedy.

(See Zullo Cert., Ex. G, Lease § 10.3).

In spite of above-enumerated provision, Village Square seeks damages for TD Bank's alleged bad faith breach of the lease. Village Square contends that it relied upon this promise by paying carrying charges, arranging for financing for the purchase of the Property, and entering into a contract to sell the Property to a third party with the Lease in place. Village Square argues that it suffered damages in the amount of all monies expended to cover Carrying Costs and the loss of the potential sale of the Property that could have resulted in a profit of at least $2,275,000.00.

PROCEDURAL HISTORY

THIS MATTER was commenced on September 17, 2013 by way of the Plaintiffs' Complaint. On January 27, 2014, the Defendant filed its Answer and Affirmative Defenses to Village Square's Complaint, after TD Bank's motion to dismiss was denied. On September 18, 2015, the Court entered a Case Management Order setting forth dates upon which the parties must complete discovery. The Defendant contends that the Plaintiff failed to comply with these dates and the Court's Order. Discovery ended December 11, 2015. Now pending before the Court is the Defendant's motion for summary judgment seeking to dismiss the Plaintiff's Complaint in its entirety. The Plaintiff filed opposition to the Defendant's motion for summary judgment. Additionally, the Defendant filed a motion for sanctions on the basis that Village Square failed to provide discovery. The Plaintiff also filed opposition to this motion.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. § 4:46-2(c). In

Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under N.J.S.A. § 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on N.J.S.A. § 4:37-2(b) or N.J.S.A. § 4:40-1, or a judgment notwithstanding the verdict under N.J.S.A. § 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "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 N.J.S.A. § 4:46-2." Id. at 540.

> "The determination whether there exists a genuine issue with respect to a material fact challenged requires the motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra at 523.

RULE OF LAW AND DECISION

The instant matter requires the Court to conduct an in depth interpretation of the provisions contained in the parties' Lease agreement and the circumstances precipitating TD Bank's eventual termination of said agreement. "The interpretation of a contract is a legal question for the court and may be decided on summary judgment unless there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation" Celanese Ltd. v. Essex Cnty. Imp. Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (internal citations omitted). Therefore, interpretation of the terms of the Lease agreements may be decided by the Court as a matter of law in the absence of any uncertainty or ambiguity dependent on testimony or other evidence. See id.

A. The Implied Covenant of Good Faith and Fair Dealing is Inapplicable.

First, the Court disposes of the Plaintiff's claims that the Defendant violated the implied covenant of good faith and fair dealing. "Every party to a contract…is bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract." See Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224 (2005) (citing Wilson v. Amerada Hess Corp., 168 N.J. 236, 241, 244, 773 A.2d 1121 (2001)); see also Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420-21, 690 A.2d 575 (1997); Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130, 207 A.2d 522 (1965).

Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420-21, 690 A.2d 575 (1997) is the seminal case concerning the implied covenant of good faith and fair dealing. In Sons of Thunder, the plaintiff Sons of Thunder, Inc. entered into a contract with defendant Borden, Inc. for the sale of shellfish. Pursuant to the contract, Borden agreed to purchase a minimum quantity of shellfish at market price for a period of up to one year. In addition, the contract provided that at the end of the first year, the contract could automatically renew for a period up to five years. The contract provided, however, that either party could cancel the contract by giving written notice of termination ninety days before the effective cancellation date. See Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 402, 690 A.2d 575 (1997). In its widely cited substantive statement, the New Jersey Supreme Court held that the implied covenant of good faith and fair dealing mandates that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Id. at 420. The Supreme Court concluded that the implied covenant is an independent duty and may be breached even where there is no breach of the contract's express terms. See id. 148 N.J. at 422-23.

Sons of Thunder and its progeny sought to clarify what precisely constitutes "good faith". The Restatement (Second) of Contracts defines "good faith" in accordance with the definition set

forth in the Uniform Commercial Code § 1-201(19), providing that good faith entails "honesty in fact in the conduct or transaction concerned." See RESTATEMENT (SECOND) OF CONTRACTS, § 205 cmt. a (1981). "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." See id.

Ultimately, proof of "bad motive or intention" is vital to an action for breach of the implied covenant of good faith and fair dealing. See, e.g., Wilson, supra, 168 N.J. at 251, 773 A.2d 1121. The Restatement states that "[a] complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. See RESTATEMENT (SECOND) OF CONTRACTS, § 205 cmt. d (1981). The aggrieved party must demonstrate with sufficient evidence that the party alleged to have acted in bad faith engaged in some conduct that denied the benefit of the bargain originally intended by the parties. See, e.g., Sons of Thunder, supra, 148 N.J. at 420, 690 A.2d 575; see also Defino v. Wachovia Bank, No. A-5836-12T4, 2015 N.J. Super. Unpub. LEXIS 1959, at *10, *16-17 (App. Div. Aug. 14, 2015) (rejecting plaintiffs' breach of contract claim arising out of bank's termination of its lease before planning board rendered a decision on the bank's pending application and holding that the lease gave the bank a right to terminate if it was unable to procure permits or approvals by certain deadline); accord Prudential Stewart Realty v. Sonnenfeldt, 285 N.J. Super. 106, 112 (App. Div. 1995) (affirming summary judgment on implied covenant claim where defendant exercised its contractual right to terminate the exclusive listing agreement after six months and finding that defendant's questionable motive to reduce the contract price by saving commission expense did

not constitute a material fact). A plaintiff may be entitled to relief if it demonstrates that the defendant destroyed the plaintiff's reasonable expectations by acting with ill motives and without any legitimate purpose. See Wilson, supra, 168 N.J. at 251. Similarly, a plaintiff may be entitled to relief if it relies to its detriment on the defendant's intentional misleading assertions. See Brunswick Hills Racquet Club, supra, 182 N.J. at 226.

a. TD Bank Acted In Accordance With The Express Provisions Of The Lease.

Preliminarily, the Court finds that the plain language of the Lease afforded TD Bank the unambiguous, absolute, and express right to terminate the Lease if it determined, in its sole judgment, that it would not be able to obtain all necessary approvals. The implied covenant of good faith and fair dealing did not prevent TD Bank from terminating the Lease in accordance with the expressly negotiated provisions, irrespective of its motive. See Prudential Stewart Realty v. Sonnenfeldt, 285 N.J. Super. 106, 110 (App. Div. 1995). Thus, the success of Plaintiff's claim for breach of the covenant of good faith and fair dealing depends, in part, on its ability to show that TD Bank did not act in conformity with its contractual obligations under the Lease agreement.

In interpreting a contract, a court generally turns first to a contract's plain language. See Kieffer v. Best Buy, 205 N.J. 213, 223 (2011). A court should give contractual terms their plain and ordinary meaning, unless the parties use specialized language peculiar to a particular trade, profession, or industry. See Kieffer, 205 N.J. at 223; see also N.J.S.A. § 12A:1-205. A court must consider the contract as a whole, without isolating certain provisions from others that pertain to the same subject. See Newark Publishers Ass'n v. Newark Typographical Union, 22 N.J. 419, 425, 126 A.2d 348 (1956). A court must enforce the contract as it finds it when the terms of a contract are clear and unambiguous. See Stone v. Royal Ins. Co., 211 N.J. Super. 246, 248 (App. Div. 1986). A court cannot rewrite a contract for the parties better than or different from the one they wrote for themselves. See Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595, 775 A.2d 1262 (2001).

The plain language of the Lease is unambiguous on its face and expressly authorized TD Bank's actions. The Lease explicitly states that the Lease was contingent on TD Bank obtaining all necessary permits and approvals for the demolition of existing structures on the Property and the construction of a new bank. Section 12.2 of the Lease provided, in relevant part:

> This Lease is contingent upon Tenant,…obtaining all necessary permits and approvals,…to demolish all existing improvements on the Premises, operate a financial services institution,…and construct the New Building…including, without limitation, site plan approval, zoning and rezoning approvals, variances[.]

(See Zullo Cert., Ex. G, Lease § 12.2). The plain language of the lease provided TD Bank the right to the terminate the Lease if at any time prior to the date of approval or any extensions thereof, TD Bank determined in its sole judgment that it would be unable to obtain all necessary approvals. By October 2012, the Zoning Board still had not provided TD Bank the necessary approvals. (See Zullo Cert., Ex. G, Lease § 12.2).

Village Square does not contest that the Lease affords TD Bank these contractual rights. Rather, Village Square argues that TD Bank did not render its "judgment" to terminate the Lease in good faith. However, Village Square overlooks the significant fact that by October 17, 2012, TD Bank waited two years for Zoning Board approval before it withdrew its application, terminated the lease, and timely advised the Owners that it was exercising its right to terminate in accordance with the express terms of Section 12.2 of the Lease. The record does not show that TD Bank exercised its contractual rights arbitrarily or without due consideration to the pending status of its application or the development of the Property.

When engaged in the process of contract interpretation, the Court will strive to articulate an interpretation that fulfills the expectations of the parties, interprets the contract as written, and avoids writing a better contract than the one bargained for. Even though the plain language of the Lease is uncontroverted, the Plaintiff asks the Court to write a better contract than the one

bargained for. The Lease clearly indicates that its validity was contingent on obtaining the zoning board approvals. Furthermore, the authority to render a determination regarding the imminence of zoning approval rested solely with TD Bank. The Court can appreciate Village Square's frustration, as it too anxiously awaited zoning approval for two years. However, the Court will not read into the contract inconsistent terms to benefit Village Square. Therefore, Village Square's claim for the breach of the implied covenant of good faith and fair dealing fails insofar as the express terms of the Lease precludes this claim.

b. The Factual Record Does Not Establish That TD Bank Acted With Bad Faith.

The undisputed facts of this case leads this Court to the conclusion that Defendant did not act with bad faith and did not breach the implied covenant of good faith and fair dealing. The basis of Village Square's claim is that TD Bank "pulled" its application at the eleventh hour, on the eve of Village Square's subjective hypothesis that the Zoning Board was now going to approve the Property development. However, Village Square does not suggest that TD Bank acted in bad faith in the time period leading up to October 17, 2012. There is no evidence that TD Bank willfully thwarted the approval process, or slacked off in assembling and submitting the application required for zoning approval. Rather, Village Square's claim rests solely on TD Bank's purported contractual violation when it "pulled the plug" on the approval process without fully explaining its reasons for doing so. The undisputed facts demonstrate that TD Bank submitted its application to obtain zoning approvals and awaited the Zoning Board's approval for two years before it ultimately decided to rescind its application. There is no evidence in the record to suggest that during this time, TD Bank received any definitive confirmation that approval was imminent.

In spite of this deficiency in the record, the Plaintiff divines that TD Bank knew or should have known that approval was imminent. Mr. Rotonde claims to have heard through uncorroborated hearsay that zoning approval was imminent and purportedly informed TD Bank's

counsel of such. TD Bank was not obligated to forebear termination based on this unsubstantiated exchange between Rotonde and Zoning Board members, more aptly characterized as "gossip".

Furthermore, the Plaintiff claims that its representative polled the Zoning Board members and summarily determined that enough "yes" votes existed to approve TD Bank's application.[1] For the same reasons stated above, the covenant of good faith and fair dealing did not obligate TD Bank to rely on such unsubstantiated information. The Plaintiff's emphasis of one e-mail exchange is unpersuasive, inasmuch as Mr. Rotonde merely stated "[i]f we have the vote on the 27th instead of the 25th still not confirmed 100% yet just my assumption" and proceeded to hypothesize which members *may* vote "yes". (See Rotonde Cert. in Opp. To Def.'s Mot. For Summ. J., Ex. B, at 1) (emphasis added). To reiterate, TD Bank waited for zoning approval for two years prior to withdrawing its application and did not receive any definitive evidence that approval was imminent. Accordingly, there is no basis in the record before the Court to conclude that TD Bank breached its implied covenant of good faith and fair dealing by terminating the Lease.

B. The Doctrine of Promissory Estoppel Is Inapplicable.

Next, the Court considers Village Square's argument that it should recover under the doctrine of promissory estoppel. Village Square contends that it relied on TD Bank's promise to obtain Zoning Board approval and did so to its detriment. Village Square claims that it expended Carrying Cost Charges in contemplation of developing the Property and that TD Bank's alleged breach of the Lease foreclosed Village Square's ability to recoup substantial sums in the eventual yet speculative sale of the Property. TD Bank claims that it rightfully exercised its contractual right to terminate the Lease and did not make any definite, clear promises that it would never exercise this right.

[1] The legality of Zoning Board members secretly declaring how they would vote prior to actually voting is so dubious that the Court is loathe to comment further on it.

The equitable doctrine of promissory estoppel is widely recognized in New Jersey. Section 90 of the Restatement (Second) of Contracts governs promissory estoppel and provides that:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

See RESTATEMENT (SECOND) OF CONTRACTS, § 90(1) (1981). To establish a *prima facie* claim of promissory estoppel, the aggrieved party must prove:

> (1) a clear and definite promise by the promisor; (2) the promise must be made with the expectation that the promisee will rely thereon; (3) the promisee must in fact reasonably rely on the promise, and (4) detriment of a definite and substantial nature must be incurred in reliance on the promise.

Pop's Cones, Inc. v. Resorts Intern. Hotel, Inc., 307 N.J. Super. 461, 468-69 (App. Div. 1998). "The essential justification for the promissory estoppel doctrine is to avoid the substantial hardship or injustice which would result if such a promise were not enforced." See id. at 468-69 (citing Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank, 163 N.J. Super. 463, 484 (App. Div. 1978)). As a matter of New Jersey law, summary judgment is not warranted on a promissory estoppel claim in the absence of evidence that plaintiff took action in reliance on defendant's promise, which caused plaintiff to suffer a "definite and substantial detriment". See, e.g., Malaker Corp. Stockholders Protective Comm., 163 N.J. Super. at 479.

Village Square failed to establish a *prima facie* claim of promissory estoppel. Firstly, the record does not indisputably show that Village Square made a clear, definite promise that it would seek approval from the Zoning Board in a diligent manner. There is no evidence in the record to suggest that TD Bank did not pursue Zoning Board approval in a diligent manner. TD Bank waited for approval for two years. After two years, TD Bank exercised its contractual right to withdraw its application, as it deemed approval to be unlikely in the near future. Village Square knowingly

and voluntarily executed the Lease, which contained the provisions of Section 12.2. Village Square knew or should have known that TD Bank could possibly exercise its rights and that it was obligated to fulfill its contractual obligations despite possible withdrawal. In addition, the record shows that while TD Bank took reasonable steps to obtain Zoning Approval and waited for approval, it did not intend that these steps constitute a waiver of TD Bank's Section 12.2 right and that Village Square should rely on these steps as such.

Furthermore, Village Square did not in fact rely on TD Bank's actions to obtain Zoning Approval. Village Square claimed that it changed its position in that it expended approximately $344,639 to carry the property, instead of utilizing it for other investments and purposes. However, this ignores the Lease's express terms, ignores the cancellation of the Real Owner's Agreement, and fails to prove detrimental reliance by Village Square. The Lease expressly provided that both TD Bank and Landlord will share in covering carrying costs while the approval process was pursued and that TD Bank was not entitled to reimbursement if it terminated the Lease. Section 4.3 of the Lease provided that:

> **Carrying Costs Charges.**
>
> Notwithstanding anything to the contrary contained herein, Tenant covenants and agrees to pay to Landlord a portion of Landlord's carrying costs with respect to the Premises in the amount of Eight Thousand and 00/100 ($8,000.00) Dollars per month (the "Carrying Cost Charges"), for the period commencing on the date that is five (5) months after the Effective Date (as defined in Section 11.18 below) and ending on the earlier of the Rent Commencement Date or the date this Lease is terminated by Tenant pursuant to a termination right hereunder (the "Carrying Cost Period")…In the event Tenant obtains the Approvals (as defined in Section 12.2 herein), then from and after the Rent Commencement Date, Tenant shall receive a monthly credit against Fixed Rent in the amount of $8,000.00 until the aggregate Carrying Cost Charges previously paid by Tenant have been applied to Fixed Rent due hereunder. In the event this Lease is terminated by Tenant, Tenant shall not be entitled to any reimbursement of the Carrying Cost Charges previously paid to Landlord.

(See Zullo Cert., Ex. G, Lease § 4.3). TD Bank paid Village Square $8,000.00 per month in Carrying Cost Charges from November 2011 through October 2012. Furthermore, if TD Bank did in fact terminate the Lease, Village Square was permitted to retain the Carrying Cost Charges TD Bank paid to date. TD Bank does not seek reimbursement of these Costs and Village Square simply paid costs it was contractually obligated to pay. Village Square is not entitled to recoup its Carrying Cost Charges on the basis that the express language in Section 4.3 forbids this, and that the Court has found that TD Bank did not breach the Lease. Moreover, Village Square asserts that it is entitled to recovery under a claim of promissory estoppel because it *could have* reaped a financial gain by the eventual sale of the Property. These purported damages are too speculative to succeed on a claim for promissory estoppel. Therefore, summary judgment on this claim is granted in favor of the Defendant TD Bank.

C. The Economic Loss Doctrine Bars Village Square's Promissory Estoppel Claim.

Next, the Court considers the applicability of the economic loss doctrine. Under New Jersey Law, "economic loss" may constitute either direct or consequential damages. See Spring Motors Distribs. V. Ford Motor Co., 98 N.J. 555, 566, 489 A.2d 660 (1985). "A direct economic loss includes the loss of the benefit of the bargain, *i.e.*, the difference between the value of the product as represented and its value in its defective condition." See id. A "[c]onsequential economic loss includes such indirect losses as lost profits." See id. Pursuant to New Jersey's economic loss doctrine, "contract law is better suited to resolve disputes between parties where a plaintiff alleges direct and consequential losses that were within the contemplation of sophisticated business entities with equal bargaining power and that could have been the subject of their negotiations." See Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 248 (3d Cir. 2010). In other words, a "dispute [that] clearly arises out of and relates to [a] contract and its breach" should be resolved pursuant to contract law rather than tort law. See Wasserstein v. Kovatch, 261 N.J.

Super. 277, 286, 618 A.2d 886 (App. Div. 1993). When considering whether a cause of action sounds in contract rather than tort, a court may consider whether the loss was of a nature more normally associated with a contract action and whether the relationship between the parties is governed by a lengthy and comprehensive contractual arrangement. See New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 494, 497 A.2d 534 (App. Div. 1985). It is well-settled New Jersey law that "a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." See Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2002). The economic loss doctrine operates to bar tort claims where a plaintiff through its tort allegations seeks to enhance the benefit of the bargain it contracted for with the defendant. See id. at 315-16.

Here, Village Square's promissory estoppel claim is barred by the economic loss doctrine. Village Square has not, as a matter of law, proven any duty owed by TD Bank independent of the Lease. Rather, Village Square is attempting to enhance its reimbursement of Carrying Cost Charges despite the express allocation the parties contracted for under the Lease. Village Square cannot ignore the express contractual provisions simply to recover damages it is not entitled to under the contract. Village Square cannot succeed on its promissory estoppel claim given the express language of Section 4.3. The alleged wrongdoing, *i.e.*, breach of contract, the nature of the damages sought, and the existence of a lengthy and comprehensive contractual arrangement between the parties collectively sound in contract rather than tort law. Therefore, summary judgment on Village Square's promissory estoppel claim is granted in favor of TD Bank because the economic loss doctrine bars Village Square from seeking to rewrite the contract and recoup damages it did not suffer.

D. Village Square Did Not Suffer Damages As A Result of TD Bank's Termination And The Lease Barred Recovery For Liquidated Damages.

Next, the Court disposes of Village Square's argument that it is entitled to reimbursement of Carrying Cost Charges, lost rental income, and speculative sale proceeds. The speculative nature of the damages sought by Village Square is sufficient to grant summary judgment in its own right. Village Square seeks possible damages for Carrying Cost Charges and lost rental income under the Lease. As stated in Section C, the plain language of the Lease contractually obligated Village Square to pay the carrying costs for the property. TD Bank shared the Carrying Cost Charges until it terminated the Lease. Village Square knowingly and voluntarily agreed to the provisions of the Lease that obligated it to pay its portion of the Carrying Cost Charges, which survived TD Bank's termination of the Lease.

Similarly, Village Square's recovery for lost rental income fails in two ways. Firstly, Village Square's claim for lost rental income is too speculative. "[D]amages claimed in a breach of contract action must be reasonable, certain and not speculative." See, e.g., Westrich v. McBride, 204 N.J. Super. 550, 557 (Law. Div. 1984). The plain language of the Owner's Agreement required Village to either purchase or lease the Property. Village Square did not purchase or lease the Property prior to TD Bank's termination of the Lease. Thus, Village Square cannot seek recovery for lost rental income on a property it did not own. In addition, Village Square's damages were expressly contingent on Zoning Board approval. Considering the express termination provision of the Lease, Village Square had no reasonable expectation that the Lease would become effective. Second, there is no legally cognizable proof that Zoning Board approval would be granted. Third, there is no definitive proof that the purchase of the Property by a third party would have occurred prior to TD Bank's termination or shortly thereafter.

Secondly, the plain language of the lease bars recovery for lost rental income. Specifically, Section 10.3 provides that:

> **Damages.**
>
> Notwithstanding anything to the contrary contained in this Lease, in no event shall Landlord or Tenant have the right to receive punitive or other similar measures of damages against the other nor shall Landlord be entitled to receive any consequential or speculative damages or any remedy that involves or entails confession of judgment or acceleration of any Fixed Rent or Additional Rent payable by Tenant in the future pursuant to this Lease, and each party hereby irrevocably waives, for itself and its successors and assigns, its right to seek or receive any such measure of damages or remedy.

(See Zullo Cert., Ex. G, Lease § 10.3). This provision is clear and unambiguous on its face. Pursuant to Section 10.3, the Landlord "irrevocably waive[d]" the right to seek or receive consequential or speculative damages, or any remedy involving the acceleration of rent payable by TD Bank in the future. Lastly, Village Square's claim for damages incurred from the potential sale of the Property fails insofar as these damages are far too speculative to award a recovery. Accordingly, Village square is barred from seeking or recovering any future rent, or any additional Carrying Cost Charges from TD Bank because this provision is clear and unambiguous and must be enforced as written. See Royal Ins. Co., 211 N.J. Super. at 248.

E. Village Square's Damages Claims Are Barred By The Plain Language Of The Liquidated Damages Provision Contained In The Lease.

Finally, the Court considers whether Village Square may seek or recover liquidated damages as a result of TD Bank's termination of the Lease. "The decision whether a stipulated damages clause is enforceable is a question of law for the court." Wasserman's v. Twp. of Middletown, 137 N.J. 238, 257 (1994). Under New Jersey law, a liquidated damages provision may be enforceable "depending on whether the set amount is a reasonable forecast of just compensation for the harm that is caused by the breach and whether that harm is incapable or very difficult of accurate estimate." See id. at 250 (internal citations omitted); see also Naporano

Assocs., L.P. v. B & P Builders, 309 N.J. Super. 166, 177 (App. Div. 1998) (finding liquidated damages provision that entitled plaintiff-seller to keep deposit in event of defendant-buyer's breach of real estate sale enforceable where parties could not predict actual losses in event of breach at time of contract execution, damages were not unduly punitive or excessively harsh, and parties were sophisticated business people represented by legal counsel).

In the instant matter, TD Bank did not breach the Lease when it terminated it on October 17, 2012. Even if, *arguendo*, TD Bank breached the Lease, the damages provision in Section 4.3 read in conjunction with Section 10.3 of the Lease provided for just compensation in the event of any purported breach. The Lease expressly required TD Bank to pay Landlord $8,000.00 per month in Carrying Cost Charges, and provided that if TD Bank were to terminate the Lease, Landlord would be entitled to retain such payments. (See Zullo Cert., Ex. G, Lease § 4.3). TD Bank in fact paid Village Square these Carrying Cost Charges from November 2011 through October 2012, in the total amount of $88,533.33. Village Square was allowed to retain the Carrying Cost Charges that TD Bank remitted until the time of termination. The parties expressly allocated these costs between TD Bank and Landlord, and expressly acknowledged that TD Bank could terminate the Lease if it determined in its sole discretion that it would be unsuccessful in obtaining Zoning Board approval. Accordingly, the Court finds that the Carrying Cost Charges provision constituted a reasonable forecast of just compensation in the event of termination and was knowingly and voluntarily agreed upon by sophisticated parties represented by legal counsel.

Therefore and in accordance with the foregoing reasons, summary judgment is awarded in favor of the Defendant TD Bank.

It is so ordered.

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HON. ROBERT C. WILSON