SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
BARRY P. SARKISIAN
PRESIDING JUDGE
CHANCERY-GENERAL EQUITY

Brennan Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

NOT FOR PUBLICATION WITHOUT THE
WRITTEN APPROVAL OF THE COMMITTEE ON OPINIONS

LETTER OPINION

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Re: Estate Capital Group, LLC, McGinley Square Group, LLC and Cedar Lane Realty, LLC v. Alliance Healthcare, Inc., Seaview Capital Partners, LLC and Jersey City Bergen, LLC
Docket No. HUD-C-78-17
Date of Hearing: December 1, 2017
Date of Decision: December 14, 2017

Dear Counsel:

Introduction

On December 1, 2017, this Court heard oral argument on the return date for Plaintiffs' order to show cause together with cross-motions for summary judgment in an action concerning Plaintiff, McGinley Square Group, LLC (hereinafter "McGinley") and Defendant, Jersey City Bergen LLC (hereinafter "Jersey City Bergen")'s competing contractual claims to rights in certain properties located in Jersey City to which Defendant Alliance Healthcare, Inc. (hereinafter "Alliance") currently holds title. Plaintiffs Estate Capital Group, LLC (hereinafter "Estate Capital"), McGinley, and Cedar Lane Realty, LLC's (hereinafter "Cedar Lane"), all entities owned and

primarily controlled by a Mr. Rafael Levy and his wife (hereinafter "Levy" or "Mr. Levy"), made application to this Court seeking to enjoin Defendants Alliance, Seaview Capital Partners, LLC (hereinafter "Seaview"), and Jersey City Bergen, an entity created by Seaview, from transferring, conveying, encumbering, or auctioning the properties located at 706-708 Bergen Avenue, 710 Bergen Avenue, 712-714 Bergen Avenue, 719-721 Bergen Avenue, and 301 Fairmount Avenue (hereinafter "301 Fairmount"), Jersey City (together "the properties"). Plaintiffs were granted the same relief on a temporary basis pursuant to the Court's June 21, 2017 order. Following this temporary relief, the Court entered a scheduling order on June 27, 2017 providing for a limited period of expedited discovery followed by a briefing schedule and a return date for Plaintiffs' order to show cause as well as any cross-motions. This scheduling order was amended on August 9, 2017, and amended again on September 20, 2017 with a return date eventually set for December 1, 2017. Now, with all discovery having been completed, Plaintiffs, as an alternative to that injunctive relief, move for partial summary judgment pursuant to R. 4:46 for (a) specific performance of a June 1, 2016 purchase and sale agreement entered into between McGinley and Alliance, (b) judgment and costs of collection on a $50,000 loan provided by Cedar Lane to Alliance, and (c) judgment for interest on McGinley's mortgage on the properties. Defendants Jersey City Bergen and Alliance filed cross-motions in opposition to Plaintiffs' request for preliminary injunctive relief, or as an alternative, for summary judgment dismissing Plaintiffs' claims for specific performance, declaratory judgment, injunctive relief and unjust enrichment, along with a motion to discharge the *Lis Pendens* recently filed by McGinley in this action.

This matter arises out of several complex contractual agreements entered into between Alliance with, on one hand, Jersey City Bergen, and on the other hand with McGinley. It is under these agreements that McGinley and Jersey City Bergen claim competing rights in the properties. For the reasons set forth herein, the Court denies Plaintiff's application for preliminary injunctive relief. In doing so, the Court also denies Plaintiff's motion for partial summary judgment with regard to their claim for specific performance of the June 1, 2016 purchase and sale agreement entered into between McGinley and Alliance. The Court finds that Jersey City Bergen's agreement with Alliance is enforceable to the exclusion of McGinley's competing contractual claim and, therefore, grants Defendants' motion dismissing Plaintiff's specific performance claim. Furthermore, the Court denies Plaintiff's application for interest on the pay-off amount held by Jersey City Bergen and grants Defendants' motion to discharge the *Lis Pendens* filed by McGinley in this action. However, the Court grants Plaintiff's claim for judgment and costs for collection on a $50,000 loan provided by Cedar Lane to Alliance. In an effort to bring the status of this property to a conclusion, which has been the subject of litigation before this Court since June 2016[1], the Court orders Jersey City Bergen and Alliance to close on the transfer of the properties to Jersey City Bergen no later than January 31, 2018.

By way of procedural background, Plaintiffs filed this complaint together with its application for temporary restraints on June 5, 2017, as amended on July 7, 2017, seeking: (1) specific performance of the purchase and sale agreement between Alliance and McGinley,

[1] In the previously filed action in the Chancery Division, Alliance Healthcare, Inc. v. Jersey City Bergen and Seaview, C-87-16, the Court made a determination that the agreement between Jersey City Bergen and Alliance was enforceable. However, Plaintiffs here were not a party to that action. The Court entered final judgment on October 18, 2016 in the above referenced matter with a letter opinion ordering, among other relief, specific performance of Jersey City Bergen's agreement with Seaview.

arguing that the Jersey City Bergen's option to purchase has expired; (2) injunctive relief barring the sale of the property; (3) a declaratory judgment that the option to purchase no longer requires Alliance to sell the property to Jersey City Bergen and that Alliance must sell the property to McGinley; (4) breach of contract against Alliance; (5) book account and account stated against Alliance for the Cedar Lane Realty loan; and (6) unjust enrichment. Plaintiffs argue for partial summary judgment, contending that the option agreement to which this Court ordered specific performance has expired by its own terms and is no longer enforceable. Defendants Seaview and Jersey City Bergen contend that Jersey City Bergen timely exercised its option to purchase the property. Defendant Alliance replaced its counsel, resulting in an adjournment of the return date on this matter to December 1, 2017. Alliance supplemented its motion joining in on the relief sought by Defendants Seaview and Jersey City Bergen, asserted its desire to close on its deal with Jersey City Bergen as soon as possible. At oral argument all parties appeared and reasserted their positions in this matter with counsel for Jersey City Bergen asserting that the only thing preventing closing at this stage is the Court's June 21, 2017 order granting Plaintiffs' request for temporary restraints and the *Lis Pendens* filed by Plaintiffs. Pursuant to this Court's request, Joshua B. Eisenberg, managing member of Seaview, which is managing member of Jersey City Bergen, submitted a supplemental certification, dated December 7, 2017 confirming that no other obstacles stand in the way of Jersey City Bergen closing on its deal with Alliance within the next thirty (30) days.

Facts

Plaintiffs Estate Capital Group, LLC, McGinley Square Group, LLC, and Cedar Lane Realty, LLC are New Jersey limited liability companies owned by Rafael Levy and his wife, with Rafael Levy serving as managing member of each of these companies.

Defendant Alliance Healthcare (d/b/a Horizon Health Center, Alliance Capital Partners LLC), is a non-profit corporation that operates a medical center and is the current owner of the properties located at 706-708 Bergen Avenue, 710 Bergen Avenue, 712-714 Bergen Avenue, 719-721 Bergen Avenue, and 301 Fairmount Avenue, Jersey City. Its Chief Executive Officer is Marilyn Cintron.

Defendant Seaview is a limited liability company that formed Defendant Jersey City Bergen in 2016 for the purpose of providing a loan to Alliance for the subject property. Seaview's managing members are Joshua Eisenberg and Eli Aaron.

March 2015 Loan from Plaintiff to Defendant Alliance (The Bankruptcy Loan)

On July 26, 2013, Defendant Alliance filed a voluntary petition for Chapter 11 reorganization in the United States Bankruptcy Court for the District of New Jersey. See U.S.D.N.J. Bankruptcy Case No. 13-26348. In March 2015, Alliance approached Mr. Levy about making a loan to Alliance to provide finances to assist Alliance in coming out of bankruptcy.

Levy, through Plaintiff Estate Capital, then agreed to make the loan, and on April 24, 2015, Estate Capital loaned Alliance approximately $2 million secured by a note and first

mortgage on Alliance's property. The principal amount of the bankruptcy loan was due to Estate Capital on May 1, 2016.

Jersey City Bergen Loan

In order to pay the $2 million owed to Estate Capital on the bankruptcy loan due on May 1, 2016, Alliance entered into discussions for another loan, secured by a mortgage with an option to purchase the properties as part of a contemplated sale-leaseback transaction with Defendant, Jersey City Bergen LLC, an entity created by Seaview for the purpose of entering into that agreement. ("Option Agreement").

Jersey City Bergen and Alliance entered into an Option Agreement on May 2, 2016. The parties contemplated that Alliance would sell the properties to Jersey City Bergen under the Option Agreement, and Jersey City Bergen would lease back the premises to Alliance as a tenant. This transaction was structured to include a $2.1 million loan from Jersey City Bergen to Alliance, secured by a short-term mortgage on the properties (with the exclusion of the Fairmount Avenue property) so that Alliance could repay the loan due to Estate Capital in a timely manner. The agreement also included a collateral mortgage on the Fairmount Avenue property designed to secure Alliance's obligations under a commercial lease agreement, and an option contract under which Jersey City Bergen was given the option to purchase the properties for $2.8 million "at any time between the Effective Date (May 2, 2016) and July 1, 2016." The option was to be exercised by Jersey City Bergen no later than July 1, 2016 by written notice of exercise to Alliance and was to close thirty days later. Section 18.8 of the Option Agreement provides that any amendment or modification to the terms of that agreement must be done by the parties in writing. This Option Agreement also provides that Jersey City Bergen's due diligence period would be for twenty-one days after the exercise of the option and that during that period all inspections will be non-invasive and not involve the use of a Licensed Site Remediation Professional.

In May of 2016, immediately following Jersey City Bergen's and Alliance's execution of documents, Jersey City Bergen began conducting environmental inspections on the properties. During this period Jersey City Bergen's environmental consultant discovered evidence of possible contamination, including a potential former dry cleaning operation which led it to believe that a second phase of environmental inspection was necessary to determine whether Alliance would be responsible for remediating these possible contaminates.

Alliance Sells Property to Plaintiff McGinley and Plaintiff Cedar Lane Realty extends loan to Alliance

In May of 2016, Alliance also renewed discussions with Levy about a potential sale-leaseback transaction in which Levy, through McGinley, would purchase the property, pay off the Jersey City Bergen loan, and lease the subject property back to Alliance, where it would continue to operate a medical center. In May of 2016 Mr. Levy and Ms. Cintron, Alliance's Chief Executive Office met to discuss whether the Jersey City Bergen Option Agreement was enforceable. Ms. Cintron also provided Mr. Levy copies of the Jersey City Bergen Option Agreement, which he then forwarded to attorney Jeffrey Testa of McCarter & English ("M&E") for

review. M&E has represented Mr. Levy and his associated entities in a number of matters and Mr. Testa himself was involved in the bankruptcy proceedings for Alliance (f/k/a Horizon healthcare). During that month, discussions took place between Mr. Levy, M&E, and Cintron with regard to Levy's ability to purchase the properties. In these discussions, M&E referred Ms. Cintron to Michael Pasquale, Esq. to represent Alliance in a lawsuit to challenge the Option Agreement. There were multiple communications between Mr. Pasquale and M&E during the months of May and early June 2016, but it is unclear to what extent those conversations involved litigation strategy, legal research, or legal assistance in the challenge Alliance was bringing to the Jersey City Bergen Option Agreement which was ultimately filed in June, 2016 under Docket Number C-87-16. Mr. Levy and Alliance did however, discuss the possibility of having one of the Plaintiff entities participate in the prospective litigation and Mr. Pasquale did send drafts of pleadings to M&E before filing.

On June 1, 2016, Levy, through McGinley, executed a Purchase and Sale Agreement with Alliance for the properties. This agreement obligated Alliance to convey a fee simple interest to the properties, free and clear of all liens and encumbrances.

On June 1, 2016, when Alliance and McGinley entered into the purchase and sale agreement, Plaintiff Cedar Lane Realty, another entity owned by Levy, extended a $50,000 loan to Alliance, which is evidenced by a written loan agreement as part of that same transaction. Under this loan, the principal amount was due to Cedar Lane Realty on July 1, 2016, but Alliance has not made any payments on the loan.

Pursuant to Alliance and McGinley's agreement, Alliance informed Jersey City Bergen that it was ready, willing and able to pay the entire balance of their loan in the amount of $2,100,000 immediately. On June 1, 2016 Jersey City Bergen, through its counsel, provided Alliance with wiring instructions.

On June 2, 2016, McGinley, through its attorney, wired $2,095,748.24 to Alliance. On that same day, Alliance, through its counsel, wired the total payoff amount to Jersey City Bergen.

Jersey City Bergen Exercises the Option to Purchase

On June 3, 2016, Jersey City Bergen rejected the payoff and refused to discharge the Jersey City Bergen loan because the money came from McGinley, rather than Alliance, and because Alliance had breached the Option Agreement by entering into a contract to sell the property to another buyer prior to the option termination date. Jersey City Bergen, having received no return instructions to wire the payoff amount back to Alliance, deposited the funds in its attorney's trust account.

On June 6, 2016, Jersey City Bergen exercised the Option Agreement by written notice which also included notification that Jersey City Bergen intended to perform certain environmental inspections on the properties.

Prior Litigation between Alliance Healthcare and Jersey City Bergen (C-87-16)

After Jersey City Bergen refused to accept the payoff, Alliance filed an order to show cause on June 6, 2016. On June 16, 2016, this Court entered a temporary restraining order requiring that the nearly $2.1 million Jersey City Bergen payoff would remain in the trust account of Jersey City Bergen's counsel.

During the pendency of this litigation, Mr. Levy was kept apprised of the status of this lawsuit and participated in various phone conferences, e-mails, and preliminary settlement negotiations related to this prior litigation. Mr. Levy's real estate counsel, Larry Diener also participated in settlement negotiations with Seaview's counsel. The record shows that Mr. Levy considered intervening in the previous litigation before the return date on Alliance's order to show cause, but ultimately decided not to participate.

On the return date of that order to show cause, Alliance sought to enjoin Jersey City Bergen from refusing to discharge the mortgage and declaring the option to purchase, commercial lease, collateral mortgage, UCC filings, and all related agreements concerning the sale and lease of the property between Alliance and Jersey City Bergen void and unenforceable. Jersey City Bergen also filed a cross-motion for summary judgment, returnable on the same date as the return date of Alliance's order to show cause opposing Alliance's order to show cause, seeking to dismiss Alliance's claims, while also seeking specific performance of the Option Agreement.

After oral argument, the Court issued a decision and final judgment on October 18, 2016: (1) restraining Jersey City Bergen from refusing to discharge the mortgage on the subject property securing the Jersey City Bergen loan; (2) granting Defendants' cross-motion for summary judgment on Jersey City Bergen's counterclaim for specific performance of the Option Agreement; and (3) dismissing the remaining counts of Alliance's complaint.

Following the entry of this October 18, 2016 decision, Mr. Levy and Ms. Cintron discussed the possibility of appeal and contacted a separate attorney, Mr. Joseph Fiorenzo, to discuss the possibility that he would represent Alliance in that appeal. However, Levy and Ms. Cintron ultimately determined not to pursue that appeal.

Pursuant to the Court's October 18, 2016 Order, Seaview discharged the mortgage on the property securing the Jersey City Bergen Loan although it still held onto the amount McGinley had wired to it to discharge that loan in anticipation that it would pay McGinley back when Jersey City Bergen and Alliance closed on their deal.

Modified Option Contract

Following the entry of the October 18, 2016 decision, Alliance and Seaview commenced negotiations concerning amendments to the Option Agreement. Mr. Levy was made aware of these negotiations, but did not actively participate in them. Alliance and Seaview thought it necessary to modify their Option Agreement given that Seaview had filed a motion to recover attorney's fees against Alliance and that some concerns about environmental liability on the

properties had arisen during Seaview's initial due diligence investigation; Alliance was concerned for its part with obtaining more cash at closing. This modified option contract (hereinafter, "Modified Option Agreement") was executed on December 12, 2016. The terms of this modified option contract now included the real property located at 301 Fairmount Avenue in the parcels to be purchased at closing, while that property had previously been subject to a five-year mortgage under the prior agreement. The Modified Option Agreement also included terms under which Alliance would be responsible for obtaining a Response Action Outcome ("RAO") letter for the properties prior to closing from a Licensed Site Remediation Professional. If the RAO letter was unobtainable, Alliance would be responsible for certain capped environmental remediation costs; and; if necessary an escrow account would be created as security for ongoing costs. Moreover, $100,000.00 from the seller-financed mortgage would be paid under this modified agreement to cover Seaview's attorney's fees. The Modified Option Agreement provides that, "[n]otwithstanding anything contained in Section 1.1 of the [original] Agreement or any previous actions, Seller and Buyer agree that the Option has been properly exercised by Buyer and that the "Option Exercise Date" shall be the date that this Amendment has been fully executed and delivered." A new closing date was set for January 31, 2017. Seaview agreed to contribute $100,000 façade improvement if closing occurred before January 31, 2017; or, if delay was due to Seaview or force majeure, by April 30, 2017.

Closing of the Option Contract

Pursuant to the original option contract between Jersey City Bergen and Alliance, due diligence was to be performed within twenty-one days while the closing was to occur within "30 days after the option exercise date." The Modified Option Agreement provided a specific closing date of January 31, 2017 with a financial penalty if closing did not occur by that date.

To date, Seaview and Alliance have not closed. As set forth above, closing was delayed by the Court order during the pendency of the prior litigation from June 6, 2016 to October 18, 2016. Shortly thereafter, after a few weeks of negotiation, Jersey City Bergen and Alliance entered into a Modified Option Contract on December 12, 2017, which provided for, inter alia, the hiring of a licensed site remediation professional ("LSRP") to complete an environmental review of the property and create an RAO.

One of the reasons the parties modified the Option Agreement is that Jersey City Bergen's mortgage lender, Lakeland Bank, who is financing Jersey City Bergen's obligations in this transaction requires the LSRP's inspections to be complete prior to closing. Jersey City Bergen is required to provide Lakeland Bank with the LSRP's report prior to closing so that it can determine the amount of escrow, if any, Alliance is required to deposit at closing.

On March 23, 2017, the LSRP hired to perform these investigations determined that there was no contamination from a former dry cleaner on the properties as had previously been suspected, but discovered the existence of an oil tank on one of Alliance's properties.

While this discovery would not have prevented closing under either the original Option Agreement or the modified agreement, Alliance and Seaview determined that they wanted to resolve the oil tank issue prior to closing so that Alliance would have more cash available to it at

closing. Pursuant to the supplemental certification of Joshua B. Eisenberg, managing member of Seaview, the existence of that oil tank is no longer preventing Alliance and Jersey City Bergen from closing on their agreement.

In addition to the oil tank issue, closing has been further delayed by the discovery that a federal grant Alliance had obtained created a lien on one of the properties, 714 Bergen Avenue. In preparing an updated title search in anticipation of closing, Defendants learned, on March 27, 2017, that Notices of Federal Interest were recorded against that property, which prohibited Alliance from transferring title. On August 14, 2017, Alliance obtained a Withdrawal of the Filed Notice of Federal Interest, giving Alliance the ability to transfer all of the properties included in this transaction.

With the removal of these obstacles, Jersey City Bergen and Alliance assert that they are ready, willing, and able to close on their deal. However, this closing is still being prevented by this Court's June 21, 2017 Order granting temporary restraints and the *Lis Pendens* filed by Plaintiffs in this matter. While this matter has been pending, Jersey City Bergen has continued to retain the nearly $2.1 million constituting the Jersey City Bergen payoff from Plaintiff McGinley in its attorney's trust account. During this period, Mr. Levy inquired on several occasions if and when the closing between Jersey City Bergen and Alliance would take place. Plaintiffs have now also asserted that they are ready, willing, and able to close on the McGinley Agreement, should the Court so order.

Discussion

Order to Show Cause

Plaintiffs here seek preliminary injunctive relief to continue the relief previously granted by this Court as temporary restraints enjoining Defendants from transferring, conveying, encumbering, or auctioning the properties at issue.

The seminal case in determining whether preliminary injunctive relief should be granted is Crowe v. DeGioia, 90 N.J. 126, 447 A.2d 173 (1982). Under Crowe, the movant bears the burden of demonstrating that: (1) irreparable harm is likely if the relief is denied; (2) the applicable underlying law is well settled; (3) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and (4) the balance of the hardship to the parties favors the issuance of the requested relief. Id. at 132-34. Each of these factors must be clearly and convincingly demonstrated. Waste Mgmt. of N.J., Inc. v. Union Cnty. Utilities Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Although all four factors must weigh in favor of injunctive relief, courts may take a less rigid view in consideration of the factors where the interlocutory relief sought is designed to preserve the status quo. McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007); see also Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006).

Here, the Court will discharge the Order grantingtemporary restraints entered by the Court on June 21, 2017 and deny plaintiffs' application for preliminary injunctive relief as, for the

reasons set forth below, the Court has made a final judgment with respect to the parties' rights in this matter. Accordingly, there is no reason to further delay the closing of the Option Contract by granting injunctive relief.

Summary Judgment

Pursuant to R. 4:43-2(c), summary judgment is appropriate "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. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact."

When deciding whether a genuine issue of material fact exists to preclude summary judgment, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995); see also Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74-75 (1954). All favorable inference must be drawn in favor of the party opposing the motion. Brill, supra, 142 N.J. at 536. The judge's function is not to weigh the evidence and determine the truth of the matter; rather, it is to determine whether there is a genuine issue for trial. Id. at 540. Summary judgment is to be granted where there is no issue to be decided by a jury based on the evidence. Id. at 536-37.

Enforceability of the Option Agreement

This Court previously ruled that the original Option Agreement was enforceable as it was properly exercised within the timeframe set forth under that agreement. Likewise here, the Court finds that Alliance exercised their option within the time period required by the Option Agreement, and that even though the closing did not occur within the thirty day period set forth in that agreement, the Option Agreement as a whole is still enforceable. Our courts have described an option contract in a real estate transaction as a "unilateral agreement requiring a party to convey property at a specified price, provided the option holder exercises the option 'in strict accordance' with the terms and time requirements of the contract." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 223 (2005) (citations omitted). This is because "the property owner is bound by an irrevocable offer to sell the property, while the option holder is under no obligation to act." Id. However, once the option is exercised the agreement becomes a bilateral contract for the sale of real property. See State, By & Through Adams v. N.J.Zinc Co., 40 N.J. 560, 577 (2005) ("[w]hen an optionee exercises his option, a mutually enforceable contract of sale arises. It is then no longer an option but a contract for the sale of real estate.") (citations omitted).

Here, the Court finds that Jersey City Bergen exercised its option within the required time frame and according to the terms set forth in the original Option Agreement which is provided in section 1.1 as follows:

(a) Time to Exercise Option. Buyer may exercise its Option at any time between the Effective Date and July 1, 2016 ("Option Termination Date").

(b) Mechanism for Exercise of Option. To exercise the Option, Buyer shall notify Seller in writing at least ten (10) days prior to the Closing Date pursuant to Section 16.1 of this Agreement. The date in which this writing is sent shall be the "Option Exercise Date."

Plaintiffs contend that this exercise of the option was invalid as the letter titled Notice of Intent to Exercise Option, in addition to notifying Alliance of Jersey City Bergen's exercise of the option, included a notification that that Jersey City Bergen intended to perform certain environmental inspections on the property that conflicted with the type of inspections agreed upon in the Option Agreement.

Section 19 of the Option Agreement provides that

> Buyer shall not utilize a Licensed Site Remediation Professional for any Due Diligence Investigations . . . . None of Buyer's Due Diligence Investigations shall interfere with the Seller's conduct of business at the Property . . . . Buyer to give Seller at least one (1) full business day's notice, in each instance [of intent to perform inspections], prior to entry onto the Property. Buyer shall obtain such inspections and complete its due diligence within on or before 11:59 p.m. on the twenty-first (21st) day after the Option Exercise Date . . . in the event a tank tightness test fails or any contamination be discovered or hypothesized in a Preliminary Assessment Report, Buyer shall be entitled to conduct soil borings adjacent to the tank area only upon three (3) days notice to Seller. Any invasive testing other than soil borings in the event of a failed tank tightness test shall be subject to Seller's reasonable discretion.

The June 6, 2016 option exercise letter requested certain environmental inspections, including soil borings, which were to be performed by a Licensed Site Remediation Professional hired by Jersey City Bergen. While the notice of exercise of the option and notice of intent to perform environmental inspections were set forth in the same letter from Jersey City Bergen, these two notices were in no way conditional upon one another. Even if the proposed environmental inspections would, if carried out, have violated § 19 of the Option Agreement, merely providing notice of intention to perform such inspections in the same letter as the Notice of Intent to Exercise Option letter does not affect the valid exercise of Jersey City Bergen's option under § 1.1 of the Option Agreement.

Moreover, the failure to comply with the closing date set forth in the Option Agreement does not invalidate that agreement once the option was exercised. There is a distinction to be made with regard to the terms that must be exercised in strict compliance with an option agreement and those terms whose compliance do not have to be exercised in such a strict manner. In an option agreement, it is undisputed that the option exercise period must strictly be complied with. This is so for the reasons set forth in Brunswick Hills supra 182 N.J. 210, because that period of time to exercise the option puts the property owner in a position where he/she is obligated to sell the property to the option holder and cannot withdraw its offer. The option holder and the property owner negotiate that time frame so that any unilateral extension of it by the

option holder would take away important rights of the property holder that were not bargained for. This is distinguished from the exercise of other terms, such as the time for closing, that are set forth in an option agreement. Once the option has been exercised, the purchaser and the property owner are parties to a bilateral contract and the time for closing is deemed a formality, although both are bound to close within a reasonable time where there is no indication that time would be of the essence. See also Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 603 (App. Div.), certif. denied, 183 N.J. 591 (2005) ("[t]he date fixed in a contract of sale is considered a formality, unless the contract provides that time is of the essence") (citing Paradiso v. Mazejy, 3 N.J. 110, 115 (1949)

> Ordinarily, equity does not regard time as of the essence of an agreement. When a certain period of time is stipulated in the contract for its completion, or for execution of any of its terms, equity treats the provision as formal rather than essential. Delay, unless willful or unreasonably long or prejudicial to the other party, is not of itself a reason for denying the relief of specific performance.

Salvatore v. Trace, 109 N.J. Super. 83, 91 (App. Div. 1969).

Here, the Court will not find the Option Agreement unenforceable merely because the parties did not close within the contemplated period of time set forth therein. Moreover, there was no time is of the essence clause relating to the closing in the Option Agreement and Plaintiffs have not shown that there are circumstances which show that it was the clear intent of the parties to make the time for closing of the essence. See Schultz v. Topakyan, 193 N.J. Super. 550, 553 (App. Div. 1984) ("[a]n intention to make time of the essence as to the communication of notice would have to be specifically set forth or, at the very least, clearly implied from an examination of the surrounding circumstances.").

Plaintiffs also contend that even if the Option Agreement was validly exercised on June 6, 2016, the Modified Option Agreement by its terms sets the exercise date after the original option lapsed, thereby making the exercise of that option invalid. This argument is without merit. The exercise of the option on June 6, 2016 was valid. The fact that the Modified Option Agreement entered into on December 12, 2016 purports to set the exercise date on the date of that modified agreement's execution does not change the fact that there was already a valid exercise of the option.

Enforceability of the Modified Option Agreement

Given that the exercise of Jersey City Bergen's option was valid and timely, Jersey City Bergen and Alliance were bound by the terms of that agreement as members of a bilateral real estate contract. State by Adams v. New Jersey Zinc Co., 40 N.J. 560, 578 (1963). Parties to such an agreement may generally amend or modify the terms of their agreement only by writing. N.J.S.A. 25:1-11. Here, Section 1.1 of the Option Agreement made it clear that the agreement may in fact be modified, but only by "written instrument signed by the party to be charged or by its agent duly authorized in writing . . . .". There is no question that the December 12, 2016 modification was made in writing and signed by the parties to be charged. The fact that the modification agreement was executed on December 12, 2016 does not make it unenforceable. This was within the bounds of a reasonable time from when the option was exercised

considering that litigation had stalled the Defendants' ability to close until October 18, 2016.

Given that the modified option was executed in a timely manner, we must next determine whether the modified option enlarged the rights of Jersey City Bergen with respect to a equitable right McGinley may have held pursuant to its agreement with Alliance. Plaintiffs contend that the modifications to the Option Agreement pertaining to additional or different procedures for environmental inspection/remediation impinges upon McGinley's rights to the properties. See Dexter Cert., Exh. PP, § 8 (requiring Alliance to obtain an RAO from an LSRP, or if not possible, requiring Alliance to pay for remediation or establish an escrow account for purposes of completing environmental remediation/inspection). This contention is without merit as the enlargement of Jersey City Bergen's rights under these modified terms only pertain to rights negotiated between Alliance and Jersey City Bergen and do not affect Plaintiffs' rights under its agreement with Alliance. "A litigant may not [ordinarily] claim standing to assert the rights of a third party," unless "the litigant can show sufficient personal stake and adverseness so that the [c]ourt is not asked to render an advisory opinion." In re Estate of F.W., 398 N.J. Super. 344, 354 (App. Div. 2008) (alterations in original) (quoting Jersey Shore Med. Ctr. v. Estate of Baum, 84 N.J. 137, 144 (1980)); see also Bank of New York v. Raftogianis, 418 N.J. Super. 323, 350 (Ch. Div. 2010) ("[L]itigants generally have no standing to assert the rights of third parties."). Accordingly, and because the exercise of the original option was timely and valid, we find that Plaintiffs do not have standing to challenge the modification of that agreement as any rights or interest Plaintiffs may have had in the properties were extinguished by Jersey City Bergen's exercise of their option.

While the Modified Option Agreement's amendment with regard to environmental inspection/remediation does not affect Plaintiffs' rights, Plaintiff also objects to the Modified Option Agreement's validity on the grounds that the transfer of 301 Fairmount Avenue to Jersey City Bergen unjustly enlarges Jersey City Bergen's rights to the detriment of Plaintiffs. The Modified Option Agreement purports to sell 301 Fairmount to Jersey City Bergen, whereas 301 Fairmount had only been subject to a mortgage as collateral to Alliance in the original Option Agreement. Plaintiffs here claim that, pursuant to McGinley's agreement with Alliance, McGinley should have equitable title over the properties, including 301 Fairmount as the execution of that contract occurred prior to the exercise of the option. The Court finds that Plaintiffs had no equitable title in 301 Fairmount. Mr. Levy engaged in numerous discussions with his attorneys and Ms. Cintron with regard to the Option Agreement prior to entering into the McGinley Agreement and presumably had some knowledge of its contents. It is clear from the Option Agreement that the properties, including 301 Fairmount were subject either to an option to purchase or a mortgage. The McGinley Agreement explicitly states that McGinley was to take title to all the properties free and clear of any encumbrances and/or mortgages. Plaintiffs can not be said to be equitable title holders of 301 Fairmount when they entered into such an agreement knowing that 301 Fairmount was in fact encumbered by a mortgage. Therefore, the Court here finds that the Modified Option Agreement did not unjustly enlarge Jersey City Bergen's rights over those of Plaintiffs, and that the Modified Option Agreement was validly exercised and is enforceable.

Moreover, the Court finds that Plaintiffs here are precluded from raising the issue of the validity of the Option Agreement and the subsequent Modified Option Agreement under the doctrine of collateral estoppel. Under this equitable doctrine a party is foreclosed from relitigating an issue where

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

In re Estate of Dawson, 136 N.J. 1, 20 (1994) (citations omitted).

Collateral Estoppel is an equitable doctrine and the courts rely on certain enumerated factors when making the determination as to whether its application would be fair. See Allen v. V& A Bros., Inc., 208 N.J. 114, 138 (2011).

> The factors favoring issue preclusion include: conservation of judicial resources; avoidance of repetitious litigation; and prevention of waste, harassment, uncertainty and inconsistency. Those factors disfavoring preclusion include: the party against whom preclusion is sought could not have obtained review of the prior judgment; the quality or extent of the procedures in the two actions is different; it was not foreseeable at the time of the prior action that the issue would arise in subsequent litigation; and the precluded party did not have an adequate opportunity to obtain a full and fair adjudication in the prior action.

Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 523 (2006)

Here, there is no dispute that the validity of the option contract was decided in the October 18, 2016 Decision. The issue was thoroughly litigated and the determination of that issue was essential to the prior judgment. For purposes of finding Plaintiffs precluded under this doctrine, the Court also finds that Plaintiffs were also in privity with Alliance in the prior litigation.

> Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. The word 'privy' includes those who control an action although not parties to it (see Sec. 84); those whose interests are represented by a party to the action (see Secs. 85-88); successors in interest to those having derivative claims (Secs. 88-89).

L. L. Constantin & Co. v. R. P. Holding Corp., 56 N.J. Super. 411, 417-418 (1959) (citing Hudson Transit Corp. v. Antonucci, 137 N.J.L. 704 (*E. & A.* 1948)). (Citing the Restatement of Law of Judgments § 83).

While Plaintiffs were not parties to the prior action litigated between Alliance and Jersey City Bergen, there is enough evidence in this record to show that Mr. Levy was involved in that

litigation to such an extent where it would be inequitable to find that he is not precluded by our finding therein.[2] It is undisputed that there was collaboration between Mr. Levy, Ms. Cintron and their respective attorneys both prior to and during the previous litigation. This collaboration rose to the level where Mr. Levy was asserting control over Alliance in the previous litigation. This control is demonstrated by Mr. Levy's direct interactions with Ms. Cintron, the discussions/review of pleadings in that matter that took place between attorneys for Mr. Levy and Ms. Cintron, Mr. Levy's participation in preliminary settlement negotiations, and the discussions between Mr. Levy and Ms. Cintron following the entry of the October 18, 2016 decision as to whether Alliance should appeal that decision. Therefore, the Court finds that collateral estoppel bars Plaintiff's claims as to the validity of Jersey City Bergen's Option Agreement, as amended in December 2016. However, even where all those factors set forth in L. L. Constantin & Co., supra at 417-418 are satisfied, collateral estoppel "will not be applied when it is unfair to do so." Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521-522 (2006) (quoting Pace v. Kuchinsky, 347 N.J. Super. 202, 215 (App. Div. 2002)).

> The factors favoring issue preclusion include: conservation of judicial resources; avoidance of repetitious litigation; and prevention of waste, harassment, uncertainty and inconsistency. Those factors disfavoring preclusion include: the party against whom preclusion is sought could not have obtained review of the prior judgment; the quality or extent of the procedures in the two actions is different; it was not foreseeable at the time of the prior action that the issue would arise in subsequent litigation; and the precluded party did not have an adequate opportunity to obtain a full and fair adjudication in the prior action.

Ibid. at 523 (quoting Pace v. Kuchinsky, 347 N.J. Super. 202, 216 (App. Div. 2002)).

The fairness factors set forth above weigh in favor of precluding the issue of the Option Agreement's validity. Such a finding at this stage would support a dispositive decision on these motions thus preventing waste of judicial resources and avoiding repetitious litigation. Moreover, none of these factors weigh against the application of collateral estoppel. There was no obstacle to a review of the October 18, 2016 decision, in fact Mr. Levy and Ms. Cintron engaged in discussions as to whether an appeal was in their best interest, ultimately deciding that it was not. Because both suits here were brought before this Court, there are no differences in the quality or extent of these procedures that denied Plaintiff's from obtaining a full and fair adjudication of its claims in the prior action. Moreover, the record shows that Plaintiffs were quite aware of the issues raised in the prior litigation and determined that it was not in their best interest to join those proceedings. Thus, the Court here finds that it would be equitable to preclude Plaintiff's from asserting that the Option Agreement was invalid . That issue was already determined by this Court on October 18, 2016, and the modification to that agreement was made according to the terms of the Option Agreement.

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[2] While the Court finds that, under the equitable doctrine of collateral estoppel, Mr. Levy was in privity with Alliance, the Court would not necessarily find that privity existed for purposes of *res judicata*, as that doctrine is not primarily based in equity. Because we find that Plaintiffs are barred from relitigating the issue of the Option Agreement's validity, we need not address whether Plaintiffs would themselves be barred from asserting its claims under *res judicata* or the entire controversy doctrine.

Interest on McGinley's Payoff

Separate and apart from the issue of the parties' contractual rights to the properties at issue, Plaintiffs contend that they are owed interest and have an equitable lien as a result of the fact that Alliance used McGinley's $2.1 million to pay of the note and satisfy the mortgage entered into as part of the Option Agreement. They contend that, under the theory of equitable subrogation, they are entitled to interest at the rate set forth in the mortgage that they paid off for the time since that payoff as Alliance has continued to occupy and use the premises, rent-free, without having to obtain another mortgage while Plaintiffs have been deprived of their use and enjoyment of that $2.1 million. The doctrine of equitable subrogation is usually reserved for situations in which one lender pays off the balance of a prior mortgage and thus takes the place of that prior lender. See e.g. Equity Sav. & Loan Ass'n v. Chicago Title Ins. Co., 190 N.J. Super. 340, 342 (App. Div. 1983). However, our courts have recognized that some purchasers who satisfy outstanding liens and mortgages may take priority over those other lien and mortgage holders. See Gutermuth v. Ropiecki, 159 N.J. Super. 139, 146 (Ch. Div. 1977). Here, the doctrine of equitable subrogation is inapplicable as Plaintiffs' rights in the properties were terminated with the exercise of the Option Agreement which occurred only several days after Plaintiff's transferred the $2.1 million to Alliance to pay off the Jersey City Bergen loan. Therefore, Plaintiffs have no standing to base their claim for equitable subrogation on the failure of Alliance to pay Jersey City Bergen mortgage payments or interest in the period between when Plaintiffs paid off the Option Agreement mortgage and this Court's order that the mortgage be discharged.

Likewise, Plaintiffs here will not be awarded interest on this payoff on the basis of unjust enrichment. A party making a claim for unjust enrichment must establish that it conferred a benefit on another and that retention of that benefit without payment would be unjust. See VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Here, Plaintiffs conveyed the benefit of $2.1 million on Alliance to pay off its debt to Jersey City Bergen. Thus, both defendants here retained a benefit as a result of this payoff. The Court finds that the delay in closing after the Modified Option Agreement was entered into to be reasonable and not the source of any unjust enrichment to Plaintiffs' detriment. The delay in closing from December 12, 2016, the date on which the modified option was executed, and the present date was primarily due to this Court's June 21, 2017 order restraining Defendants from transferring title and closing on the property. The record demonstrates that the Defendants were ready and willing to close by March of 2017, but closing was delayed due to the discovery of an oil tank on the property and Federal Notices of Intent filed on certain of the properties, which prohibited their transfer. Although, under the terms of the Modified Option Agreement, the defendants could have closed regardless of the discovery of the oil tank issue, the parties decided to resolve that issue first so that Alliance wouldn't have to establish an escrow for environmental remediation. While this decision to delay closing on its own may have been a basis for finding that Defendants unreasonably delayed closing at the expense of Plaintiff, the discovery of the Federal Notices of Intent, which occurred only days after the discovery of the oil tank, created an issue that was necessary to resolve prior to closing. Therefore, it was not unreasonable for Jersey City Bergen to delay closing while resolving this last matter. Accordingly, Plaintiffs' claim for unjust enrichment will be dismissed.

Moreover, as set forth in the supplemental certification received pursuant to this Court's instruction Jersey City Bergen is ready, willing and able to close on their deal with Alliance with the Court's dismissal of Plaintiff's claim and Plaintiff's *Lis Pendens*. Given that the Court has resolved all issues of fact in this matter and is issuing a final determinative order establishing Plaintiffs and Defendants rights to the properties, the Court will discharge the *Lis Pendens* filed by Plaintiff in this matter.

While the Court does find that Defendants' Option Agreement is enforceable and therefore denies Plaintiff's first claim for specific enforcement and finds that interest on McGinley's $2.1 million payoff amount is not required, the Court will grant relief to Plaintiff in the form of a judgment and costs for collection on a $50,000 loan provided by Cedar Lane to Alliance.

Cedar Lane Loan

Given that Alliance does not even dispute its liability to Cedar Lane for the balance of the $50,000 Loan, the Court finds that Alliance is responsible for the amount of that loan. The Court finds that Alliance did enter into an interest free loan agreement with Cedar Lane contemporaneously with the McGinley Agreement for the amount of $50,000. Under the terms of that loan agreement, repayment was to be made in full on July 1, 2016. Alliance remains liable for this debt. Pursuant to the terms of that loan agreement Alliance is also liable upon default to pay all costs of collection, including reasonable attorney's fees. Given the extensive litigation involving this matter, most of which having nothing to do with this Loan, the Court denies plaintiff's application for attorney's fees.

Pursuant to the Jersey City Bergen and Alliance's certifications and testimony at oral argument, the Court finds that a thirty-day window for closing on their Option Agreement is reasonable. Therefore, Defendants are ordered to close on their Option Agreement and complete a transfer of the properties by January 31, 2017. Once closing occurs, Jersey City Bergen is to repay McGinley in full for their $2.1 million payoff. Alliance is ordered to pay the full amount of the $50,000 loan it took from Cedar Lane. In the event the closing does not take place on or before January 31, 2018, plaintiff is given leave to file a motion for reconsideration of the Court's denial of interest in the McGinley Loan and fees and costs on the collection of the Cedar Lane loan.

Conclusion

The Court herewith enters a dispositive order which reflects the relief granted to the parties under this Opinion.

SO ORDERED,

Hon. Barry P. Sarkisian, P.J.Ch.