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802 ABSECON BOULEVARD/ABSECON, LLC, 102 JFK WAY/WILLINGBORO, LLC, 1843 BURLINGTON MT. HOLLY RD/WESTHAMPTON, LLC, BROWNING LANE/BROOKLAWN, LLC, 1390 E. MARLTON PIKE/CHERRY HILL, LLC, 1200 ROUTE 73 NORTH/PENNSAUKEN, LLC, 1409 LAUREL ROAD/LINDENWOLD, LLC, 2229 2ND STREET NORTH/MILLVILLE, LLC, 8401 RIVER ROAD ASSOCIATES, LLC, 485 ROUTE 46 E/LITTLE FALLS, LLC

Plaintiffs,

v.

FAIRVIEW INVESTMENT FUND, successor by assignment from GE CAPITAL FRANCHISE FINANCE CORP., successor by assignment to GE CAPITAL COMMERCIAL INC., successor by assignment to CITICORP LEASING, LLC

Defendant.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

GENERAL EQUITY PART

BERGEN COUNTY

DOCKET No. BER-C-049-17

CIVIL ACTION

DECISION

Argued: December 12, 2017
Decided: December 14, 2017

Honorable Robert P. Contillo, P.J.Ch.

Joseph R. Valle, Jr., Esq. appearing on behalf of the plaintiff, 802 Absecon Boulevard/Absecon, LLC. (Riermer & Braunstein LLP).

Jason Shafron, Esq. appearing on behalf of the defendant, Fairview Investment Fund II, LP. (Shafron Law Group, LLC).

OPINION

I. Statement of the Case

Before the Court is the Motion of Defendant Fairview Investment Fund II, LP, successor by assignment from GE Capital Franchise Finance Corp., successor by assignment to GE Capital Commercial Inc., successor by assignment to Citicorp Leasing, LLC ("Fairview" or "Defendant") for Summary Judgment; filed on November 8, 2017. On November 30, 2017, 802 Absecon Boulevard/Absecon, LLC, ("802 Absecon"), 102 JFK Way/Willingboro, LLC ("102 JFK LLC"), 1843 Burlington Mt. Holly Rd/Westhampton, LLC ("1843 Burlington LLC"), Browning Lane/Brooklawn, LLC ("Browning Lane"), 1390 E. Marlton Pike/Cherry Hill, LLC ("1390 E. Marlton Pike LLC"), 2229 2nd Street North/Millville, LLC ("2229 2nd Street LLC"), 8401 River Road Associates, LLC ("8401 River Road LLC"), 1200 Route 73 North/Pennsauken, LLC ("1200 Route 73 LLC"), 1409 Laurel Road/Lindenwold, LLC ("1409 Laurel LLC"), and 485 Route 46 E/Little Falls, LLC ("485 Route 46 LLC") (or collectively as "Plaintiffs") filed Opposition to Defendant's Motion for Summary Judgment. Defendant filed no reply. Oral argument was held on December 12, 2017 and the Court reserved decision.

At the heart of this matter is a breach of contract claim, arising from a number of promissory notes, mortgages, and a subsequent Letter Agreement between the parties. On April 6, 2006 the Plaintiffs entered into a Credit and Security Agreement (the "Loan") with Citicorp Leasing, Inc. ("Citicorp"), under which Citicorp agreed to loan the Plaintiffs $8.3 million. Defendant Statement of Facts, ("Defendant Facts") ¶ 10. In exchange, Plaintiffs executed a total of seven (7) promissory notes ("Notes") in favor of Citicorp, along with Mortgages, guaranty riders and related loan documents. Id. at ¶ 11. The following entities executed the promissory notes and are plaintiffs in this action:

1. 802 Absecon Boulevard/Absecon, LLC ("802 Absecon") who holds title to property located at 802 Absecon Boulevard, Absecon, New Jersey ("Absecon Property"). Id at ¶ 1.
2. 102 JFK Way/Willingboro, LLC ("102 JFK LLC") who holds title to property located at 102 JFK Way, Willingboro, New Jersey ("Willingboro Property"). Id. at ¶ 2.
3. 1843 Burlington Mt. Holly Rd/Westhampton, LLC ("1843 Burlington LLC") who holds title to the property located at 1843 Burlington Mt. Holly Road, Westhampton, New Jersey ("Westhampton Property"). Id. at ¶ 3.
4. Browning Lane/Brooklawn, LLC ("Browning Lane") who holds title to property located at Browning Lane, Brooklawn, New Jersey ("Brooklawn Property"). Id. at ¶ 4.
5. 1390 E. Marlton Pike/Cherry Hill, LLC ("1390 E. Marlton Pike LLC") who holds title to property located at 1390 E. Marlton Pike, Cherry Hill, New Jersey ("Cherry Hill Property"). Id. at ¶ 5.
6. 2229 2nd Street North/Millville, LLC ("2229 2nd Street LLC") who holds title to property located at 2229 2nd Street North, Millville, New Jersey ("Millville Property"). Id. at 6.
7. 8401 River Road Associates, LLC ("8401 River Road LLC") who holds title to property located at 8401 River Road, North Bergen, New Jersey ("River Road Property"). Id. at ¶ 7.

Each of these entities (collectively referred to as "Plaintiffs") are limited liability companies in which Fred A. Daibes, Michael McManus, and Nancy McManus are members. Id. at ¶¶ 8-9. The seven Notes were executed with respect to each of the above listed properties, respectively, in varying amounts ($830,000 on the Absecon Property,[1] $590,000 on the Willingboro Property,[2] $620,000 on the Westhampton Property,[3] $590,000 on the Brooklawn Property,[4] $690,000 on the Cherry Hill Property,[5] $850,000 on the Millville Property,[6] and $1,225,000 on

[1] Exhibit C to Valle Cert.
[2] Exhibit D to Valle Cert.
[3] Exhibit E to Valle Cert.
[4] Exhibit F to Valle Cert.
[5] Exhibit G to Valle Cert.
[6] Exhibit H to Valle Cert.

the North Bergen Property[7]). See id. at ¶¶ 12-18; See also Verified Complaint, ¶ 11 (Exhibit A to Certification of Joseph R. Valle ("Valle Cert.")).[8]

On August 4, 2008 Citicorp changed its name to GE Capital Commercial Inc. ("GE Capital"). Id. at ¶ 19. A number of the properties listed above were impacted by Hurricane Sandy, which caused GE Capital to declare a default under the terms of the Loan, because the debt service coverage fell below the required coverage threshold.[9] Plaintiffs' Additional Material Facts ("Plaintiff Facts"), ¶ 6. Plaintiffs state that they disputed this non-monetary default but continued to make all payments in accordance with the terms of the Loan. Id. at ¶ 8. Thereafter, "Plaintiffs entered into negotiations with GE Capital . . . and subsequently with GE Franchise, to reach agreement to pay off the Notes from other sources, including from the sale of real estate securing the Loan." Defendant Facts, ¶ 21. Indeed Plaintiffs sold a number of properties in an effort to make payments in accordance with the Loan. See Plaintiff Facts, ¶¶ 11-14.

GE Capital then assigned all seven (7) Notes to GE Capital Franchise Finance Corp. ("GE Franchise") on July 12, 2016. Defendant Facts, ¶ 20. Plaintiffs' efforts to satisfy the terms of the Notes were ultimately unsuccessful and the Notes matured on May 1, 2016. Id. at ¶ 22. In a letter dated May 16, 2016 GE Franchise notified Plaintiffs of the maturity of the Notes and corresponding default for nonpayment. Ibid. (Exhibit K to Valle Cert.). "Thereafter, on or about October 26, 2016 GE Franchise and the Plaintiffs entered into a letter agreement ("Letter Agreement"). Id. at ¶ 23 (Exhibit L to Valle Cert.).

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[7] Exhibit I to Valle Cert.

[8] Plaintiffs also state that the following properties were pledged as collateral for the Loan: 1409 Laurel Road, Lindenwold, New Jersey; 485 Route 46 East, Little Falls, New Jersey; 1200 Route 73 North, Pennsauken, New Jersey; and 1505 River Road, Lakewood, New Jersey. Certification of Robert P. Travers ("Travers Cert."), ¶ 4.

[9] Apparently the hurricane caused the Absecon and Millville Properties to be abandoned, and Citicorp declared a non-monetary default under the terms of the Loan.

The Letter Agreement stated that the Plaintiffs would be entitled to receive a total discount of $627,797.51 ("Discount") off the remaining balance then due under the Notes "if and only if each of the conditions precedent set forth in the Letter Agreement were satisfied in the Lender's sole discretion." Id. at ¶ 24 (Exhibit L to Valle Cert.).[10] The Letter Agreement states that the full unpaid balance at the time it was entered into was $4,337,571.60. Id. at ¶ 25. The Letter Agreement required Plaintiffs to satisfy five (5) conditions precedent, to the satisfaction of the Lender, i.e. GE Franchise, in its sole discretion. Id. at ¶ 26. The Letter Agreement further provided that the "Letter Agreement would be automatically terminated, deemed null and void and of no further force and effect and the [underlying Loan and Notes] would thus remain in full force and effect" if Plaintiffs failed to timely satisfy all five of the conditions precedent. Ibid.[11] The five conditions precedent were as follows:[12]

1. Delivery of the executed counterparts of the Letters Agreement by no later than 5:00 p.m. on November 1, 2016. ("First Condition Precedent").
2. Delivery by the Plaintiffs of the sum of $125,000.00 to GE Franchise by November 1, 2016 by wire payment only made to GE Franchise's account at Deutsche Bank ("Second Condition Precedent").
3. Delivery by the Plaintiffs of an additional wire payment to the Deutsche Bank Account in the sum of $125,000.00 to GE Franchise on or before December 1, 2016 ("Third Condition Precedent").
4. The Plaintiffs were to employ best efforts to cause the release of, and remit to GE Franchise, the sum of $75,000.00 from a good faith deposit held in escrow by the Plaintiffs' attorney in connection with the contract of sale for certain properties ("Fourth Condition Precedent").
5. Delivery by wire transfer to Deutsche Bank account of payment of the remaining payment balance in the Full Balance Then Due (i.e., $4,337,571.60.), plus the Lender's attorney's fees and costs in the amount of $42,186.56 less the

[10] Plaintiffs provided the following response to this assertion in the Plaintiffs' Counterstatement of Material Facts: "Disputed in Part. Although that language is referenced in the Letter Agreement, Plaintiffs dispute its legal efficacy as Plaintiffs have established that they were ready, willing and able to make the payment required under the Fifth Condition Precedent and attempted to exercise their rights under the Letter Agreement, but were prevented by Defendant's bad faith and frustrated in their ability to exercise their rights under the Letter Agreement. Plaintiffs' Counterstatement of Material Facts, ¶ 22 (Plaintiff repeats this assertion a number of times).

[11] Plaintiffs state in their Counterstatement of Material Facts: "Disputed in part. Although that language is referenced in the Letter Agreement Plaintiff disputes its legal efficacy . . . ." Plaintiffs' Counterstatement of Material Facts, ¶ 26.

[12] See Defendant Facts, ¶ 27.

> Discount; that is final payment in the amount of $3,426,900.65 *on or before December 15, 2016* ("Fifth Condition Precedent").

Plaintiffs agree that: "The Letter Agreement further stated that the payoff *needed* to occur on or before December 15, 2016." Travers Cert., ¶ 37. Plaintiffs admittedly only performed four of the five condition precedents for the application of the Discount under the Letter Agreement. Defendant Facts, ¶ 29.[13] Indeed, Plaintiffs do not contest that they did not satisfy the Fifth Condition Precedent but instead state that "they were ready, willing, and able to make the payment required under the Fifth Condition Precedent and attempted to exercise their rights under the Letter Agreement, but were prevented by Defendant's bad faith and frustrated in their ability to exercise their rights under the Letter Agreement." Plaintiff Facts, ¶ 29.

On December 9, 2016 – after Plaintiff successfully satisfied the first four conditions precedent under the Letter Agreement, but before the December 15, 2016 deadline for the fifth condition precedent – Plaintiffs' General Counsel advised Christopher Lynch, Counsel to GE Franchise, via email, that Plaintiffs were "on target to close on our financing next Thursday [December 15, 2016]. Can you send me an updated payoff letter." Id. at ¶ 50; Exhibit P to Travers Cert. On December 9, 2015 GE Franchise provided an updated letter to Plaintiffs ("Final Payoff Letter"). Id. at ¶ 51; Exhibit Q to Travers Cert. The Final Payoff Letter provided a schedule of all amounts owing and provided Plaintiffs with wiring instructions for making the payments, advising Plaintiffs "you must remit funds in accordance with the wire instructions attached hereto." Exhibit Q to Travers Cert. The Final Payoff Letter was the final formal communication between Plaintiffs and GE Franchise.

[13] In Plaintiffs Complaint, they state that conditions precedent one through four were complied with and that Plaintiffs were "ready, willing, and able" to comply with the fifth condition precedent. Complaint, ¶ 29-30; Exhibit A to Valle Cert.

Plaintiffs state that they understood that, notwithstanding the Letter Agreement, GE Franchise really only needed the money, i.e. satisfaction of the Fifth Condition Precedent, before the end of the year, and not on December 15, 2016. See Id. at ¶ 44.[14] Plaintiffs further state that they spoke to General Counsel for GE Franchise about the possibility of extending the deadline for the Fifth Condition precedent, and "[a]lthough Mr. Lynch (Counsel to GE Franchise) never affirmatively stated that they would [grant an extension], he never stated they would not." Id. at ¶¶ 47-48.[15] Michael McManus ("McManus"), who is a member to Plaintiffs, claims that he advised Robert Manfredi ("Manfredi"), loan officer of GE Franchise, on December 12, 2016 that "Plaintiffs may need a day or two beyond the scheduled closing date of December 15, 2016, to which Manfredi informed McManus that he would get back to him." Id. at ¶ 53. McManus claims he never received a return call from Manfredi or any other representative of GE Franchise. Id. at ¶ 54. McManus certifies that because he did not receive a return call he "made arrangements to have the funds wired by our General Counsel." Certification of Michael McManus ("McManus Cert."), ¶ 9. Similarly, Mr. Daibes (also a member of Plaintiffs) states that because Manfredi did not return McManus' call, he also "made arrangements to have the funds wired to payoff GE by our General Counsel." Certification of Fred A. Daibes ("Daibes Cert."), ¶ 14.

On December 15, 2016 "Plaintiffs' General Counsel was advised that Manfredi had not responded and that Plaintiffs' General Counsel should reach out to Mr. Lynch to determine whether an extension was granted or whether Plaintiffs needed to wire the payoff funds." Id. at ¶

[14] Robert Travers, Plaintiffs' Attorney states that in speaking with Christopher Lynch ("Mr. Lynch"), an attorney for GE Franchise, "*I advised him* as I had numerous times before that 'we both know that GE just wants its money before the year.'" Travers Cert., ¶ 43 (emphasis added). "Mr. Lynch never confirmed or denied that statement each time I said it." Travers Cert., ¶ 44.

[15] Plaintiffs state that "virtually all of Plaintiffs' General Counsel's contact with GE was with and through Mr. Lynch." Id. at ¶ 22; Certification of Robert P. Travers, ¶ 21.

56. "I immediately placed a call to Mr. Lynch in the morning and left a message asking if GE had granted the extension or whether my client needed payoff GE and to please call me back. The purpose of my call was whether GE was going to extend the deadline to pay by a few days or if I should wire the final payoff payment." Travers Cert., ¶¶ 56-57.[16] Despite Plaintiffs' efforts to reach Mr. Lynch on December 15, 2016, Plaintiffs were unable to contact any representative of GE Franchise to confirm whether or not an extension was approved. See id. at ¶ 59. To that end, Plaintiffs stated that the "lack of response to both Plaintiffs' General Counsel and Plaintiffs created the impression that the extension had been granted." Id. at ¶ 62 ("Plaintiffs and Plaintiffs' General Counsel, Mr. Travers, believed that because both Mr. Lynch and Mr. Manfredi, who were usually prompt in responding, failed to respond, that the extension was granted." Id. at ¶ 67).

On December 8, 2016, and therefore prior to Plaintiffs' alleged default, GE Franchise entered into a Loan Sale Agreement ("LSA") with Defendant, in which Defendant would acquire the Loan (referred to as the "Daibes Portfolio") through a loan broker, the Debt Exchange. Defendant Facts, ¶ 30. Indeed, under the terms of the LSA, the sale of Daibes Portfolio was scheduled to close on December 16, 2016, one day after Plaintiffs' deadline for satisfying the Fifth Condition Precedent. See Certification of Nels Stemm ("Stemm Cert."), ¶ 2; see also Exhibit M to Valle Cert., Appendix A.[17] Indeed on December 16, 2016 GE Franchise notified Plaintiffs that the Loan was sold to a third party. Plaintiffs' Counterstatement of Material Facts,

[16] Mr. Travers certifies that he "was also uncomfortable to advise my client to wire the funds because of the lack of response. Typically, in a situation with a multimillion dollar payoff such as in this matter, there are numerous calls between all parties to confirm many things including the accuracy of the wire instructions, the confirmation that funds are received, the exchange of the cancellation of the notes and the discharge of the mortgages. None of that information was able to be discussed." Travers Cert., ¶¶ 62-64.

[17] Plaintiffs argue that Defendant owned the Daibes Portfolio on December 15, 2016 and therefore before the deadline for payment under the Fifth Condition Precedent, as demonstrated by the fact that (i) Defendant was informed by GE Franchise that Defendant's wire transfer for the purchase of the Daibes Portfolio was accepted on December 15, 2016; and (ii) because Defendant declared in an email that they had "[c]losed the GE Loan." Plaintiffs Facts, ¶¶ 80-81; Exhibit E to Shafron Cert.

¶ 68. Defendant maintains that "[w]hen Fairview acquired the Daibes Portfolio, Fairview was aware of the Letter Agreement", id. at ¶ 38, and that "Fairview was prepared to accept the balance due under the Notes less the Discount in full satisfaction of the outstanding loans provided that the Plaintiffs complied with the terms and conditions of the Letter Agreement." Id. at ¶ 39. At oral argument, Defendant clarified that had Plaintiffs wired the required funds to the GE Franchise bank account, in accordance with the Final Payoff Letter instructions and in a timely manner under the terms of the Letter Agreement, the Defendant would have honored that payment and been satisfied that Plaintiffs had satisfied the Fifth Condition Precedent. Nothing in the Loan Sale Agreement impairs the conclusion that, had Plaintiffs made the requisite payment on time, they would have been entitled to the Discount.

Nevertheless, Plaintiffs failed to make the payment required under the Fifth Condition Precedent of the Letter Agreement by the closing date, December 15, 2016. Defendant Facts, ¶ 31. On December 19, 2016, Defendant notified Plaintiffs that it had in fact acquired the Loan through purchase of the Daibes Portfolio on December 16, 2016. Id. ¶ 32. Between December 22, 2016 and January 6, 2017 Defendant and Plaintiffs shared a number of communications, in which Defendant "notified the Plaintiffs that in its sole discretion as the successor lender, the Plaintiffs had not complied with the terms of the Letter Agreement such that the Loan . . . remained in full force and effect and the Plaintiffs were not entitled to the benefit of the Discount under the Letter Agreement." Id. at ¶ 33; Exhibit O to Valle Cert. On or about January 4, 2017 Defendant made demand upon the Plaintiffs for the payment of all amounts due and owing under the Notes ("Demand Letter"), sans Discount. Id.at ¶ 34 (Exhibit P to Valle Cert.). Plaintiffs have failed to comply with the obligations set forth under the terms of the Notes to date. Id. at ¶ 35.

Plaintiffs commenced this action, filing a Complaint on February 21, 2017. See Complaint, Exhibit A to Valle Cert. In the Complaint, Plaintiffs outline these events and maintain that Plaintiffs were ready and willing to comply with the fifth condition precedent. Complaint, ¶ 30; Exhibit A to Valle Cert. Plaintiffs state that they are under contract to sell the Absecon, Willingboro, Cherry Hill, and Westhampton properties, but are unable to do so until defendant removes the mortgage liens it holds against these properties. Complaint, ¶ 43-44; Exhibit A to Valle Cert. The Complaint asserts five counts for relief: (i) breach of contract; (ii) breach of duty of good faith and fair dealing; (iii) unjust enrichment; (iv) declaratory judgment; and (v) specific performance. See Exhibit A to Valle Cert. Defendant filed an Answer and Counterclaim on March 28, 2017. Plaintiffs filed an Answer to the Counterclaim on May 4, 2017. Thereafter, and on November 8, Defendant filed the present Motion for summary judgment. Plaintiffs' opposition was filed on November 30, 2017. The matter was argued on December 12, 2017.

II. Defendant's Argument

Defendant argues that under the terms of the Letter Agreement, Plaintiffs would have been able to obtain the benefit of paying off the total balance of the Loan, less the Discount, if and only if Plaintiffs timely performed each of the five express conditions precedent. Defendant Brief, 4. Defendants argue that failure to strictly comply with the five conditions precedent would result in the Letter Agreement automatically being deemed null and void, and each of the Notes would remain in full effect under their original terms. Ibid. In sum, "while the Plaintiffs claim they were ready and willing to perform the fifth and final condition precedent, they failed to do so as they were seeking to extend the time for such performance, which requests was admittedly never agreed to in writing by GE [Franchise]." Ibid.

Defendant also asserts that ownership of the Loan, vis a vis the Daibes Portfolio, was not completed until December 16, 2016,[18] and Plaintiffs therefore had a full opportunity to complete their performance in accordance with the Letter Agreement. Id. at 5. Moreover, Defendant states that because the purchase was not effective until December 16, 2016, Defendant knew that Plaintiffs would either (i) comply with the Letter Agreement, thereby rendering Defendant bound by the Discount, or (ii) fail to comply with the Letter Agreement, thereby rendering the Loan and underlying Notes in full effect and proving Defendant with the right to enforce those instruments. Ibid. Accordingly, Defendant argues that Defendant has the full right to enforce the Loan and Notes and collect on the balance due, without the Discount. Ibid.

In support of the Motion for Summary Judgment, Defendants first rely upon Brill, which held summary judgment should be granted "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." Id. at 6 (quoting Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Defendants also argue that Brill, adopted a standard of review similar to that utilized for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). Defendants maintain that summary judgment should not be denied where the opposing party only relies upon "mere sworn conclusions of ultimate facts, without material basis or supporting affidavits by persons with actual knowledge of the facts[.]" Id. at 6-7 (quoting James Talcott, Inc. Shulman, 82 N.J. Super. 438, 443 (App. Div. 1964). Defendants

[18] In the Loan Sale Agreement entered into between Defendant and GE, the "Closing Date" of the sale is defined as "seven calendar days after the effective date of this Agreement [which was December 8, 2016]." Exhibit M to Valle Cert. Therefore, it would appear that the closing date was on December 15, 2016.

acknowledge that Motions for summary judgment require the Court to provide every inference of fact in favor of the non-moving party, to determine if a genuine issue is in fact presented to the Court such that summary judgment should be denied. Id. at 7 (referencing Brill, 142 N.J. at 540).

Second, Defendants state that because each of the seven (7) Notes state they are governed by New York law, the Letter Agreement must be construed under New York law as well. Id. at 7. Defendants state that under New York law an unconditional promise is not made conditional merely because it refers to a separate agreement. Ibid. (citing A.I. Trade Finance, Inc. v. Laminaciones, 41 F.3d 830 (2d Cir. 1994)). Moreover, in any contract an unambiguous provision must be given its plain and ordinary meaning, while the interpretation of such provisions creates a question of law for the court. Ibid. (citing Teichman v. Community Hosp. of W. Suffolk, 87 N.Y.2d 514, 520 (1996)). Furthermore a condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises." Id. at 8 (quoting Calamari and Perillo, Contracts § 11-2, at 438 [3d ed]). Defendants state that the five condition precedents are express conditions and therefore "must be literally performed." Ibid. (referencing Oppenheimer & Co. v. Oppenheim, 86 N.Y. 2d 685, 690-91 (1995)). Defendants argue that it is black letter law in New York, that a failure by one party to satisfy a condition precedent excuses the other party from performing. Ibid. (referencing Perna v. Desai 101 A.D.2d 857, 858 (1984)).

Accordingly, Defendants state that Plaintiffs' own Verified Complaint states that they only performed four of the five conditions precedent. Furthermore, because the Letter Agreement expressly states

> Notwithstanding anything to the contrary set forth under this Agreement, this Agreement shall be automatically terminated, null

> and void and of no further force and effect upon the occurrence of any of the following: (i) any one of the Discounted Payoff Conditions are not satisfied *in accordance with the timing*, terms and conditions of the Agreement.
>
> Id. at 9; Exhibit L to Valle Cert. (emphasis added by Defendant).

Defendant therefore argues that Defendant is well within its rights to enforce the Loan and Notes, under the original terms based upon the Plaintiffs' uncontested failure to satisfy the Fifth Condition Precedent under the Letter Agreement. Defendant also argue that the Letter Agreement contemplates time being of the essence and that "[w]hen a provision that time is to be of the essence is inserted in a contract, the date established as the date for performance takes on significance, such that each party must tender timely performance unless the time for performance is extended by mutual agreement." Ibid. (referencing Rhodes v. Astro-Pac, Inc., 41 N.Y.2d 919 (1977), Kotcher v. Edelblute, 250 N.Y. 178, 184 (1928), and Kaplan v. Scheiner, 1 A.D.2d 329, 330 (1956)). Accordingly, Defendant argues that the emphasis of time, coupled with the clear failure by Plaintiffs to satisfy the Fifth Condition Precedent, as determined in the sole discretion of GE Franchise, warrants summary judgment. Ibid.

Third, Defendant argues that all of Plaintiffs' Claims asserted in the Verified Complaint (Count 1: breach of contract, Count 2: breach of duty of good faith, Count 3: unjust enrichment, Count 4: declaratory judgment, and Count 5: specific performance) must fail as a matter of law. Id. at 10. As to Counts 1, 4, and 5 Defendant argues that because the Letter Agreement clearly provided for its own automatic termination in the event Plaintiffs failed to satisfy all of the Condition Precedents, Plaintiffs cannot seek to enforce or otherwise recover based upon the Letter Agreement. Id. at 10. As for Count 2: Breach of the Duty of Good Faith, Defendant acknowledges that in all contracts the duty of good faith and fair dealing are implied, "but the existence of the covenant cannot negate express provisions of the agreement, and the covenant is

not violated where the terms of the contract unambiguously afford a party the right to exercise its absolute discretion." Ibid. (referencing 767 Third Ave. LLC v. Greble & Finger, LLP, 8 A.D.3d 75 (1st Dept. 2004) and Moran v. Erk, 11 N.Y.3d 452 (2008). Defendant therefore asserts that Plaintiffs' breach of the duty of good faith must fail:

> Fairview cannot be liable for actions under the Letter Agreement where it was not the owner of the Notes or Loans on the Discounted Payoff Outside Date. Moreover, even if Fairview was the owner of the Notes on December 15, 2016, the express terms of the Letter Agreement would have made any determinations as to Plaintiffs' performance under the Letter Agreement in a matter in Fairview's "sole discretion." Fairview would have had no obligation to extend the time for the Plaintiffs' performance, and under New York law, any decision not to extend the performance deadline would not have constituted a breach of the covenant of good faith and fair dealing.

Id. at 11.

Defendant argues that Plaintiffs' claim of unjust enrichment must also fail. Defendants argue that the primary question for unjust enrichment under New York law requires a showing that (i) the other party was enriched; (ii) that the enrichment was at the party's expene; and (iii) such that it would be against equity and good conscience to permit the other party to retain what is sought to be recovered. Ibid. (citing Citibank, N.A. v. Walker, 12 A.D.3d 480, 481 (2d Dept. 2004). Defendant argues that the primary question is "whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Ibid. (referencing Paramount Film Distrib. Corp v. State of New York, 30 N.Y.2d 415, 421 (1972). Defendant maintains that any partial payments rendered by Plaintiffs in accordance with the Letter Agreement and Conditions Precedent one through four have been properly accounted for and there is thus no unjust enrichment.

Lastly, Defendant argues that the Uniform Commercial Code, as enacted in New York, provides the holder of a note entitled to summary judgment against the maker of the note, when the note is clear, unambiguous, and unconditional promise to pay. Id. at 12 (referencing DH Cattle Holdings Co. v. Kuntz, 165 A.2d 658 (3rd Dept. 1991)). Defendant states that "the maker or acceptor engages that he will pay the instrument according to its tenor at the time of its engagement . . ." Ibid. (quoting N.Y. U.C.C. § 3-413(1)). Moreover, an obligor's signature on a promissory note necessitates that said party is the obligor and is thus the appropriate party from whom to seek payment. Ibid. (referencing Marine Midland Bank v. Di Marzo, 57 A.D.2d 733 (N.Y. App. Div. 1977). Defendant therefore argues that a *prima facie* case for judgment as a matter of law has been established based upon Plaintiffs' own acknowledgement of the default under the terms of the Letter Agreement, and the previous maturation and default under the original terms of the Notes. Id. at 12-13.

III. Plaintiffs' Opposition

Plaintiffs argue that the bad faith acts of the Defendant frustrated their ability to comply with the Fifth Condition Precedent. Plaintiff Brief, 1. Plaintiffs maintain that the Plaintiffs only required a few extra days after December 15, 2016 to close financing on a number of properties, which would have allowed for Plaintiffs to fulfill their obligations under the Letter Agreement. Ibid. To that end, Plaintiffs state that their own counsel, Mr. Travers, made statements to counsel for GE Franchise, Mr. Lynch, that GE really only required repayment by December 31, 2016; and that Mr. Lynch failed to object to these comments. Id. at 1-2. In sum, Plaintiffs state that there are four ways by which the covenant of good faith and fair dealing was breached: (i) Neither GE nor Mr. Lynch disclosed that the Loan was for sale, or that it was subsequently sold to Defendant; (ii) that GE Franchise failed to advise Plaintiffs of its inability to grant an

extension on December 15, 2016 as the Loan had already been sold to Defendant, and that GE Franchise knew Plaintiffs were relying upon receiving an extension; (iii) Plaintiffs were actively misled to believe an extension would be granted; and (iv) the failure of GE Franchise and Defendant to advise Plaintiffs of the sale of the Loan frustrated Plaintiffs ability to correctly wire the required funds to the correct destination on the date of December 15, 2016. See id. at 2-3.

Plaintiffs argue that New Jersey law should apply here, rather than New York law. First, Plaintiffs state that all the subject collateral are located in New Jersey and the current litigation is before a New Jersey court. Id. at 7. Plaintiffs maintain that a party seeking to have a court apply the law of another jurisdiction must first demonstrate that the laws of the two jurisdictions differ. Ibid. (citing to Pressler & Verniero, *Current N.J. Court Rules, comment 6.1* on R. 4:5-4 (2014). Plainiffs argue that Defendant has not demonstrated a conflict between New York and New Jersey law here, as "Plaintiff has not cited a specific claim that applies to this matter that is exclusive to New York and is not considered in New Jersey . . . [and] both jurisdiction imply a covenant of good faith and fair dealing in every contract and apply significantly similar tests." Id. at 8. Plaintiffs argue that to the extent a conflict does exist, New Jersey courts still will not automatically apply a foreign jurisdiction's law because a contract so provides, but instead New Jersey courts still must determine whether the chosen state has a substantial relationship to the parties or the transaction. Id. at 7-8. Plaintiffs contend that New York bears no relationship to the parties as they are located in New Jersey and Arizona, nor to the transaction because all of the collateral properties are located in New Jersey. Id. at 8. Therefore, Plaintiffs argue that New Jersey law should apply.

Plaintiffs maintain that they were unable to perform the fifth and final condition precedent in the Letter Agreement because of the bad faith conduct of the Defendant and GE

Franchise. Id. at 9. "[T]he covenant of good faith and fair dealing is contained in all contracts and 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." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 253 (App. Div. 2002). Plaintiffs argue that Seidenberg, held that the covenant of good faith allows for a court to modify the obligations of the parties under a contract and to correct acts of bad faith. Id. at 9 (citing Seidenberg, 348 N.J. Super. at 254). Plaintiffs state that the determination of what constitutes good faith requires a court to review the intentions of the parties which may necessitate the consideration of evidence outside the written contract. Ibid. (citing Seidenberg, 348 N.J. Super. at 258) (holding that "it may occur that a party will be found to have breached the implied covenant even if the action complained of does not violate a 'pertinent express term.'")

Plaintiffs argue that the covenant provides for a relief when one party suffers detriment from the other party's misleading assertions. Id. at 10 (citing Bak-A-Lum Corp. v. Alcoa Building Products, Inc., 69 N.J. 123, 129, 130 (1976). "As a general rule, '[s]ubterfuges and evasions in the performance of a contract violate the covenant of good faith and fair dealing 'even though the actor believes his conduct to be justified.'" Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224-25 (1965) (quoting Restatement (Second) of Contracts, § 205, comment d). Plaintiffs summarize Bak-A-Lum, as holding that a Defendant who did not violate any express terms of the contract was nevertheless in breach of the covenant based upon the "selfish withholding from [the] Plaintiff of its intention" while knowing that disclosure of such information would cause Plaintiff to act in a different manner. Id. at 11. Plaintiffs analogize GE Franchise and Defendant's purported failure to provide any indication as to whether an extension for the Fifth Condition Precedent or to otherwise advise Plaintiffs that

Defendant had purchased the Loan. Id. at 11-12. Plaintiffs argue that "[t]he Loan was purchased by Defendant in hopes that the Plaintiffs would not pay off the Loan by December 15, 2016." Id. at 13. Plaintiffs argue that this true intention of the Defendant caused both Defendant and GE Franchise to fail to inform Plaintiffs of the purchase of the Loan or to provide any update on a possible extension of the Fifth Condition Precedent, even though it was clear how important this information was to Plaintiffs. Ibid.

Plaintiffs argue that Defendants closed the purchase of the Daibes Portfolio on December 15, 2016, as demonstrated by an email correspondence on that day at 1:00 p.m. Ibid. However, Plaintiffs state that Defendant did not provide Plaintiffs with any opportunity to pay off the Loan until January 5, 2017, in which Defendant advised Plaintiffs that it would not honor any prior agreements with respect to the loan. Ibid. Plaintiffs therefore maintain that "[d]ue to the intentional misleading through deception, evasions, and willfully malicious conduct, Plaintiffs were prevented from exercising their rights under the Letter Agreement." Id. at 14.

In addition to the covenant of good faith breaches allegedly committed by Defendant, Plaintiffs state that on December 15, 2016 Plaintiffs were in fact ready and able to deliver the required sum of funds to Defendant. Ibid. "A party to a contract may not avail itself of a condition precedent where by its own conduct it has rendered compliance therewith impossible." Id. at 15 (CIT Communications Fin. Corp. v. Microbilt Corp., No. A-1491-09T1 *4, (N.J. App. Div. Jan. 25, 2011), *quoting* Creek Ranch, Inc. v. New Jersey Tpk. Auth., 75 N.J. 421, 432 (1978). Moreover, "[i]n New York, there exists similar contractual principles as in New Jersey. 'condition precedent is linked to the implied obligation of a party not to 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 15 (quoting A.H.A. General Const., Inc. v. New York City Housing Auth., 92

N.Y.2d 20, 31 (1998)). Plaintiffs argue that Defendant and GE Franchise failed to furnish a response to Plaintiffs' request for an extension or to otherwise confirm the wire transfer. Id. at 16. Plaintiffs state that based upon the size of the sum (more than $3 million) Plaintiffs "needed confirmation of the wire transfer in order to send the funds to GE" on December 15, 2015. Ibid. Because Defendant stood to gain financially from Plaintiffs' failure to satisfy the Fifth Condition Precedent, Plaintiffs argue that necessary wire transfer information was withheld from the Plaintiffs, and the Defendant and GE Franchise therefore improperly prevented Plaintiffs from satisfying the Fifth Condition Precedent and obtaining the Discount in accordance with the Letter Agreement. Id. at 16-17.

IV. Analysis

A. Choice of Law

Before proceeding to the merits of summary judgment, the parties dispute which jurisdiction's substantive law on contracts should be applied in this matter. For the reasons set forth below, the Court will apply New Jersey law.

Generally, the forum state will apply its own choice-of-law rules. See Erny v. Estate of Merola, 171 N.J. 86, 94 (2002) (stating that New Jersey utilizes a flexible "governmental-interest" to determine which state has the greater interest in governing the specific issue in the underlying litigation). In determining whether to apply a foreign jurisdiction's law, a New Jersey court must first determine that an actual conflict exists between the jurisdictions, such that "there is a distinction" between New Jersey law and the substance of the potentially applicable law of another state. P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 143 (2008). Moreover, the party seeking to apply the law of a foreign jurisdiction has the burden of establishing an actual conflict between the laws of the jurisdictions. See Pressler & Verniero, *Current N.J. Court*

Rules, comment 6.1 on R. 4:5-4 (2014) (citing to Rowe v. Hofman-La Roche, Inc., 189 N.J. 615, 621 (2007)(holding that "[i]f there is no actual conflict, then the choice-of-law question is inconsequential, and the forum state applies its own law to resolve the disputed issue.") Upon a finding that an actual conflict exists, "the second step is to determine the interest that each state has in resolving the specific issue in dispute." Rowe, 189 N.J. at 622-23. Notwithstanding the two-step analysis, "when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphold the contractual choice if it does not violate New Jersey's public policy." Industrial Sys. V. Computer Cirriciulum Corp., 130 N.J. 324, 343 (1992).

Here, all seven (7) Notes state that "[t]his Note shall be governed by, and construed in accordance with, the laws of the State of New York." See e.g. Exhibit C to Valle Cert, p. 4. Moreover, the Letter Agreement states that "[t]he Loan Documents remain in full force and effect without alteration or amendment and are enforceable in accordance with their terms." Nevertheless, Plaintiffs' Verified Complaint seeks relief for, *inter alia*, breach of contract as to the Letter Agreement itself. See Exhibit A to Valle Cert, ¶ 51 ("As a result of the Defendant's breach of the Letter Agreement Plaintiffs have been damaged.") Accordingly, this Court will assume that New York law does not automatically apply based upon the choice-of-law provisions in the Note, because the underlying dispute in this action concerns the Letter Agreement.

Defendant does not argue that any actual conflict exists between New York and New Jersey law.[19] Notwithstanding Defendant's failure to demonstrate an actual conflict, the Court will inquire as to the existence of an actual conflict, if any. On this point, Plaintiffs argue that

[19] At oral argument the parties agreed that there is no conflict between New York and New Jersey law in the context of this matter with respect to breach of contract and covenant claims.

"both jurisdiction imply a covenant of good faith and fair dealing in every contract and apply significantly similar tests." Plaintiff Brief, 8. The Court agrees. Defendant cites Vermont Teddy Bear Co., which held "[w]hen interpreting contracts, we have repeatedly applied the familiar and eminently sensible proposition of law [ ] that, when parties set down their agreement in a clear, complete document, their writings should . . . be enforced according to their terms." Defendant Brief, 8 (citing Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co., 1 N.Y. 3d 470, 475 (2004). Similarly, New Jersey Courts have declared it a "fundamental principle that contracts will be enforced as written. Ordinarily, courts will not rewrite contracts to favor a party, for the purpose of giving that party a better bargain." Lucier v. Williams, 366 N.J. Super 485, 491 (App. Div. 2004).

Both New York and New Jersey apply a covenant of good faith and fair dealing in every contract. Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997); accord 511 W. 232nd Owners Corp v. Jennifer Realty Co., 98 N.Y.2d 144 (2002). Defendants argue that under New York law, the mere existence of the covenant of good faith "cannot negate express provisions of the agreement, and the covenant is not violated where the terms of the contract unambiguously afford a party the right to exercise its absolute discretion." Defendant Brief, 10 (citing to 767 Third Ave. LLC v. Greble & Finger, LLP, 8 A.D.3d 75 (1st Dept. 2004). Likewise, the New Jersey Supreme Court has held, "the implied covenant of good faith and fair dealing cannot override an express term in the contract . . . " Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001); ." Gruppo Editoriale Oggi, Inc. v. Bonaro, 2008 N.J. Super. Unpub. LEXIS 590 (App. Div. Jan. 29, 2008)(holding that a party to a contract does not breach the covenant of good faith and fair dealing when he "did nothing other than rely on his legal rights under the contract.); Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 223 (2005)

("Courts generally should not tinker with a finely drawn and precise contract entered into by experiences business people that regulates their financial affairs. Equitable relief is not available merely because enforcement of the contract causes hardship to one of the parties.")

Under New York law, "[a] condition precedent is an act or event, other than a lapse of time, which unless the condition is excused must occur before a duty to perform a promise in the agreement arises." Oppenheimer & Co. v. Oppenheim, 86 N.Y.2d 685, 690 (1995). In the same way, New Jersey's Supreme Court has stated that "[g]enerally, no liability can arise on a promise subject to a condition precedent until the condition is met . . . A condition in a promise limits the undertaking of the promisor to perform either by confining the undertaking to the case where the condition happens, or to the case where it does not happen." Duff v. Trenton Beverage Co., 4 N.J. 595, 604-05 (1950).

Based upon all of the foregoing similarities between New York and New Jersey contract and breach of covenant law, this Court finds that no actual conflict exists within the context of this litigation, and that New Jersey law therefore governs the dispute. Furthermore, even assuming that a conflict did exist, application of the New Jersey "governmental-interest" test further demonstrates that New Jersey law is appropriate here. While the Notes undoubtedly contain a choice-of-law provision, naming New York as the appropriate authority, it is the Letter Agreement and not the Notes per se that are at the heart of this dispute, and the Letter Agreement has no choice of law provision. Neither Plaintiffs, nor Defendant are from New York (Plaintiffs being from New Jersey and Defendant being from Arizona). Virtually all of the collateral properties under the Notes are located in New Jersey. Accordingly, New Jersey has a greater interest than New York based upon the disposition of the parties and the location of the real property subject to this litigation.

B. Summary Judgment – Standard of Review

Generally, a court shall render 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." R. 4:46–2(c). The court may render summary judgment "on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages)." Ibid. "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 therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid. This "showing requires more than a scintilla of evidence in favor of the party resisting the motion." Pressler, Current N.J. Court Rules, comment 2.1 to R. 4:46–2(c) (2017).

The entirety of this dispute revolves around Plaintiffs' admitted failure to comply with the Fifth Condition Precedent, and Defendant's alleged breach of the covenant of good faith in fair dealing. Indeed, Plaintiffs maintain that their failure to satisfy the Fifth Condition Precedent, and therefore the Letter Agreement is attributable to Defendant's alleged breach of the covenant of good faith and fair dealing. Under that line of reasoning, Plaintiffs filed the Verified Complaint seeking to establish (i) Defendant's breach of the Letter Agreement; (ii) Defendant's breach of the covenant of good faith and fair dealing; (iii) Defendant was unjustly enriched by Plaintiffs; (iv) that a declaratory judgment for the Plaintiffs is proper; and (v) specific performance on the Letter Agreement. Accordingly, the entirety of Plaintiffs' Complaint rests upon the alleged breach of the duty of good faith by the Defendant, and Defendant moves for summary judgment on that claim. Moreover, there are two underlying factual disputes presented

here: (i) whether Defendant is liable for any breach of contract, including the covenant of good faith committed by GE Franchise; (ii) whether Defendant acquired the rights and obligations to the Letter Agreement on December 15 or December 16, 2016. The legal issue to be resolved, through the prism of Summary Judgment, is whether Defendant and/or GE Franchise's actions on the days prior to and on December 15, 2016 constitute a breach of contract and/or a violation of the covenant of good faith and fair dealing.

C. Vicarious Liability of Defendant as to Acts Committed by GE Franchise

Plaintiffs argue that Defendant, by and through its purchase of the Daibes Portfolio, assumed all the rights, obligations, and liabilities of GE Franchise. Indeed, the LSA states the "Buyer [Defendant] has the power and authority to execute, deliver and perform each of the Sale Documents to which it is a party and has taken all necessary action to authorize such execution, delivery and performance . . . Assuming due authorization, execution and delivery by the Seller, the Sale Documents and all obligations of the Buyer thereunder are the legal, valid and binding obligations of the Buyer, enforceable in accordance with the terms of the Sale Documents . . ." Exhibit M to Valle Cert, p. 3.

Defendant's filings do not dispute Plaintiffs' position that Defendant is liable for any alleged contractual violations by GE Franchise. Therefore, this Court will assume that Defendant is in fact vicariously liable for any breach of contract, including breaches of the covenant of good faith and fair dealing, committed by GE Franchise as to the Plaintiffs.

D. LSA Closing Date

Defendant maintains that the LSA closing date did not occur until December 16, 2016, one day after the expiration of the deadline for Plaintiffs to satisfy the Fifth Condition Precedent under the Letter Agreement. In support of that contention, Defendant relies upon the

Certifcation of Nels Stemm, a co-founding principal of Defendant. Mr. Stemm certifies that under the terms of the LSA, the sale of Daibes Portfolio was scheduled to close on December 16, 2016, one day after Plaintiffs' deadline for satisfying the Fifth Condition Precedent. See Stemm Cert., ¶ 2. Conversely, Plaintiffs maintain that the Defendant closed on the LSA and acquired the Daibes Portfolio on December 15, 2016. Plaintiffs point to an email correspondence, dated December 15, 2015, in which Defendant declared that Defendant had closed the LSA and the fact that GE Franchise had accepted Defendant's wire transfer for the purchase of the Daibes Portfolio on December 15, 2016. Plaintiffs Facts, ¶¶ 80-81; Exhibit E to Shafron Cert

Additionally, the Court takes notice of the actual language contained within the LSA. Under the definitions of the LSA, "Closing Date" of the sale is defined as "seven calendar days after the effective date of this Agreement [which was December 8, 2016]." Exhibit M to Valle Cert. Therefore, it would appear that the closing date was on December 15, 2016.

Affording every reasonable inference of fact in favor of the non-moving party requires the Court to assume that Defendant did in fact close the LSA on December 15, 2016 and not December 16, 2016, and therefore owed a duty of good faith and fair dealing to the Plaintiffs under the Letter Agreement prior to the expiration of the Fifth Condition Precedent deadline. Moreover, the Court notes that as discussed above, the debate over when Defendant acquired the Letter Agreement (on December 15 or 16, 2016) is somewhat tangential as the Court will assume that Defendant is vicariously liable for the acts of GE Franchise up until the date of the closing of the LSA (whenever it is found to have occurred). Accordingly, the Court will review the entirety of the actions committed by GE Franchise and Defendant below to determine if summary judgment is appropriate on the claim that the covenant of good faith and fair dealing was violated, and if the contract was breached.

E. Covenant of Good Faith and Fair Dealing

As aforementioned, the Court will assume that any and all actions and inactions taken by GE Franchise and/or Defendant are ultimately attributable to Defendant. Nevertheless, and as expanded upon below, the Court finds that even when affording the Plaintiffs every reasonable inference of fact, there is no genuine issue as to whether Defendant and/or GE Franchise breached the covenant of good faith and fair dealing, or whether Defendant was unjustly enriched, or whether, conversely, Defendant is entitled to summary judgment on its counterclaim to enforce the debt in full.

The Supreme Court has cautioned judicial intervention within the context of certain commercial transactions:

> Courts generally should not tinker with a finely drawn and precise contract entered into by experienced business people that regulates their financial affairs. Equitable relief is not available merely because enforcement of the contract causes hardship to one of the parties. A court cannot abrogate the terms of a contract unless there is a settled equitable principle, such as fraud, mistake, or accident, allowing for such intervention
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> Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 223 (2005).

Nevertheless, the covenant of good faith and fair dealing is implied in every contract in New Jersey. Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001). "Good faith is a concept that defies precise definition. The Uniform Commercial Code, as codified in New Jersey, defines good faith as 'honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.'" Brunswick Hills, 182 N.J. at 224 (quoting N.J.S.A. 12A:2-103(1)(b)). Despite its universal application in New Jersey, "the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent

express term." Ibid. The covenant is attached to all contracts to ensure 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." Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997) (emphasis added). In making determinations as to a party's good faith performance, or lack thereof, "the court must consider the expectations of the parties and the purposes for which the contract was made." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 258 (App. Div. 2002) (holding that such an inquiry may lead a court beyond the mere terms of the contract and to the surrounding circumstances of the agreement).

"Proof of 'bad motive or intention' is vital to an action for breach of the covenant. The party claiming a breach of the covenant of good faith and fair dealing 'must provide evidence to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.'" Brunswick Hills, 182 N.J. at 225 (quoting Wilson, 168 N.J. at 251). Courts have recognized that violations of the covenant may occur in a variety of functions and the each case is fact-sensitive, but generally, "subterfuges and evasions in performance of a contract" violate the covenant. See Brunswick Hills, 182 N.J at 225.

New York employs mirror-like standards to the covenant. 511 W. 232nd Owners Corp v. Jennifer Realty Co., 98 N.Y.2d 144 (2002) (holding that the covenant of good faith and fair dealing is implied in all contracts in New York); 767 Third Ave. LLC v. Greble & Finger, LLP, 8 A.D.3d 75 (1st Dept. 2004) (holding that the covenant cannot negate an express provision of a contract); Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995) (holding that the covenant "embraces a pledge 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*.") (internal quotations

omitted)(emphasis added); N.Y. U.C.C. Law § 1-201 (defining good faith as "honesty in fact in the transaction or conduct concerned.")

Here, there is no evidence that a follow up communication from GE or Defendant was necessary for Plaintiffs to be able to perform in conformance with the Fifth Condition Precedent, because such a further communication was somehow required to effectuate the wire transfer. In fact, both McManus and Daibes certify that after not hearing a response from Manfredi they "made arrangements" to have the funds successfully wired to GE Franchise. McManus Cert., ¶ 9; Daibes Cert., ¶ 14. Moreover, on December 15, 2016 Travers, General Counsel to Plaintiffs certify that he further attempted to contact GE Franchise, and that the "*purpose of my call was whether GE was going to extend the deadline to pay by a few days or if I should wire the final payoff payment*." Travers Cert., ¶¶ 56-57 (emphasis added). Thus, Plaintiffs concede that the purpose of the calls and emails to GE Franchise was for the sole purpose of seeking an extension, and not for purposes of securing any unpossessed information to effectuate the wire transfer. Assuming *arguendo* that the Plaintiffs' communications were for the purpose of obtaining necessary wire transfer information, Defendant's lack of response still does not arise to a breach of the covenant of good faith and fair dealing. The Final Payoff Letter contained all of the necessary instructions as to how to successfully wire funds to GE Franchise, and the lack of response in no way, therefore, destroyed or injured or impeded the Plaintiffs' ability to perform under the contract and realize the full fruits of that performance. Accordingly, there is no genuine issue that the lack of response to Plaintiffs' communications constituted a breach of the covenant of good faith, insofar as detailed wire instructions were provided and there is no suggestion that had the Plaintiffs sought to timely wire the funds in accordance with those instructions, the wire would somehow have failed.

Plaintiffs also argue that the covenant was breached based upon the failure of GE Franchise and/or Defendant to return the Plaintiffs' calls on December 15, 2016 for purposes of informing the Plaintiffs of whether an extension would be granted to them for satisfaction of the Fifth Condition Precedent. While an affirmative denial of an extension may have aided Plaintiffs, it has not been demonstrated, nor can it be inferred, that the lack of response had the effect of "destroying or injuring" the Plaintiffs rights under the contract. As discussed, the Final Payoff Letter was received by Plaintiffs no later than December 9, 2016 and provided the necessary instructions how to properly wire the funds required under the Fifth Condition Precedent. Defendant has conceded that if Plaintiffs simply followed those instructions and wired the funds to GE Franchise's named account, the Fifth Condition Precedent would have been satisfied and Defendant would have been bound to respect the Plaintiffs' right to the Discount, pursuant to the Letter Agreement. Therefore, the failure to provide a response to the request for an extension does not constitute a breach of the covenant as Plaintiffs' retained the ability to perform under the terms of the Letter Agreement. And there is no breach of contract by Defendant because Plaintiffs, not the Defendant (or GE), failed to comply with the contractual terms as to the Discount.

The Court finds no basis for the assertion that Defendant and/or GE Franchise had a bad motive or affirmatively misled the Plaintiffs to believe that an extension would be granted. The mere fact that Defendant was cognizant that Plaintiffs *might* not satisfy the Fifth Condition, and that such would result in a larger profit, does not constitute bad motive. As discussed, Plaintiffs retained all necessary information to timely wire the funds to the appropriate GE Franchise account, and had they done so, Defendant was bound to apply the Discount as required under the Letter Agreement. Furthermore, there is no indication that the Defendant and/or GE Franchise

affirmatively misled the Plaintiffs. In fact, Mr. Lynch sent an email to Mr. Travers on November 29, 206 stating, "this is a reminder that an additional $125K is due on 12/1/16 *and 12/15/16 the absolute latest to close on the refinancing to pay off GE. Please advise where things stand."* Exhibit O to Travers Cert. (emphasis added). Based upon this unambiguous statement that the absolute deadline for satisfaction of the conditions precedent under the Letter Agreement was in fact December 15, 2016, the Court finds no basis to support the argument that Defendant and/or GE Franchise affirmatively misled or otherwise failed to provide Plaintiffs with the necessary information to realize the benefit of their bargain under the terms of the contract.

The Court is satisfied that Defendant and/or GE Franchise performed under the contract in good faith. The Plaintiff has not demonstrated any basis upon which the Court could conclude that the actions and/or inactions of either Defendant or GE Franchise prevented or impaired Plaintiffs' ability to perform under the Letter Agreement. In addition, to the extent Plaintiffs argue that they assumed they were granted an extension based upon the lack of response, the Court finds such a position to be not legally tenable. Plaintiffs' were provided with explicit instructions that December 15, 2016 was an "absolute" deadline, and were never advised by any individual that any other date would be acceptable for purposes of satisfying the Fifth Condition Precedent. Defendant performed in accordance with the Letter Agreement and stood ready and bound to honor Plaintiffs' performance, should it have occurred, and there is therefore no genuine issue as to Defendant's compliance with the covenant of good faith and fair dealing. The Court also is further satisfied that the same conclusion is reached upon application of New York law, which, if anything, is even more strongly supportive of Defendant's position.

The Letter Agreement specifies that the full payment was due "on or before December 15, 2016". The email from GE counsel to Plaintiffs' counsel on November 29, 2016 emphasized

that December 15, 2016 was "the absolute latest (sic) to close on the refinancing to pay off GE". The Final Payoff Letter of December 6, 2016, specifies the loan maturity date and the pay-off date as December 15, 2016. No one represented to Plaintiffs that the date would be extended. No one prevented or discouraged the fulfillment of the Fifth Condition. The Court acknowledges that Defendant was **hoping** Plaintiffs failed to protect their own interests and thereby entitle themselves to the Discount. I will infer for present purposes that Defendant was counting on Plaintiffs counting on getting an extension on the deadline. For purposes of summary judgment, it will be assumed that the failure to explicitly reject verbal requests for an extension was calculated to increase the chance that Plaintiffs would not make the required payment on time. These are legitimate inferences from the record, including as to the email attached as Exhibit B to Mr. Shafron's certification. But the failure to respond to a request to extend the deadline does not constitute consent to extend, and any assumption on Plaintiffs' part that silence equaled consent did not result from any misconduct by Defendant or GE, neither of whom had a duty to advise Plaintiff of the sale, nor a duty to advise Plaintiffs that Plaintiffs' request for more time was not going to be granted, or responded to.

For these reasons, this Court finds that the Motion for Summary Judgment should be granted as there is no genuine issue as to Defendant breaching the covenant of good faith and fair dealing. Furthermore, this holding leads to the inevitable conclusion that Defendant did not breach the Letter Agreement, but rather that Plaintiffs failed to comply with the Fifth Condition Precedent and that the Letter Agreement is declared null and void pursuant to its own terms. Therefore, insofar as Plaintiff seeks to enforce the Letter Agreement through Counts I, II, IV, and V of the Verified Complaint, this Court enters Summary Judgment in favor of the Defendant. Moreover, this Court further grants Summary Judgment in favor of the Defendant as

to Plaintiff's Count III for unjust enrichment. Plaintiff failed to abide by the Letter Agreement and has defaulted under the terms and conditions of the underlying Notes. As the party in breach of contract, coupled with Defendant's demonstrated accommodation of Plaintiffs' payments rendered to date, a claim for unjust enrichment cannot be sustained as a matter of law as Defendant's seek only what they are entitled to under the contract.

The Court has accepted as true the factual claims of the Plaintiffs. All legitimate inferences from those facts have been given to the Plaintiffs. Those same facts repeated live at a trial could lead to no result different from the result reached on the motion papers. There are no credibility issues to resolve and no proofs to challenge. The Court has determined that, on the facts presented, viewed in the light most favorable to Plaintiffs, the Defendant is entitled to summary judgment as a matter of law.

V. Conclusion

For the foregoing reasons, the Court grants Defendant's Motion for Summary Judgment. An Order accompanies this Decision.

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ROBERT P. CONTILLO, P.J.CH.