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NOT FOR PUBLICATION WITHOUT THE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: Park Stone Management, LLC v. Kenneth Betza and Margaret L. Betza v. Norman Ostrow Management, Inc. and Stephen Lesko
Docket No. HUD-C-124-17
Date of Trial: April 18, 19, 23 and 24, 2018
Date of Decision: May 15, 2018

Dear Counsel:

INTRODUCTION

This is Plaintiff, Parkstone Management's ("Plaintiff" or "Parkstone") specific performance action relating to a contract for the sale of certain property located at 82 Ferry Street, Jersey City, New Jersey ("Property in Question" or "PIQ"). Defendants, Kenneth and Margaret Betza

("Defendants" or "Betza"), brought affirmative defenses seeking rescission of that contract and also brought a third party complaint against the real estate agent involved in that sale, Mr. Stephen Lesko ("Lesko") and his company, Norman Ostrow Management, LLC ("Norman Ostrow" or "Ostrow" and together "Third-Party Defendants").

The thrust of Defendants' defense is that Mr. Lesko violated his fiduciary obligation to the Defendants by (a) failing to make certain disclosures to Defendants with regard to Mr. Lesko's prior relationship with Parkstone, (b) failing to obtain a fair purchase price for the subject property on Defendants' behalf, and (c) failing to comply with certain regulations of the New Jersey Real Estate Commission which constitute violations of New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-2 et seq. Both Plaintiff and Third-Party Defendants refute those contentions. Furthermore, the realtor seeks its 4% commission provided for in the executed contract of sale.

After hearing testimony from Plaintiff's principals, Jonathan Feifer ("Feifer") and Christopher Gratto ("Gratto"); Defendants, Kenneth and Margaret Betza; Stephen Lesko; Defendants' real estate appraiser, Carl Mucciolo; and Third-Party Defendant's appraiser, Joseph D'Amato; and considering all the exhibits marked into evidence; the stipulation of facts; excerpts from deposition testimony; and the post-trial submissions by the parties, the Court enters Judgment in favor of Plaintiff and dismisses Defendants' third-party complaint. The Court's opinion, as a result of this four day trial in April 2018, now follows.

OPERATIVE FACTS

In 2003, Kenneth Betza and, his wife, Margaret Betza purchased and jointly owned a four-family residential property located at 82 Ferry Street, Jersey City, New Jersey (the "Property"). The Defendants purchased it as an investment property. Since 2007 they have resided in Fairfield, Connecticut. While Mr. Betza is a licensed real estate agent in the state of Connecticut and owns two other multi-unit investment properties, Mr. Betza does not engage in his investment activities on a full-time basis and he is currently employed full-time as a sales representative in telecommunications.

In the past eighteen (18) months, Defendants have purchased, renovated and then "flipped" at least two (2) other properties. Currently, Mr. Betza has acted as a lender for real estate developers, and recently loaned $100,000.00 to a developer for a pending project.

Since 2003, with the exception of the period between 2015 and 2017, when the third-party defendant Ostrow managed Betza's Ferry Street property, Mr. Betza acted as the property manager for the PIQ.

Third-party defendant Norman Ostrow Management, Inc. is an entity that has operated since at least the 1970s in Jersey City, and provides real estate management, leasing, sales, and brokerage services to property owners. Third-party defendant Stephen Lesko is the President and owner of Norman Ostrow since approximately 1979.

Plaintiff , Park Stone Management LLC is a limited liability company whose purpose since 2014 is to find investment residential properties in Jersey City for purchase and ownership

through related LLC entities, management of those properties and ultimate sale for a profit. They have purchased and sold their interest in approximately six (6) properties since 2014, all in Jersey City. The principals, Feifer and Gratto both attended New York University Schack Institute of Real Estate, and earned Master Degrees in Real Estate Science, and attended courses involving, among other things, real estate valuation using the income-based and sales comparison approaches.

At various times prior to June 2017, pursuant to written agreements, Norman Ostrow had also provided property management service in connection with four properties owned by Park Stone affiliates, but at the time of their negotiations and contract for the PIQ, Ostrow only managed one (1) property for them on Ocean Avenue in Jersey City.

Within days of terminating Mr. Lesko's management services for the PIQ, on June 2, 2017, Kenneth Betza sent an e-mail to Lesko and Marieca Quiles of Norman Ostrow stating, in part:

> Again, thanks for the management of Ferry St. On another topic, I might consider selling Ferry St. Do you know any investors who might want to buy Off Mkt.
>
> Of course, there would be a fee for you if instrumental in the sale.

In early June 2017, after Mr. Betza sent the foregoing June 2 e-mail, Mr. Betza and Mr. Lesko spoke and Mr. Betza requested, among other things, that Mr. Lesko find potential buyers of the Property with the financial ability to engage in an "all cash" transaction without a financing contingency.

Norman Ostrow proposed listing the Property for sale on the Hudson County Multiple Listing Service but Mr. Betza rejected the idea of listing the Property. Mr. Betza said he did not want the tenants to know about the proposed sale. Mr. Betza expected Lesko to approach investors that Lesko knew.

During their conversations, Lesko suggested $480,000.00 as a potential asking price for the 82 Ferry St. Property, and Mr. Betza, thinking Mr. Lesko's suggested price was on the high side, informed Mr. Lesko that he thought a better asking price would be $450,000.

In response to Mr. Betza's request, Lesko called Chris Gratto of Park Stone Management, whom he knew were interested in acquiring Jersey City residential properties for cash, and told him that he knew an owner of a four unit building in Jersey City and that the owner was looking for a quick sale for cash.

After providing Gratto with rent rolls and expenses for the PIQ to Parkstone, Gratto indicated that Park Stone was willing to offer $375,000, which was based on their analysis of the numbers and expenses they anticipated that they would have to incur to upgrade the property. After Lesko conveyed that offer to Ken Betza, he asked Lesko how he knew that Park Stone Management could pay the $375,000.00 in cash. Lesko advised that he managed property for them and knew that they have the assets to buy the property in cash. Mr. Betza rejected the

$375,000 offer and countered with $425,000. The $425,000 counteroffer was a decision of Ken Betza, without a recommendation from Steve Lesko nor was one solicited. Mr. Lesko testified, which the Court finds credible, that Betza himself indicated to Lesko that he had performed his own cap analysis[1] and that after performing that analysis and speaking to other brokers, he felt a $425,000 counteroffer for a quick all cash deal was fair.

Parkstone did their own underwriting analysis of the income and expenses of the Property and projected capital improvements that would have to be made to the units to maximize the rent to be charged. Mr. Gratto testified that at the time of these negotiations, in June 2017, there was pending local legislation to bring four family dwellings under the rent control ordinance and this was a concern to them. Re-evaluation of taxes was also going forward at this time so they had to anticipate an increase in taxes. In addition, Gratto considered the comparable sale he considered the closest to the PIQ --- 105 Ferry Street, located on the same street as the PIQ. In late June and early July 2017, Park Stone independently learned and concluded the following about 105 Ferry Street:

a. 105 Ferry Street was sold in September of 2016 for $530,000.00 after being listed on the MLS.

b. Prior to the sale of 105 Ferry Street in September of 2016, various improvements and repairs were performed, including a new roof and windows.

c. Because 82 Ferry Street did not have the improvements identified in the preceding paragraph, the value of 82 Ferry Street could be assessed by adjusting the sale price of 105 Ferry Street downward by approximately $90,000.00.

Their summary of their analysis, engrafted on Exhibit 18A, led them to arrive at a value of approximately $420,000, which led to the decision to accept Betza's counteroffer of $425,000.

Mr. Lesko also testified based upon his two year experience with the PIQ through May 2017, leading up to the June 2017 negotiations, the property was 98 years old and based on age and old fixtures and finishes, it was difficult to obtain good rents in the building.

Lesko played no part in the preparation of the contract of sale.

On June 26, 2017, Defendants' transactional attorney, Andrew J. Cerco, Esq. sent a proposed: (a) "Contract for Sale of Real Estate" using the Realtor form of contract and (b) a letter Rider that included twelve additional terms to Plaintiff's transactional attorney, Scott Herzog.

After negotiation of language in the contract and rider, both were fully executed on or about July 11, 2017 with the key terms of the contract in place — a purchase price of $425,000, all cash and a quick closing date on or before July 31, 2017. The contract also provided for a

[1] Cap analysis, is a term of art used by real estate investors and appraisers to arrive at a value by dividing the net operating profit by a capitalization rate. According to Mr. Gratto's testimony, the cap rate for similar Jersey City properties was approximately 4.5%.

realtor's commission to Ostrow of 4% per a telephone conference between Betza and Lesko when Lesko suggested a commission of 5% but agreed to Betza's counter of 4%. Betza agreed to pay Lesko's commission for "bringing [Defendants] the buyer." Defendants did not request that Lesko perform a valuation of the Property or consider "comps". Betza had the right to speak with other brokers and invite them to seek buyers for the Property, and Lesko did not have the exclusive right to attempt to locate a buyer.

Based upon due diligence property inspections, Park Stone requested a $15,000.00 price reduction and Defendants counteroffered with a $5,000.00 price reduction, but Defendants eventually withdrew their counteroffer and Plaintiffs indicated they stated would accept the contract price of $425,000 without adjustment.

The Purchase Agreement's requirement that Defendants receive a deposit of $42,500.00 was satisfied which Defendants' Transactional Counsel still possesses.

All of the testimony of the Defendants surrounding the "pre" and post contract communications were conducted by Kenneth Betza, but the Court did hear from Mrs. Margaret Betza, his wife, on conversations she had with third-parties after the contract was executed that started the events leading up to Betza's termination of the contract, More specifically, on Friday, July 14, 2017, Ms. Betza attended a party in New Jersey, where she met a woman who "grew up in the Heights, [and] lives in the Heights" and stated to Ms. Betza that Jersey City Heights is "booming" and referred her to a real estate agent.

A few days later, Ms. Betza spoke to a real estate agent who stated that the Property was worth substantially more than the purchase price of $425,000.

On July 20, 2017, Defendants instructed their Transactional Counsel to send Plaintiff a letter that to terminate the Purchase Agreement because Defendants felt the Property was worth more than the purchase price. On July 20, 2017, Defendants' Transactional Counsel sent a letter to Plaintiff's Transactional Counsel stating, among other things, "Sellers have decided to terminate the agreement of sale."

The following day, July 21, 2017, Defendants' attorney advised Plaintiff's attorney, in writing, that Defendants decided to rescind and withdrew their July 20, 2017 termination letter and looked forward to closing within the next ten (10) days.

Defendants had made their decision to withdraw or rescind their July 20, 2017 termination letter with the advice of counsel, and after discussing all of their concerns about the Property's purported real value based on calls with real estate agents. Further confirmation of the intent to close was indicated by, inter alia, Betza's attorney on July 21, 2017 requesting the realtor, Lesko, to obtain certifications from the City, including smoke detector certifications required under the contract. The same day, upon receipt of the proof of funds, Defendants' Transactional Counsel sent an e-mail to Plaintiff's attorney stating "Let's get this done."

Seven days later on July 28, 2017, Defendants' Transactional Counsel conveyed to Plaintiff's Transactional Counsel that Sellers were refusing to close on the Purchase Agreement

and transfer title to the Property and instructed him not to prepare the required closing documents.

Defendants' Transactional Counsel never sent a letter or e-mail to Plaintiff's Transactional Counsel contending that the Purchase Agreement was procured by fraud.

Plaintiff's complaint for specific performance followed, filed on August 10, 2017.

The Court will address, later in the opinion, the facts which Defendants cite and Third-Party Defendants refute as operative in Defendants' allegations of fraud and violations of the Consumer Fraud Act by Lesko. However, the Court will identify the Defendants' categories of Lesko's alleged actionable conduct. Defendant contends Lesko:

(1) failed to represent the interests of the Betzas as Betzas' agent in not presenting a valid market value and appraisal of the PIQ;

(2) failed to disclose to Betzas of his prior relationship with Plaintiff in management of their properties;

(3) failed to secure from Betzas a written Brokerage Agreement in violation of Real Estate Commission regulation; and

(4) failed to obtain an executed Consumer Information Statement required in violation of Real Estate Commission regulations.

The Court also received the testimony of two real estate appraisers, whose testimony was limited to the market value of the Property as of the date of the contract negotiations, June 2017. They both used a comparative sales approach, but reached different values. Defendants' expert , Mr. Carl Mucciolo, arrived at a market value of $640,000, while Third-Party Defendants' expert, Mr. Joseph D'Amato, arrived at a market value of $480,000. They both agreed that 105 Ferry Street, Jersey City, was the most comparable sale and sold for $530,000.00.

Mr. D'Amato testified that the price of 105 Ferry Street had to be downward adjusted because prior to the sale a new roof new windows and separate heating and hot water heaters were installed.

Both realtors testified that in an off market sale, sellers put themselves at risk of not getting market value for the property.

Discussion and Findings

Under New Jersey law and "long established equity principles, a contract for the sale of real property is specifically enforceable by the purchaser. Presumptively, real property is unique and damages at law are an inadequate remedy for breach of a contract to sell it." Pruitt v. Graziano, 215 N.J. Super. 330, 331 (App. Div. 1987); Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 113 (App. Div. 1990) ("There is a virtual presumption, because of the uniqueness of land and the consequent inadequacy of monetary damages, that specific

performance is the buyer's appropriate remedy for the vendor's breach of the contract to convey."). "To establish a right to specific performance, the party seeking the relief must demonstrate that the contract in question is valid and enforceable at law, and that the terms of the contract are clear." Estate of Cohen, ex rel. Perelman v. Booth Computers, 421 N.J. Super. 134, 149–50 (App. Div. 2011). Finally, granting specific performance should not be "unduly oppressive." See Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 618 (App. Div. 2005).

In determining whether specific performance is appropriate, it is not the Court's role "to rewrite a contract for the parties better than or different from the one they wrote for themselves." Keiffer v. Best Buy, 205 N.J. 213 (2011). See also Solondz v. Kormehl, 317 N.J. Super. 16, 22 (App. Div. 1998) ("Plaintiff is bound by the deal he made. This court may not relieve plaintiff from the hardship that might have been guarded against. We must enforce the contract which the parties themselves have made.").

I. Defendant is Not Entitled to Rescission of the Contract Based Upon Fraud

Rescission of a contract is an equitable remedy that is only available in limited circumstances; even where grounds for rescission exist, the remedy is within the discretion of the Court. See Intertech Assocs., Inc. v. City of Paterson, 255 N.J. Super. 52, 59–60 (App. Div. 1992). Grounds for rescission of a contract include instances of fraud, failure of consideration, material breach or default or original invalidity of the contract. (Id.) (citing Hilton Hotels Corp. v. Piper Co., 214 N.J. Super. 328, 336 (Ch.Div.1986)). Fraud is a basis for rescission of a contract where one party has gained an unfair advantage by a fraudulent misrepresentation, and money damages alone are insufficient to remedy the injury. Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 626-27 (1981).

In answering Plaintiff's complaint, Defendants contend that they are entitled to rescission of the July 11, 2017 contract on the grounds that the contract was entered into through fraudulent misrepresentations ---- not by the Plaintiffs but rather by the Third-Party Defendant, the realtor, Mr. Lesko. More specifically, Defendants contend that Mr. Lesko fraudulently induced Defendants to enter into this contract by (1) failing to disclose his and Ostrow's past and present business contacts with Plaintiff, (2) failing to present to Defendants the fair market value of 82 Ferry Street, and (3) breached the fiduciary duty to Betza based upon (1) and (2) and also violating certain regulations promulgated by New Jersey's Real Estate Commission. Based on these contentions Defendants bring counts against Mr. Lesko and Norman Ostrow for (1) Common Law Fraud, (2) Breach of Fiduciary Duty, (3) Aiding and Abetting a Breach of Fiduciary Duty, (4) Negligence, and (5) Consumer Fraud, pursuant to the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.

A party claiming equitable fraud must prove the required elements by clear and convincing evidence"); Weil v. Express Container Corp., 360 N.J. Super. 599, 612–13 (App. Div. 2003). Under the clear and convincing standard, the evidence "should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960). Further, the evidence must be "so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." See Id. at 162. See also,

Matter of Seaman, 133 N.J. 67, 74 (1993).

In general, "equitable fraud requires proof of (1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party." See Liebling v. Garden State Indem., 337 N.J. Super. 447, 453 (App. Div. 2001).

Defendants do not contend that Park Stone made any misrepresentations to Defendants. Having no proof that Plaintiff's committed any fraud of misrepresentation that would justify rescission of the contract, Defendant must then premise his theory of rescission based on the conduct of Lesko.

Where a claim for rescission of a contract is based on the fraudulent conduct of a non-party, the Restatement (Second) of Contracts provides that:

> If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.

See Restatement (Second of Contracts § 164(2). See also Bankco Petrol, Inc. v. Epstein, 115 N.J. 599 (1989) (applying the second restatement's rule in New Jersey).

Even if the Court were to find that Mr. Lesko made fraudulent or material misrepresentations that induced Defendants to enter into the contract, which the Court does not, see opinion at pp. 9, 10, 12 and 13, infra, Plaintiff, in this case, executed that contract in good faith and without reason to know of any of these alleged fraudulent or material misrepresentations. In executing that contract, Plaintiff promised to pay the agreed upon price of $425,000 after negotiating in good faith with the Betzas through Mr. Lesko. This promise to pay is consideration for the contract and is therefore value given by Plaintiff in this transaction. For these reasons, rescission is not an appropriate remedy for Defendants claims and will not be granted by the Court in this instance.

II. Defendant Betza Has No Actionable Claims Against Lesko

Having rejected Defendant's claim for rescission of the contract, the Court now turns to Betza's claims againt Lesko.

1. Lesko Did Not Breach Any Fiduciary Duty it Had to Betza

The analysis under which Betza posits that Lesko violated his fiduciary duty to Betza first requires a finding by the Court as to the "type" of broker relationship that existed between the Defendants and Mr. Lesko.

Prior to July of 1995, New Jersey only recognized one type of broker relationship available to a real estate broker working with the seller -- the seller-agent relationship. Even brokers who worked with the buyers were considered as subagents of the seller's agent and owed fiduciary duties to the seller, not the buyer. In order to resolve ambiguities and confusion that frequently arose under this type of real-estate broker relationship, the New Jersey Real Estate Commission, under the powers granted to them pursuant to N.J.S.A. 45:15-1 et seq., set forth regulations identifying four types of business relationships a real estate licensee might be involved in as part of a real estate transaction. These relationships as set forth in N.J.A.C. 11:6-9(h) are: (1) seller's agent; (2) buyer's agent; (3) disclosed dual agent; and (4) transaction broker. In promulgating these regulations, the Real Estate Commission further required that, prior to the initiation of any such business relationship, the realtor provide the real estate consumer with a Consumer Information Statement identifying each type of business relationship in writing.

The Court finds that in this case, Mr. Lesko was acting as a transactional broker. As set forth in N.J.A.C. 11:6-9(a)(7), a transaction broker works with buyer and seller without representing either party or acting in the capacity of an "agent." A transactional broker is primarily a manager of the transaction who communicates information between the parties to assist them in arriving at a mutually acceptable agreement. Given the transaction broker's lack of agency relationship, the transactional broker is prohibited from advising or counseling either party as to how to gain an advantage at the expense of the other party.

Without engaging in any agency relationship with buyer or seller, a transaction broker is not obligated by the same fiduciary duties or agency law as a as a broker who is an "agent" to one or both of the parties to a transaction. As is well-established in New Jersey law, a real estate broker acting as an agent owes a fiduciary duty to exercise fidelity and demonstrate a primary devotion toward the interests of his principal, see Mango v. Pierce-Coombs, 370 N.J. Super. 239, 256, (App. Div. 2004). See also N.J.A.C. 11:5-6.4,

A transaction broker, on the other hand, is not in a fiduciary relationship with either party and is not subject to the same fiduciary duties, especially as the relate to devotion toward the interests of the principal. See N.J.A.C. 11:5-6.9(a)(7)(a transaction broker "does not represent either party, and has no agency relationship with either party to the transaction."). As set forth in N.J.A.C. 11:5-6.9, a transaction broker is therefore only obligated to deal honestly and act in a competent manner in facilitating the transaction between the parties.

Defendants' claim that Mr. Lesko breached his duty to them as a broker in suggesting an asking price of $480,000 for the subject property is not supported by the facts of this case. Mr. Lesko was initially contacted by Mr. Betza, with whom he had a prior business relationship, to facilitate a sale of the subject property. Defendants never signed a brokerage agreement with Lesko, and did not ask that he serve as an agent for them in this transaction. Rather, Betza asked him if he might reach out to his own business contacts to find a qualified buyer who would engage in an all-cash deal without a mortgage contingency. Defendants inquired as to what Mr. Lesko thought would be a reasonable asking price for the property, to which he responded with a suggestion of $480,000. Defendants upon hearing that suggestion, made their own determination that $450,000 would be a better asking price. Mr. Lesko then obtained an offer

from Parkstone for $375,000 to which Defendants countered, through communications facilitated by Mr. Lesko, with an asking price of $425,000. The parties ultimately agreed upon the price of $425,000 and executed a contract on July 11, 2017. During the parties' negotiations, Mr. Lesko facilitated communication between the parties and acted as a manager of the transaction. Here, the Court finds that he was not working on behalf of either party, but was only interested in forming a mutually acceptable contract for sale. The Court does not find that his actions, as a transactional broker, in this instance violated any fiduciary duty of honesty or competency as it appears Mr. Lesko acted in good faith suggesting his original asking price and then facilitating negotiations between the parties that ultimately led to a signed contract.

Defendants also claim that Mr. Lesko breached his fiduciary duty to the Betzas by failing to disclose his past and present business relationship and/or dealings with Parkstone. While Mr. Lesko, as a transaction broker was not bound by the same fiduciary obligations an agent involved in such a transaction might be, he was still bound to "disclose any actual or potential conflicts of interest which the licensee may reasonably anticipate" N.J.A.C. 11:5-6.4(c). Defendants contend that Mr. Lesko's failure to disclose (1) the fact that Norman Ostrow provided property management services for Parkstone and still provided these services for one property, and (2) that Mr. Lesko was acting as an agent for Parkstone in an unrelated real estate transaction to which he stands to gain a commission, if said transaction closes, violates this regulation.

At various times prior to June 2017, pursuant to written agreements, Norman Ostrow provided property management service in connection with four properties owned by Park Stone affiliates.

In July 2017, Norman Ostrow was providing property management services in connection with one property located at 430 Ocean Avenue in Jersey City, which is owned by a Park Stone Affiliate.

In 2016, Feifer discovered a potential acquisition opportunity on his own, and learned that a certain property is located at 3060 Kennedy Boulevard — was being managed by Norman Ostrow. Park Stone contacted Norman Ostrow, and then Park Stone negotiated with the owners of 3060 Kennedy Boulevard to purchase said property. A Contract was eventually executed by the owners and a Park Stone affiliate. Under the contract, Norman Ostrow, which is acting as the owners' broker, will be paid a commission by the Park Stone affiliate if (and only if) there is a closing and title to the land located at 3060 Kennedy Boulevard is transferred to the Park Stone affiliate. Title has not closed on this property to date.

When communicating Plaintiff's offer to Mr. Betza, Lesko explained to him that he had managed Plaintiff's properties and knew Plaintiff, which is why he could be comfortable that Plaintiff was a "qualified buyer."

The Court here does not find that the failure of Lesko to disclose these property management contracts, past and present, or the failure to disclose the possibility of earning a commission in the future in which Plaintiff was a party to the contract, breached any duty he had to Betza or for that matter constituted a violation of N.J.A.C. 11:5-6.4(c).

III. New Jersey's Consumer Fraud Act

Defendants contend that Mr. Lesko violated certain regulations promulgated by the New Jersey Real Estate Commission in his engagement in this transaction. Given that the Court finds Mr. Lesko to have acted competently and honestly in his capacity as a transaction broker in this instance, many of Defendants alleged regulation violations are moot. However, as a transaction broker, the Court finds that Mr. Lesko was still obligated to (1) verbally inform the parties to the transaction as to the four types of business relationships set forth in this opinion, supra at pg. 9 above, and (2) provide the parties with a Consumer Information Statement more specifically describing those business relationships in writing. See N.J.A.C. 11:5-6.9(e).[2] Here it appears that Mr. Lesko failed to provide this information. Thus, the Court must determine whether these regulatory violations can form the basis for an actionable claim against Lesko.

Consumer Fraud

New Jersey Consumer Fraud Act (the "CFA") provides for the prohibition of unlawful acts including the sale of real estate as follows:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice ...
>
> N.J.S.A. 56:8-2.

Real estate brokers and agents are subject to liability under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2 et seq. See Vagias v. Woodmont Properties, LLC, 384 N.J. Super. 129, 134-135 (App. Div. 2006). A consumer who can prove "(1) an unlawful practice, (2) an 'ascertainable loss,' and (3) 'a causal relationship between the unlawful conduct and the ascertainable loss,'" is entitled to legal and/or equitable relief, treble damages, and reasonable attorney's fees under the consumer fraud statute. Bosland v. Warnock Dodge, Inc, 197 N.J. 543, 557 (2009).

The CFA "sets forth three (3) general categories of unlawful acts: (1) affirmative acts; (2) knowing omissions; and (3) regulatory violations." Bosland v. Warnock Dodge, Inc., 396 N.J. Super. 267, 272, (App. Div. 2007). An affirmative act "has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase". See Gennari v. Weichert Realtors, 288 N.J. Super. 504, 535 (App. Div.

[2] Pursuant to N.J.A.C. 11:5-6.9 (d)(1), licensees are obligated to comply with all the requirements set forth in N.J.A.C. 11:5-6.9 when involved in transactions involving the sale of residential real estate containing one to four dwelling units. The subject property is a four-unit residential property. Therefore, Mr. Lesko, as a licensed real estate broker was obligated to comply with these regulations.

1996), aff'd as modified, 148 N.J. 582, 607 (1997). If these factors are demonstrated an affirmative act/misrepresentation does not require knowledge on the part of the actor of its falsity and does not require a showing that the actor intended to deceive. Stoecker v. Echevarria, 408 N.J. Super. 597, 623 (App. Div. 2009) (citing Gennari, supra, 148 N.J. at 605; Cox v. Sears Roebuck Co., 138 N.J. 2, 19 (1994)). A knowing omission or concealment of a material fact is an unlawful act if it is accompanied by an intent that others rely upon the omission or concealment. Stoecker supra 408 N.J. Super. at 623 (citations omitted). When the alleged unlawful act consists of an omission, "intent is an essential element of the fraud." Cox, supra 138 N.J. at 18. Regulatory violations include only specific-situation statutes (such as prize notification under N.J.S.A. 56:8-2.3 or food misrepresentation under N.J.S.A. 56:8-2.9 through 2.13) or regulations enacted under N.J.S.A. 56:8-4 (fraud in sales or advertisements or merchandise). Thus, violations of the regulations set forth under N.J.A.C. 11:5-1.1 et seq., promulgated by the New Jersey Real Estate Commission, are not "unlawful acts" within the meaning of the CFA.

Given that Mr. Lesko's failure to provide a Consumer Information Statement or provide verbal disclosure of the four different types of business relationships are not regulatory violations that would constitute prima facie "unlawful acts," the Court must determine whether these violations were affirmative acts, which do not require knowledge or intent to deceive, or whether these violations were knowing omissions, which do require a showing of intent to deceive pursuant to N.J.S.A. 56:8-2.

Here the Court finds that these violations of N.J.A.C. 11:5-6.9 were not affirmative acts and at best, were omissions. Mr. Lesko testified that he was not aware of his obligation to provide the Consumer Information Statement or an oral statement of the types of brokerage relationships to Defendants. This failure to provide information was not made to induce Defendants to sell their property. The Defendant, himself, defined the transactional type brokerage he wanted when he sent his June 21, 2017 e-mail to Lesko. The Court finds that Mr. Lesko's failure to disclose the four types of brokerage relationships and failure to obtain an executed Consumer Information Statement can only be construed, at best, as an omission, which, in order to be an "unlawful act" for purposes of alleging a CFA violation, must be made with intent that others rely upon it for purposes of engaging in the subject transaction. Here, Defendants have failed to show that this omission by Lesko constitutes a knowing failure to disclose a material fact with the intent that Betza rely upon it.

In addition, Defendants claim that Mr. Lesko violated the regulations governing the conduct of licensed real estate brokers by failing to enter into a written brokerage agreement setting forth the nature of his involvement in the transaction. After a thorough review of these regulations, the Court finds that there was no obligation under these regulations on the part of Mr. Lesko to enter into a formal written agreement setting forth his involvement as a transaction broker in this transaction.[3] N.J.A.C. 11:5-6.2 sets forth a realtor's obligations when entering into written listing agreements and contracts with the parties to a real-estate transaction, but does not set forth a requirement that a written listing agreement be produced. N.J.A.C. 11:5-6.9 provides additional regulations governing "Brokerage Agreements" which is a term defined therein to

[3] The Court recognizes that the statute of frauds, N.J.S.A. 25:1-16, requires a writing for a real estate broker, who acts as an agent or broker on behalf of a principal to be entitled to a commission.

"mean[] a written agreement between a brokerage firm and a party describing the terms under which that firm will perform brokerage services . . . [and] include, but are not limited to, sale and rental listing agreements, buyer-broker, lesee-broker, transaction broker, and dual agency agreement." N.J.S.A. 11:5-6.9(a)(1). This regulation provides certain required disclosures to be included in brokerage agreements, including a disclosure as to the nature of the brokerage relationship, but does not require that a realtor actually enter into such an agreement prior to engaging in a real estate deal as a transaction broker. As set forth in the Consumer Information Statement, the language of which is set forth in N.J.S.A. 6.9(h), "[o]wners considering working with transaction brokers are advised to sign a written agreement with that firm which clearly states what services that firm will perform and how it will be paid." While it may have been a good idea for Defendants to execute such an agreement, nothing in these regulations requires it and, in any event, Betza and Lesko engrafted their negotiated commission of 4% in the contract.

In addition, even if these regulations were considered to require a written agreement for a transactional broker, the failure to have such an agreement would be an "omission" which is not actionable under the facts of this case.

For these reasons, the Court finds Lesko has not committed any unlawful acts under the CFA.

While there is no need for the Court to address the questions of ascertainable loss or causal relationship, the Court will address briefly the Defendant's failure to prove these two (2) prongs as well.

Here, Defendants' alleged loss is based on Defendant Betza's bootstrap testimony that if he knew of the relationships Lesko had with Plaintiff, he would not have "proceeded in the fashion he did" and presumably taken a harder look at Plaintiff's offer and ultimately insist on a higher selling price. The Court does not find this testimony credible. The totality of the circumstances surrounding Mr Betza's involvement in setting the purchase price and limited role of Lesko as a transactional broker and reaffirmance of the contract and withdrawal of their termination of the contract, after Betza after received information from brokers after the contract was signed that the contract price was insufficient, leads the Court to this conclusion.

As to ascertainable loss, when considering the testimony of Plaintiff's real estate expert, Mr. Mucciolo, who opines a market value of $640,000 and that of Third-Party Defendant's expert, Mr. D'Amato, who opines a market value of $530,000, when the property, at Defendant's request, was not placed on the market, and further Plaintiff and Betza's own evaluation of the value of the PIQ, the Court also does not find conclusive Plaintiff's proofs on ascertainable loss.

IV. Ancillary Claims of Defendants and Plaintiff

Lastly, the Court finds that Defendants' negligence claim to be unsupported and where, no applicable standard of care has been established, will be denied. To establish a cause of action in negligence, a plaintiff must prove: "(1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty by defendant; and (3) and injury to plaintiff proximately caused by defendant's breach." Endre v. Arnold, 300 N.J. Super. 136, 142 (App. Div.), certif. denied, 150

N.J. 27 (1997). Generally, negligence is not presumed, and the burden of proving negligence rests on the plaintiff. Rocco v. N.J. Transit Rail Operations, Inc., 330 N.J. Super. 320, 338 (App. Div. 2000).

Our courts have recognized that expert testimony may be necessary to establish the standard by which a real estate broker might be liable for claims of negligence brought against them. See Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 444 (1993). Defendant's real estate agent, Carl Mucciolo, other than providing his opinion on the value of the subject property, countered with the opinion of Lesko's expert, Mr. D'Amato, offered nothing to support the theories of liability Defendants assert in their third-party complaint.

With respect to Plaintiff's claim for monetary damages in addition to specific performance, while the Court may have discretion in providing damages to a buyer when the seller's breach of contract causes the buyer to incur additional delay and cost, the circumstances here do not warrant additional damages on top of relief in the form of specific performance. See Kilariian v. Vastola, 379 N.J. Super. 277, 286 (Ch. Div. 2004).

Plaintiff's claims for attorney's fees and costs associated with the litigation of this trial are also rejected. Apart from certain enumerated circumstances set forth in R. 4:42-9, New Jersey follows the American rule with regard to attorney's fees and requires each party to bear his own counsel fees. See, e.g., Innes v. Marzano-Lesnevich, 224 N.J. 584, 592-592 (2016). Here, the Court finds no cause to deviate from that rule and will not award Plaintiff attorney's fees or costs associated with this litigation.

CONCLUSION

Based on the foregoing, judgment is entered in favor of the Plaintiff against Defendants for specific performance of the contract for conveyance of the property located at 82 Ferry Street, Jersey City, New Jersey with title to close within thirty (30) days of the order accompanying this opinion. No other costs, fees or damages are awarded to the Plaintiff. Defendants' third-party complaint against Norman Ostrow Management, Inc. and Stephen Lesko is dismissed, without costs; Third Party Defendant, Norman Ostrow Management, Inc.'s counterclaim against the Defendants for loss of his commission under the subject contract is moot as he is entitled to his commission once the closing takes place, which the Court has ordered in awarding judgment to the Plaintiff.

SO ORDERED,

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