

PREPARED BY THE COURT

KENNETH PASTERNAK,

Plaintiff,

vs.

ADAM MERMELSTEIN, individually and as manager, officer, director, member, and owner of certain entities, AZI MANDEL, individually and as manager, officer, director, member, and owner of certain entities, TREETOP DEVELOPMENT LLC, a New Jersey limited liability company, TT MLK, LLC, a New Jersey limited liability company, MLK NEWARK 2007, LLC, a New Jersey limited liability company, NEW HIGH STREET 2008, LLC, a New Jersey limited liability company, SPRUCE STREET 2011, LLC, a New Jersey limited liability company, and MERIDIAN CAPITAL GROUP, LLC, a New York limited liability company,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: **BER-L-2356-16**

Civil Action

OPINION

Argued: June 22, 2018

Decided: June 29, 2018

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

Sam Cornish, Esq. appearing on behalf of the Plaintiff Kenneth Pasternak (from Calcagni & Kanefsky LLP).

Y. David Scharf, Esq, and Mary E. Flynn, Esq. appearing on behalf of Defendants Adam Mermelstein, Azi Mandel, Treetop Development LLC, TT MLK, LLC, MLK Newark 2007 LLC, New High Street 2008 LLC, Spruce Street 2011, LLC, and Meridian Capital Group LLC (from Morrison Cohen LLP).

FACTUAL BACKGROUND

THIS MATTER arises from the investment by the Plaintiff Kenneth Pasternak (“Plaintiff”, “Pasternak”) in a multi-unit residential real estate project, through a joint venture with the Treetop Defendants. Defendants Adam Mermelstein and Azi Mandel are the founders of Treetop Development, an LLC which develops and manages real estate investments. The Plaintiff is an experienced investor, and in 2007 began to explore the possibility of investing directly in multi-unit residential real estate. At the time, the Plaintiff had only invested in such projects through publicly traded vehicles. In December of 2007, he was approached by the Treetop Defendants in order to invest in the MLK Properties and MLK Project.

The MLK Properties are comprised of eight multi-residential properties with 256 rental units located on Martin Luther King Boulevard and Quitman Street in Newark, New Jersey. The investment plan proposed by the Treetop Defendants entailed the purchasing of the MLK Properties with a “comprehensive repositioning” and “value added” strategy of extensive renovations. This was to be followed by Treetop Development’s management of the properties, and the eventual sale of the properties.

From October 2007 to December 2007, the Plaintiff and the Treetop Defendants negotiated possible financial structures for the Plaintiff’s investment. The Treetop Defendants, along with Defendant Meridian Capital Group (“Meridian”) created a document titled “Martin Luther King Portfolio Joint Venture Equity Investment Opportunity” (“Offering Memorandum,” or “OM”), which was supplied to the Plaintiff. Subsequently, the Treetop Defendants and Meridian created a document titled “Updated Financials & Pro Forma” which was also supplied to the Plaintiff in March of 2008. The OM included a narrative section and a financial section.

These documents were drafted by Meridian, using financial information received from the Treetop Defendants for the purpose of securing investors in the MLK Project. The written statements in the OM were reiterated to the Plaintiff by both the Treetop Defendants and Meridian. The Executive Summary to the OM states that “Meridian is seeking interest from qualified investors” and describes the MLK properties as “tremendously undervalued assets.” Additionally, the OM stated that the Treetop Defendants would invest in a twenty percent equity share for the MLK Properties and Project.

In July of 2008 the Plaintiff provided \$2,625,000.00 in exchange for 75% of the equity or membership interests in MLK LLC and New High Street LLC. The Plaintiff supplied an additional \$150,000.00 in capital to the LLCs in June 2010 and \$60,000.00 in capital to the LLCs in September 2011. Commencing in July 2008, the Plaintiff began to provide funding to the MLK Project under the “Special Membership Interest” (the Mezzanine Loan) in the Operating Agreements. The total amount of funding provided by the Plaintiff under the Mezzanine Loan was \$3.15 million dollars, structured in such a way as to allow for Defendants Mermelstein and Mandel to invest as well, in order to have “skin in the game.” During the course of the venture, the Plaintiff communicated his frustration to the Treetop Defendants as to their bookkeeping methodology and reiterated his insistence that they have “skin in the game,” as required by the operating agreement.

Ultimately the project was financially unsuccessful. It was sold to third parties in February of 2016. On March 16, 2016 the Plaintiff filed the instant case, levying allegations against the Treetop Defendants for: (1) fraud, (2) negligent misrepresentation, (3) dissolution and accounting, (4) securities fraud, (5) breach of contract, (6) breach of the implied covenant of good faith and fair dealing, (7) breach of the fiduciary duty, (8) unjust enrichment, and (9) for the

inspection of books and records. Additionally, separate counts of fraud, negligent misrepresentation, securities fraud, and aiding and abetting common law fraud and securities fraud were brought against Meridian. The Plaintiff asserts that these claims arose because, Meridian allegedly induced him to invest in the MLK Project and Properties through misrepresentations in the initial offering memorandum.

After an extensive discovery period, the Treetop Defendants and Meridian filed summary judgment motions, both arguing that the Statute of Limitations had passed and that the Plaintiff had failed to support the claims in his complaint. The Plaintiff responded by filing a cross motion, arguing that the Plaintiff is entitled to judgment as a matter of law because there are no genuine issues of material fact as to the alleged misstatements and misrepresentations made by the Defendants during the course of the investment and management of the MLK Project and Properties.

For the reasons stated below, Meridian's motion for summary judgment is hereby **GRANTED**. The Treetop Defendants' motion and the Plaintiff's cross motion are hereby **DENIED**.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for

summary judgment under R. § 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. § 4:37-2(b) or R. § 4:40-1, or a judgment notwithstanding the verdict under R. § 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that “there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a ‘genuine’ issue of material fact for purposes of R. § 4:46-2.” Id. at 540.

RULE OF LAW AND DECISION

I. Meridian’s Motion for Summary Judgment is Hereby Granted and the Claims against Meridian are Hereby Dismissed.

Meridian first argues that the claims asserted against them are barred by the Statute of Limitations and must therefore be dismissed. Three of the four claims against Meridian are torts against the Plaintiff’s rights to real property. The Statute of Limitation in New Jersey is clear that in actions such as these, the case must be commenced within 6 years next after the cause of any such action shall have accrued. N.J.S.A. § 2A:14-1. Thus, in order for the counts of fraud, negligent misrepresentation, and aiding and abetting common law fraud to survive, the Plaintiff must have brought them within six years of the accrual of the cause of action.

This is not the case in the instant matter. Meridian was involved only in the preparation and presentation of the OM to the Plaintiff, which occurred before the investment. That investment by the Plaintiff occurred on July 2, 2008, and this matter was only filed on March 16, 2016, nearly eight years afterwards. Thus, the claims against Meridian for fraud, negligent misrepresentation, and aiding and abetting common law fraud are barred by the Statute of Limitations.

Count five of the Plaintiff's complaint alleges securities fraud stemming from the same OM and investment as the previous counts. Under the New Jersey Uniform Securities Law, a claim must be brought within two years after the contract of sale or two years after the Plaintiff knew or should have known about the existence of the cause of action. N.J.S.A. § 49:3-71. As stated above, the OM was presented, and the investment occurred nearly eight years before the instant case was filed. Therefore, the claim for securities fraud against Defendant Meridian is barred by the two year Statute of Limitations.

Further, the discovery rule does not mitigate against the above outcome. The exception to the statutory rule is found in cases where the equitable principle of the discovery rule is applicable. Lopez v. Sawyer, 62 N.J. 267, 273-74, (1973). The discovery rule is essentially a rule of equity," and therefore, "in each case the equitable claims of opposing parties must be identified, evaluated and weighed. *Id.* The discovery rule and related equitable doctrines recognize that "[u]naswering 'mechanistic' application of Statute of Limitations would at times inflict obvious and unnecessary harm upon individual plaintiffs without advancing [the] legislative purposes" of providing repose for potential defendants and sparing the courts from the burden of hearing state claims. Galligan v. Westfield Centre Services, Inc., 82 N.J. 188, 192, (1980). The Supreme Court has held "it seems inequitable that an injured person...should be denied his day in court solely because of his ignorance, if he is otherwise blameless". *Id.* at 194 (quoting Lopez, 62 N.J. at 274). However, it has been well established in New Jersey case law that if the plaintiff has sufficient knowledge of its claim and there remains a reasonable time under the applicable limitations period to commence a cause of action, the action will be time barred if not filed within that remaining time. Torcon, Inc. v. Alexian Brothers Hospital, 205 N.J. Super. 428, 437, (Ch. Div. 1985).

The discovery rule is inapplicable here, to the claims raised against Defendant Meridian. First, the arguments made by the Plaintiff that there was a continuing fraud do not apply to the claims against Meridian, which occupied the limited role of drafting and presenting the OM to the Plaintiff. Second, as stated above, the discovery rule tolls the Statute of Limitations only until such time that the Plaintiff knows, or should know of the accrual of the action. The Plaintiff not only describes himself as a sophisticated investor, but has also enjoyed a long and successful career as an investor. Further, the Plaintiff himself testified in his deposition that by January 2009, he saw “yellow flags” which “screamed fraud” when reviewing the records and performance of the MLK Project and Properties. The record only contains examples of the bookkeeping and management practices that arose after the project commenced which was after the OM. Mr. Pasternak was a sophisticated investor, who undoubtable knew that the OM was not an audited financial statement. The OM clearly stated it could not be relied upon and precluded any potential claims against Meridian. Therefore, the discovery rule is inapplicable and the Plaintiff’s claims against Meridian are barred by the Statute of Limitations.

Even if the Plaintiff’s claims against Defendant Meridian were not barred by the Statute of Limitations, they would also fail as a matter of law and therefore must also be dismissed. The elements of common law fraud are “(1) material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.” Banco Popular No. America v. Gandi, 184 N.J. 161, 172-73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). Negligent misrepresentation requires that an “incorrect statement was negligently made and justifiably relied upon and that injury was sustained as a

consequence of that reliance.” Carroll v. Cellco P'ship, 313 N.J. Super. 488, 502 (App. Div. 1998). Finally, the New Jersey Uniform Securities Law imposes liability on any person who:

(1) Offers, sells or purchases a security in violation of subsection (b) of section 8, subsection (a) of section 9 or section 13 of P.L. 1967, c. 93 (C. 49:3-55, 49:3-56, or 49:3-60), or

(2) Offers, sells or purchases a security by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), or

(3) Offers, sells or purchases a security by employing any device, scheme, or artifice to defraud, or

(4) Offers, sells or purchases a security by engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, or

(5) Engages in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities, or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities (i) in willful violation of this act or of any rule or order promulgated pursuant to this act, or (ii) employs any device, scheme or artifice to defraud the other person or engages in any act, practice or course of business or conduct which operates or would operate as a fraud or deceit on the other person, is liable as set forth in subsection (c) of this section;

N.J.S.A. § 49:3-71.

Here, it is clear that the claims against Meridian arising from the statements in the OM are not actionable. The Plaintiff identified three categories of statement in the OM which he argues

constitute material misrepresentation of fact. At the outset, this Court notes that the OM contained an express provision stating that:

although all information furnished regarding property for sale, rental or financing is from sources deemed reliable, such information has not been verified, and no warranty, express or implied, is made as to the accuracy of the information contained herein, and the same is subject to errors, omissions, change in price, rental or other conditions, prior sale, lease or financing, or withdrawal without notice.

First, the Plaintiff points to statements concerning projections of future performance of the MLK Project. Meridian's role was to draft the OM using the information supplied by the Treetop Defendants. This information was used to make models and predictions as to the possible investment outcomes of the MLK Project. The Plaintiff argues in part that these projections were the material misstatements on which he relied. However, projections are not actionable as material misstatements of fact. See Daibo v. Kirsch, 316 N.J. Super. 580, 589 (App. Div. 1998) (holding that the honestly held estimate made by the seller, even if inflated, was not a fact but an opinion based on the seller's assessment of value). The Appellate Court in Diabo endorsed the view that representations as to the value of property are not usually a basis for a claim of fraud. Id. at 589 (citing Garden Realty Corp. v. Hadley, 110 N.J. Eq. 474, 160 A. 385 (E. & A.1932)). Here, where there is no evidence that Meridian made any statements other than those projections in the OM. Further, there is no evidence that Meridian saw the figures as unreliable. Thus, the pro forma projections as to the possible performance of the MLK project cannot support a claim against Meridian.

The second category of alleged misstatements are those in the OM which concern comparative market rents. As stated above, this rent data served to make projections about what the rents in the MLK Properties could potentially amount to. That these higher rents were

ultimately unrealized does not give rise to a cause of action. As stated above, future projections concerning the value of a property, do not amount to material factual misstatements. There is no evidence that the market rents supplied in the OM were knowingly or negligently falsified. Thus, these statements amount to future projections about the potential value of the rent rolls in the MLK Properties and are not actionable against Meridian.

The final category of alleged misstatements are those in the OM which relate to descriptions of Treetop's prior experience. Again, there is no evidence which shows that Meridian knew or should have known of any falsities in these sections of the OM. This, coupled with the express provision in the OM informing the Plaintiff that the information has not been verified by Meridian prevent liability stemming from these particular statements.

For the above reasons, the claims against Defendant Meridian are hereby dismissed. Defendant Meridian's motion is hereby **GRANTED**, and the portion of the Plaintiff's motion seeking relief against Meridian is hereby **DENIED**.

II. The Treetop Defendants' and the Plaintiff's Motion for Summary Judgment are Denied as there are Genuine Issues of Material Fact.

The Court next considers the Treetop Defendants' motion for summary judgment and the Plaintiff's cross motion. For the following reasons, both motions are hereby **DENIED**. Both the remaining Defendants and the Plaintiff argue that they are entitled to summary judgment. As stated above, summary judgment should only 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." R. § 4:46-2(c). The dispute between Mr. Pasternak and the remaining Defendants, whose role was both direct and much larger than that of Meridian, is

simply replete with contested facts. These principally concern whether the Defendants were required to invest a particular sum, whether that sum was actually invested, and further, whether any sum which was invested was properly invested pursuant to obligations of the parties or their representations.

The Plaintiff asserts that from the initial solicitation period through the final years of the investment, the Defendants made clear to the Plaintiff that they would be personally investing in the MLK Project and Properties. He insists that these statements by the Defendants were material to his decision to invest, and that they were ultimately integrated into the contracts between the parties. The Plaintiff alleges the Treetop Defendants continually perpetrated their alleged fraud through inadequate bookkeeping, while continuing to induce the Plaintiff to make additional contributions.

The Defendants contradict these assertions. They allege that the Plaintiff continued to invest without such representations by the Defendants, and that the Plaintiff continually understood the financing invested in the Project. They argue that the Plaintiff reviewed the Project's financial records, which were updated according to his concerns.

These contested facts, as illustrated through the extensive, voluminous records presented to the Court through the parties' motions, require the denial of the Treetop Defendants' and the Plaintiff's motions for summary judgment. Therefore, for the reasons above, both the Treetop Defendant's motion for summary judgment and the Plaintiff's motion for partial summary judgment are **DENIED**.