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SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
Chancery Division
Docket No. C-107-18

LIEB PURETZ, ARON PURETZ, JAR HOLDING URBAN RENEWAL, LLC., 125 MONITOR REALTY URBAN DEVELOPMENT LLC F/K/A 125 MONITOR REALTY LLC,

Plaintiff/
Counterclaim-Defendants

v.

YOSEF BRIKMAN,

Defendant/Counterclaimant/
Third Party Plaintiff

Decision

YOSEF BRIKMAN,

Third-Party Plaintiff

v.

MARK HEINZE and OFECK & HEINZE, LLP

Third-Party Defendants

Decided: August 26, 2019

Mark F. Heinze, for Plaintiffs/ Counterclaim-Defendants (Ofeck & Heintz, attorneys).

Jeffrey Schreiber & Samantha L. Frenchman, for the Defendant/Counterclaimant/ Third-Party Plaintiff (Meister Seelig & Fein, LLP, attorneys)

JABLONSKI, P.J. Ch.

Introduction:

Lieb Puretz, Aron Puretz, JAR Holding Urban Renewal, LLC, and 125 Monitor Realty Urban Development, LLC (the Puretz parties) sued Yosef Brikman (Mr. Brikman) alleging that he breached a settlement agreement negotiated between the parties to resolve certain litigation concerning the ownership of a piece of property located at 125 Monitor Street in Jersey City (the Property).

This court concludes that the Puretz parties have proved, by the required standard of proof, that Mr. Brikman breached the terms of the settlement agreement because he did not engage in appropriate efforts and did not sell the Property in a "commercially reasonable manner with the intention to maximize the sale price for the property."

Procedural history:

Following separate litigation in both the Law division and the Chancery division, the parties negotiated a settlement agreement to resolve a pending foreclosure action concerning the Property.

On July 20, 2018, the Puretz parties brought this complaint essentially seeking to determine the parties' rights under the agreement. In the complaint, the Puretz parties allege that the Property was valued for more than Mr. Brikman claims that it was, and that Mr. Brikman should be pursuing other sales tactics in order to meet the negotiated goal of maximizing the sales price of the Property. In response and in opposition, Mr. Brikman filed 4 counterclaims. He alleges that the Puretz parties slandered the title in the first. In the second, he seeks attorney fees for the costs of enforcing the settlement agreement. He seeks a declaration of the amounts due to him from the sale in the third. Finally, he alleges that the action was frivolous.[1]

In May 2019, the Puretz parties filed another lawsuit concerning ownership of this property, but seeking different relief. That matter, Botanical Realty Assoc. Urban Renewal LLC v. 125 Monitor Street, J.C. et, al., was filed under Hudson County

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[1] As noted by the Puretz parties in post-trial briefing, Mr. Brikman appears to have abandoned the first counterclaim since he did not offer either evidence nor argument in support of that cause of action at tria. The second counterclaim appears to focus on the efforts that were taken to enforce the terms of the November 19, 2018, agreement and do not apply to the controversy here. No evidence has been submitted in support of the third counterclaim rather than an interpretation of the obligations under the settlement agreement and whether those have been satisfied. The fourth counterclaim is procedurally infirm since the Defendant does not appear to have complied with the Frivolous Claims Act under N.J.S.A. 2A:15-59.1 and R. 1:4-8. Similarly, since no evidence was presented in support of the third-party claim, that matter is dismissed.

Chancery Docket No. C-92-19. The relief there seeks to set aside the March 18, 2019, sale.

The Parties' contentions:

The Puretz parties argue that Mr. Brikman did not engage in efforts that are considered commercially reasonable to sell the Property in order to maximize the price despite an affirmative obligation to do so. When he ultimately did sell the property, it was sold not to meet his responsibilities under the settlement agreement, but instead, to ensure the immediate return of his initial investment to the prejudice of the Puretz parties.

In opposition, Mr. Brikman argues that the Puretz parties have not sustained their burden of proof and that sale of the property was at arms-length and was sold to a bona-fide purchaser. Mr. Brikman asserts that the efforts that were taken were commercially reasonable under a totality of the circumstances that were presented.

Factual findings

Following a review of the documentary evidence and witness testimony and considering the credibility of each witness and the overall reasonableness of the positions of the parties, this court finds these facts.

In 2005, the Puretz parties acquired the Property. On June 30, 2010, Mr. Brikman loaned the Puretz parties $2 million. In return and to secure repayment, Mr. Brikman (through a separate entity) took a note and mortgage and encumbered the Property. The Puretz parties defaulted on their payment obligation and Mr. Brikman (through a separate entity) sued them in the Law Division to recover the sums due, and also in the Chancery Division to foreclose on the note and mortgage. Judgement was entered in the Law division action following arbitration for $3,953,331.94.

Mr. Brikman obtained a default judgment in the Chancery foreclosure. After collateral proceedings concerning the amount of the judgment and who or what possessed it were concluded, and after an attempt to confirm the judgment was unsuccessful, the foreclosure matter was scheduled for trial. The parties ultimately settled this litigation and memorialized the settlement on November 19, 2017 (the Agreement).

According to the Agreement, the Puretz parties agreed to pay Mr. Brikman $3,200,000.00 on or before December 31, 2017. The Puretz parties also agreed to sign bargain and sale deeds to transfer the entirety of the ownership interest in the Property to Mr. Brikman. The special discovery master would hold the documents in escrow until the obligations were mutually satisfied.

Specifically, as is pertinent to this controversy:

Paragraph 1 of the Agreement requires:

On or before December 31, 2017 (the closing date), the Puretz parties (or any one of them) shall pay, or cause to be paid on their behalf, to Brikman or to his designee(s), the amount of Three Million Two Hundred Thousand ($3,200,000.00) (the settlement amount). . . . Paragraph 2 reads,

Simultaneously with the execution of this Agreement, the Puretz parties shall (1) cause JAR Botanical and 125 Monitor to execute Bargain and Sale deeds transferring the 100% of each of their respective fee ownership interests in the Monitor Street Property to Brikman, as well as any and all other documents necessary to effectuate the transfer of such interests (the Deeds) and deliver such Deeds to the Hon. Glen Berman, (J.S.C., ret.)to hold in escrow pursuant to the terms of the escrow established in the arbitration agreement between the Puretz parties and Clarkson (the "Berman Arbitration agreement") executed in connection with the Berman arbitration; and (2) execute the Berman Arbitration Agreement and provide executed copies to Judge Berman and to counsel for Brikman/Clarkson.

Under Paragraph 3:

To the extent that the Puretz Parties do not timely deliver the settlement amount to [Mr.] Brikman Judge Berman shall release to [Mr.] Brikman the Deed pursuant to the terms of the Escrow, and [Mr.] Brikman shall then sell the Monitor Street property in a **commercially reasonable manner with the intention to maximize the sale price for the property**. . . .

If [Mr.] Brikman receives more than $3,200,000 for the sale of the Monitor Street Property (net, after deducting from the gross purchase price: all costs of sale, including without limitation, brokers and attorney's fees; as well as taxes, including transfer taxes, and recording fees, if any, payable by seller as a condition of closing or otherwise prior to the closing) any such excess amounts, less $1,000.00 per day for each day beginning on January 1, 2018 through the date of the closing of such sale by [Mr.] Brikman shall be paid to Puretz at the closing on the sale of the Monitor Street Property, but under no circumstances shall the deduction from the amounts due Puretz for such per diem amounts exceed 130 days ($130,000.00). (emphasis added).

By mid-December 2017, the Puretz parties had not delivered the deeds and had not made the agreed-upon payment under the Agreement. The discovery master issued an order to compel production of those documents within a week. When the Puretz parties still did not comply, Mr. Brikman sought relief from this court. On February 2, 2018, the Puretz parties were ordered to produce those documents by a date certain. The Puretz parties complied on February 7, 2018. The deeds were recorded on February 27, 2018. Title to the Property was vested in Mr. Brikman on that date.

After the obtained the property, and from February 2018 through September 2018, Mr. Brikman testified that he made efforts to sell it as he was required to do. His marketing strategy was personal and limited to making calls to those whom he knew might be interested in the property and answering calls from brokers who expressed an interest in the property. Mr. Brikman also continued negotiations with the Plaintiffs to purchase the property back from him.

When these efforts were not successful, Mr. Brikman said that he sought the assistance of several commercial real estate brokers including Cushman & Wakefield and CBRE. According to Mr. Brikman, they did not return his calls. Ultimately, Mr. Brikman hired Yehuda Deutsch of Greiner-Maltz, a New Jersey brokerage. Once he was retained, Mr. Deutsch generated materials and sent them to

several prospects and pointed any interested parties to information contained in on-line links that described the property development and environmental history. Mr. Deutch advertised that the property would be sold "as is" and would be subject to "quick closing." To some potential buyers, he noted the property would be offered the property at a discounted price "reflecting the challenges of going through approval and finishing environmental [endeavors.] Neither Mr. Brikman, while acting on his own, nor Mr. Deutch, once he was retained, ever established a base purchase price- preferring to allow any bidders who might respond to the Property's availability to establish the price.

Ultimately, the efforts resulted in contracts with considerations of $8 million, $7.5 million, $7 million, and $6.5 million. Mr. Brikman received these offers between October 15, 2018, and November 16, 2018. However, he did not accept them since, according to his testimony and that of Mr. Deutch, the offers were rescinded because of the designated developer of the property. Mr. Brikman, upon the purported advice of Mr. Deutsch, ultimately agreed to sell the property to 125 Monitor JC, for $5,750.000.

During this time period, the Puretz parties endeavored to convince Mr. Brikman that the Property had substantial value. Although the parties agreed that the Property was dilapidated, preliminary values were attributed to it from $31,800,000.00, to

$27,750,000.00, to $19,600,000.00—all based on offers made to the Puretz parties from developers. Additionally, a June 8, 2019, appraisal by Victor Schlesinger valued the Property in an "as is" condition at $34,000,000.00 and projected the "as completed" value at $104,000,000.00.

Mr. Brikman sold the property on March 18, 2019. The circumstances surrounding the acceptance of the agreement are curious. On November 8, 2018, counsel e-mailed each other the terms of the sale:

- $5,750,000.00 purchase price.
- 10% deposit.
- Seller will provide clean title and the parties will file bulk sales.
- NO contingencies or due diligence periods (emphasis in original).
- Property completely 'as is' (Buyer will buy subject to, and take responsibility for any ISRA, environmental, eminent domain, etc, issues/compliance)
- Closing, all cash, in a couple of weeks when title and bulk sales are cleared.

The parties to the transaction, through their attorneys, agreed to allow the matter to proceed to closing, without the creation of a contract. According to a December 5, 2018, e-mail:

> rather than both of us marking this up and adding clauses, assuming we're closing in a matter of weeks, why don't you just order the title and we'll send in the bulk sales, and we can close assuming you're happy with both when they arrive. We don't need to haggle over

contract terms, and you don't even need to put up a deposit.

On March 18, 2019, the sale took place. At closing, Mr. Brikman retained $4,354,570.55. Despite the agreement that the Puretz parties should have received a portion of these funds under the agreement, they did not.

Pertinent Legal Principles:

At bottom, this controversy concerns the interpretation of a specific, but undefined, term contained in the Agreement. That is: what is a "commercially reasonable manner with the intention to maximize the sale price for the property." To answer this question, the following legal principles apply.

It is axiomatic that a settlement agreement is governed by the principles of contract law. Thompson v. City of Atl. City, 190 N.J. 359, 379 (2007). Fundamental to our jurisprudence related to settlement is the principle that "the settlement of litigation ranks high in our public policy." Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008). Our courts have declared a strong public policy of enforcing settlements, previously holding the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone." Peskin v. Peskin, 271 N.J. Super. 261, 275 (App. Div. 1994). Our courts will "strain to give effect to the terms of a

settlement wherever possible," and "settlements will usually be honored "absent compelling circumstances." Brundage, 195 N.J. at 601.

The burden of proving that the parties had entered into a settlement agreement is upon the party seeking to enforce the settlement. Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 475 (App. Div. 1997). "On a disputed motion to enforce a settlement, as on a motion for summary judgment, a hearing is to be held to establish the facts unless the available competent evidence, considered in a light most favorable to the non-moving party, is insufficient to permit the judge, as a rationale factfinder, to resolve the disputed factual issues in favor of the non-moving party." Id. at 474-75. A plenary hearing is necessary where, as here, there are genuine issues of material fact that bear on a critical question. Lepis v. Lepis, 83 N.J. 139, 159 (1980). A trial judge may not resolve material factual disputes, including credibility determinations arising from the parties' conflicting affidavits and certifications, solely from those affidavits or certifications. Instead, when a genuine issue of fact is raised by the parties' respective assertions, a plenary hearing must be held. Tretola v. Tretola, 389 N.J. Super. 15, 20-21 (App. Div. 2006).

This is the case here. In this matter, the Puretz parties accuse Mr. Brikman of failing to sell the property according the commercially reasonable precepts. Mr. Brikman disagrees and

believes that considering a totality of the circumstances, he did dispose of the property in accordance with these responsibilities. This fact-specific inquiry can only be resolved with the evidentiary hearing convened.

To prevail, the Puretz parties retain the sole responsibility to prove their claim by a preponderance of the credible evidence. Proof of a claim by a preponderance of the evidence requires that "a litigant . . . establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met." Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2004) (quoting Biunno, Current N.J. Rules of Evidence, comment 5a on N.J.R.E. 101(b)(1) (2005). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro Bottling Co., 26 N.J. 263, 274-75 (1958). To prevail, a Plaintiff must provide evidence that "must demonstrate that the offered hypothesis is a rational inference, that it permits the trier of fact to arrive at a conclusion grounded in a preponderance of probabilities according to common experience." Joseph v. Passaic Hosp. Ass'n, 26 N.J. 557, 574-75 (1958). "The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads [a factfinder] to find the existence of the contested fact is more probable than its nonexistence." 2 McCormick on Evidence §339 (Strong ed., 5th ed. 1999).

Central to an assessment of the claims, particularly as part of a plenary hearing, is the credibility of the overall positions taken by the parties and the reasonableness of the positions advanced. Credibility assessments are key to a decision as to whether a Plaintiff has satisfied a burden of proof. Key to any determination in all litigation (and in this case in particular) is a consideration of the credibility of the witness testimony as to all issues presented since this contributes (and establishes) the overall reasonableness of the positions that they adopt. On this premise, the ultimate outcome of this case centers squarely on the credibility assessments that this court is required to make.

After an opportunity to hear the case, to see and observe the witnesses, and to hear each witness testify, this court has a unique perspective to evaluate the credibility and overall reasonableness of each witness' testimony. Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998). Guidance as to credibility findings is also provided by the model jury charges. Factfinders are instructed to consider the witness' interest in the case outcome; the accuracy of the witnesses' recollection; and the witnesses' ability to know what he or she was talking about. Model Jury Instructions (Civil) 1.12(L) "Credibility" (Approved November 1998). Additional consideration should be given to contradictions and changes in the witness testimony and the witnesses' demeanor. Ibid. Finally,

common sense and overall reasonableness provide substantive lenses though which facts can, and should, be assessed. Ibid. Therefore, having watched and considered the testimony of all the witnesses who testified in this matter, this court concludes that any credibility determinations favor that of Purtez parties as opposed to those of Mr. Brikman.

Specifically, Mr. Puretz was direct, relevant, and polite in his testimony. He knew what he was talking about, made good eye contact, and provided prompt and direct answers to all questions asked of him on both direct and cross examination. His decades of experience within the estate industry was evident with both the procedural sophistication that he displayed and substantive knowledge that he possessed. His tone remained even through each examination. Although he was unclear as to certain details occasionally, his recollection of the material events of the negotiations and transactions were consistent. His testimony was detailed, and he did not impermissibly embellish it. He did not avoid any question and was more than willing to answer any question placed to him. His testimony at trial lacked contradiction.

Mr. Brikman was similarly polite and respectful. However, the substance of his testimony stretched his credibility at times and, therefore, adversely impacted on the overall reasonableness of his litigation position. Specifically, less than adequate explanations were provided as to the reasons why alternative

offers, that did not match the appraisal value but would still have resulted in a recovery to the Plaintiffs as was envisioned in the settlement agreement were not forthcoming. Frequently, when direct questions were posed to Mr. Brikman, he was unable to answer the question succinctly and without embellishment. Although he was readily able to recall details that were favorable to his position, he could not recall details that were not. As opposed to Mr. Puretz who possessed decades of real estate experience, Mr. Brikman had other professional endeavors. Mr. Brikman's experience and expertise lies in the importing and export of appliances. The record does not reflect any experience in real estate sales and certainly not with projects and complicated as the issues attendant to 125 Monitor Street.

Similarly, the credibility of the testimony that was provided by Mr. Brikman's witness, Mr. Deutch was problematic from a credibility standpoint. Although he answered the questions posed to him on direct examination directly and relevantly, Mr. Deutch was not similarly forthcoming on cross. His testimony was punctuated, in this court's view, with frequent expressions of annoyance, on cross-examination. Mr. Deutch testified with his arms crossed— bodily expressions that mirrored the defensive tone that was infused in his responses. The troubling tone and manner in which he testified impacted about that which he testified. Specifically, although he spoke in detail about not only his

professional qualifications and his ability to market commercial properties expertly, that purported depth of understanding was belied by his unfamiliarity with a key component of this litigation- eminent domain proceedings. He noted that although he had seen "files", he had no knowledge of the threat of eminent domain proceedings- a fundamental impediment to the assessment of the value of the property.

Credibility assessments were important to be made about the expert testimony provided as well. As a general precept, expert testimony is generally required to determine the fair market value of real property. Pansini Custom Designs Assocs., LLC v. City of Ocean City, 407 N.J. Super. 137, 143 (App. Div. 2009). "Nevertheless, expert testimony need not be given greater weight than other evidence nor more weight than it would otherwise deserve in light of common sense and experience." Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001). Significantly "a factfinder is not bound to accept the testimony of an expert witness, even if it is unrebutted by any other evidence." Torres, 342 N.J Super. at 431. The credibility of an expert and the weight or value to be accorded the expert's testimony lie within the exclusive province of the trier of fact. Cnty of Middlesex v. Clearwater Vill., Inc, 163 N.J. Super. 166, 173-74 (App. Div. 1978). A judge, as a fact-finder, is free to accept or reject all or part of an expert's testimony. Ibid.

Here, the testimony provided by the Plaintiff's expert, Mr. Schlesinger was relevant, direct and specific as it applied to his scope of work: to ascertain the fair market value of the property. Mr. Schlesinger was qualified as an expert in real estate evaluations. He testified cogently as to his responsibilities for which he was engaged and limited his testimony to a specific inquiry. His appraisal opinion considered the three commonly accepted appraisal approaches and adequately explained the basis of each as it applied specifically to this property. He maintained his opinion consistently through cross examination and certainly assisted the court with an understanding of the appraised value of the premises. He did not exceed the scope of expertise nor his opinion, and credibly declined to answer questions that would have required him to do so.

This testimony contrasted with that expert testimony that was provided on behalf of Mr. Brikman. Mr. Brikman's expert, Dr. Moliver, was well-credentialed and possessed sufficient expertise in real estate appraisals and property sales to qualify as an expert. However, his testimony was, on balance, more generic and appeared only to counter the opinion provided by Mr. Schlesinger specifically. Dr. Moliver did not provide an expert report in which he independently assessed the property, nor did he present an opinion about the Property's value employing the three recognized analytical approaches. Although acknowledged that

valid appraisals must be considered in light of the surrounding area and specific neighborhood characteristics, he had not provided appraisal opinions of development property either in Jersey City nor in neighboring and similar communities including Hoboken. He testified that he was unaware of the environmental issues on the property and had not reviewed and documents detailing those concerns. Dr. Molivar testified about the "cloud of condemnation" that surrounded this property. However, on cross-examination, he was unable to detail the source of that information nor was he able to provide any specifics about it that would have assisted the court to bridge the extreme property-value gap between the $34 million appraisal submitted by the Puretz parties and this expert's acknowledgment of Mr. Brikman's belief that the $5.5 million sale price was "commercially reasonable."

These principles factor directly into the substantive determinations that are required to be made here to answer the fundamental question as to whether Mr. Brikman's sale of the property was "commercially reasonable." Considering this concept, there does not appear to be any universally-accepted definition of commercially reasonable efforts are. In New Jersey, this concept is not precisely defined by precedent. Our legislature has, however, provided guidance on the definition and parameters of this concept. Under N.J.S.A. 12A:9-627(a), one may demonstrate

commercial reasonableness by making one of the showings specified in N.J.S.A. 12A:9-627. N.J.S.A. 12A:9-627(b) notes that:

> A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
>
> (1) in the usual manner on any recognized market;
>
> (2) at the price current in any recognized market at the time of the disposition; or
>
> (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

These methods of disposition, however, are not "required [n]or exclusive." Cmt. 3 to N.J.S.A. 12A:9-627. Interpretive precedent has uniformly held that commercial reasonableness is a "flexible concept based upon a consideration of all relevant factors presented in each individual case." Sec. Sav. Bank. v. Tranchitella, 249 N.J. Super. 234, 240 (App. Div. 1991). Any precise definition of that term in specific circumstances is, therefore, inherently fact sensitive. Specific factors to be considered include the value of the property, advertising, price, and appraisal. See Jefferson Loan Co., Inc. v. Session, 397 N.J. Super. 520, 542 (App. Div. 2008). Common practices of the trade should also be considered. Franklin State Bank v. Parker, 136 N.J. Super. 476, 481-482 (Law. Div. 1975) ("disposition should be made in keeping with prevailing trade practices among reputable and responsible business and commercial enterprises engages in [the] same or similar business." The adequacy of price is a

consideration is a reasonableness determination, but inadequacy of price is insufficient on its own to conclude the issue. Id. Commercially reasonable efforts may also not require a party to act against its own business interests and is under no obligation to engage in actions that would hurt the party financially, according to another court from a neighboring jurisdiction. See MBIA Ins. Co. v. Patriarch 950 F.Supp. 2d 568, 618 (S.D.N.Y. 2013).

In light of these principles, considering the totality of the circumstances, this court cannot find that the efforts that Mr. Brikman took were commercially reasonable.

Initially, the nature of the property must be considered since it will bear on the efforts that must be developed and implemented to sell it. 125 Monitor Place is located in the middle of a developing residential area in an already highly-developed and continually developing urban area. The prior use of the premises for industrial and manufacturing purposes is now obsolete. The area been designed for redevelopment by the Jersey City Redevelopment Agency under the Morris Canal Redevelopment Plan. Threats (that might evolve to a real possibility) have been made that the property might be condemned and taken by eminent domain. A designated developer has been named that would require permission by the JCRA to change that appointment. The property has the potential to be upzoned from 275,000 square feet to over 600,000 square feet. There are environmental concerns, the remediation of

which might be costly. In like of these significant issues, Mr. Puretz has argued, most convincingly, that the ability to address their panoply is to tailor the offering, focus on specific buyers, and to build in contract contingencies. The essence of salesmanship would require a recognition of these issues and have both the experience, knowledge, and personnel to address them. Mr. Brikman neither possessed nor developed those characteristics. They were not implemented during the period in which Mr. Brikman was tasked to sell the Property.

The lack of recognition of these issues, combined with other lack of diligence or effective marketing efforts further confirms the conclusion that Mr. Brikman's efforts were less-than-satisfactory to be considered as commercially reasonable.

The price that Mr. Brikman accepted to sell the property is inadequate. The most obvious fact is the approximately $29 million gap between the appraised value of the premises and the price for which the property was ultimately sold. Although the appraisal is but only one opinion of value, the other record evidence reveals that the property was valued at much higher than the purchase price, and that the purchase price was the lowest offer received. The offers received by the Plaintiff were substantially higher and ranging from $19 million to $31 million. The offers received (and rejected) by Mr. Brikman ranged from $6.5 million to $8 million. Despite the difference in value as argued at trial, evidence as to

value is also provided by the fact that at least one lender, post-closing, has committed to providing the buyer with a $12 million loan.

Mr. Brikman did not engage in adequate methods to market the property after he received the property. The record reveals that the original efforts that were taken by Mr. Brikman were taken on his own only and represented more passive pursuits than active ones to sell the property. He did not obtain an appraisal to provide him with an expert's opinion as to value. Although Mr. Brikman has alleged that he was intimidated by certain statements that he perceived as threats that resulted in self-created impairments to the continued marketing of the property, in the world of complex commercial real estate, such aggressive tactics and enthusiastic negotiation would be the expected norm. It was a reasonable position to take that Mr. Puretz should have continued to negotiate with Mr. Brikman to re-purchase the property lest it be simply unloaded as a result of Mr. Brikman's either unwillingness or inability to meet his obligations under the agreement.

Mr. Brikman's choice of realtor and the actions that were taken after he retained Mr. Deutch were similarly not commercially reasonable. It stretches credibility that other realtors who would be better equipped to understand the intricacies of the sale would not even return calls. Once Mr. Deutsch was retained, the efforts

that were characterized as duly diligent were not. Similar to Mr. Brikman's efforts which were more reactive than active, a review of Mr. Deutch's efforts taken reveals that those efforts were more passive than the more active efforts that would be expected or required. Rather than aggressively marking the property to a targeted audience, he, instead, only forwarded files with information about the property development leaving any proposed and interested purchaser respond with an offer. Although this was characterized in argument as "reaching out to thousands of targeted prospective buyers and brokers", there is nothing to demonstrate anything but placing the property into a queue and as part of an e-mail list. Mr. Deutch similarly did not obtain an appraisal. The review of the marketing materials similarly reveals the lack of diligence in achieving the required commercial reasonableness. As noted, the use of the property was one for which residential replaced commercial. The flyer that he generated unreasonably narrowed the focus only on a specific audience, industrial or warehouse tenants noting that the property had easy access to the Turnpike and Parkway. In taking these action, Mr. Deutch limited the field of possible buyers and foisted on them the ability to make an offer in the abstract. This leads to the inescapable conclusion that the efforts taken were not commercially reasonable, and could not, by definition, been designed to maximize the purchase price.

No adequate nor credible explanation was provided as to why the other officers from other possible buyers were not accepted. Those offers resulted from sophisticated buyers who are familiar with the Jersey City market Of the 4 offers noted, the record does not reflect any response by Mr. Brikman to any of them. Although it is argued that the reason that the offers were not accepted resulted from the knowledge of the identity of the designated developer, the timeline undermines the credibility of this argument. Specifically, the ultimate offer to purchase the property was accepted by Mr. Brikman on November 8. The alternative offers were received between October and November 16, 2018. It is clear that, Mr. Brikman had already accepted an offer while other higher offers were forthcoming.

When the offer was accepted, the circumstances surrounding the closing of the transaction are similarly curious and are not consistent with normal practice. Despite the unique and complicated nature of the purchase, the property was agreed to be sold without contingencies. Due diligence periods were waived. No contract was prepared, and no notice to those with an interest in the sale of the Property was made.

At bottom, therefore, the record and credibility assessments made require a finding that the property was sold for purposes other than maximizing the sale price. The evidence presented by the Puretz parties is persuasive to support the conclusion that

the Property was not sold in a commercially reasonable manner to maximize the purchase price. Indeed, the evidence support the proposition that the property was sold quickly and ensured that Mr. Brikman received they payment to which he believes he was entitled.

In doing so, Mr. Brikman violated a fundamental tenet of contract law. In every contract, including settlement agreements, a covenant of good faith and fair dealing is implied. Wilson v. Amerada Hess Corp., 168 N.J. 236, 244, (2001). That means, therefore, 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, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997) (quoting Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965)). See Kalogeras v. 239 Broad Ave., LLC, 202 N.J. 349, 366(2010). A party may obtain relief "if its reasonable expectations are destroyed when [the other party] acts with ill motives and without any legitimate purpose." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 226 (2005) (citations omitted). Thus, a breach of this implied covenant necessarily requires "[b]ad motive or intention" on the part of the breaching party. Wilson, 168 N.J. at 251. "The party claiming a breach of the covenant of good faith and fair dealing 'must provide evidence sufficient 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 Racquet Club, 182 N.J. at 225 (quoting 23 Williston on Contracts, § 63:22 at 513-14 (Lord ed. 2002) (footnotes omitted)). As our Supreme Court has consistently held, "the 'implied covenant of good faith and fair dealing cannot override an express term in a contract.'" Seidenberg v. Summit Bank, 348 N.J. Super. 243, 258 (App. Div. 2002) (quoting Wilson, 168 N.J. at 244). Selling the property to regain his investment, and in complete derogation of the tacit rights that the Plaintiff retained and interest in the sale, violated these precepts.

Having concluded that the settlement agreement was breached, this court must now consider the consequent damages. A number of propositions are made by the Puretz parties envisioning money damages following a variety of hypothetical scenarios premised on differing sales prices. However, as correctly noted by the Puretz parties, since this matter is venued in Chancery , "judges sitting in a court of equity are permitted wide latitude in drafting an appropriate remedy provid[ed] they employ 'principles of fairness, justice, and the law' in vindicating the wrong before them." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999). As further noted by the Puretz parties, "equity will not permit a wrong to be suffered without affording the appropriate remedy." Id.

No monetary damages will be awarded at this point. Despite the conclusions made here, this controversy is not concluded, since a similar pressing issue exists: whether the sale on March 18, 2019, must be set aside following a factual determination of the bona fides of the transaction. This is a fundamental aspect of the pending lawsuit under docket number 92-19. Since the resolution of that matter might trigger the return of the funds to the purchaser of the premises, until the liability of the parties is finally assessed, the proceeds of the transaction must be preserved.

Attorney fees.

Under paragraph 13 of the Agreement, in any action to enforce the provisions of the Agreement, the non-prevailing party in such an action shall pay the attorney fees of the prevailing party. New Jersey follows the American Rule that prohibits the recovery of counsel fees by a prevailing party against the losing party. In re Estate of Vayda, 184 N.J. 115, 120 (2005); In re Niles Tr., 176 N.J. 282, 294 (2003). The purposes behind the American Rule include providing unrestricted access to the courts by all persons, ensuring equity and not penalizing a party for exercising his or her right to litigate a dispute, and administrative convenience. In re Estate of Vayda, 184 N.J. at 120; In re Niles Tr., 176 N.J. at 294.

In general, however, New Jersey disfavors the shifting of attorneys' fees. N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999). However, "a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440 (2001). When the fee-shifting is controlled by a contractual provision, the provision should be strictly construed considering our general policy disfavoring the award of attorneys' fees. Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 385 (2008).

In this matter, the settlement agreement provided for the recovery of attorney fees if any action were to be brought to enforce the terms of this agreement. Specifically, paragraph 13 of the agreement reads that "in any action to enforce the terms of this Agreement, whether in equity or at law, the prevailing party shall be entitled to attorneys' fees and other costs of suit." Here, the issue presented is whether the Puretz parties' action here is considered an enforcement of the agreement, or is, alternatively, a suit to clarify the factual definition of an undefined term- commercially reasonablness.

This court finds that the application brought by the Puretz parties is not an enforcement action of clearly defined obligations under the Agreement. Rather, it is an opportunity to assess, clarify, and define an undefined term to which the parties are

mutually bound. Enforcement, by definition, is available to compel compliance with a defined obligation. Where, as here, those obligations are not clearly defined, there can be nothing to enforce.

Clearly-defined obligations exist in the Agreement, namely, the need for the Puretz parties to sign and deliver the deeds to the escrow agent. Breach of that clear obligation would result in a remedy, including the payment of attorney fees under the Agreement. This contrasts with the cause of action brought here. In this case, the concept of commercial reasonableness as used in the agreement awaited a judicial determination of the parameters of that concept. Under the facts presented in this case, that concept was defined by what it was not. Before these parameters were established, however, Mr. Brikman could not have violated that concept that would have necessitated an enforcement action. Therefore, because of the close scrutiny given to the facts and circumstances of a particular controversy before the shifting of the fee responsibilities occurs, the request for attorney fees for this litigation is denied.

Conclusion:

For these reasons, this court concludes that the property was not sold in a reasonably commercial manner to maximize the sale price. No compensatory damages shall be recovered at this point,

and the corpus of the funds received shall remain in escrow until further order of this court. Further, the Defendant's counterclaims are dismissed.