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MEL REALTY, LLC; RAFAEL LEVIN; 505 8TH STREET, LLC; 818 NEW YORK AVENUE, LLC; and 1217 BERGENLINE AVENUE, LLC, Plaintiffs, v. BAYONNE OVAL, LLC; OLEG LANGBORT; STEVEN MATOVSKY; and REDWOOD REALTY ADVISORS, LLC, Defendants.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-7752-17** Civil Action **OPINION**
MEL REALTY, LLC; RAFAEL LEVIN; 505 8TH STREET, LLC; 818 NEW YORK AVENUE, LLC; and 1217 BERGENLINE AVENUE, LLC, Plaintiffs, v. BAYONNE OVAL, LLC; OLEG LANGBORT; STEVEN MATOVSKY; and REDWOOD REALTY ADVISORS, LLC, Defendants.	

Argued: **April 26, 2019**
Decided: **April 26, 2019**

HONORABLE ROBERT C. WILSON, J.S.C.

Howard B. Leopold, Esq. appearing for plaintiffs/third-party defendants Mel Realty, LLC; 505 8th Street, LLC; 818 New York Avenue, LLC; 1217 Bergenline Avenue, LLC; Tal Steinberg; and SELA Realty Investments, LLC (from Leopold Law, LLC).

Jeffrey I. Spiegel, Esq. appearing for defendants/third-party plaintiffs Steven Matovski and Redwood Realty Advisors, LLC (from Lewis, Brisbois, Bisgaard & Smith, LLP).

FACTUAL BACKGROUND

THIS MATTER arises from a commercial real estate transaction commenced by Dr. Rafael Levin ("Levin") by and through his entity, Mel Realty, LLC ("Mel Realty"), which is a

holding company for 505 8th Street, LLC; 1217 Bergenline Avenue, LLC; and 818 New York Avenue, LLC (collectively, "Plaintiffs"). Plaintiffs were the purchasers of three subject buildings, consisting of twenty-four units, located at 505 8th Street, Union City, New Jersey; 818 New York Avenue, Union City, New Jersey; and 1217 Bergenline Avenue, Union City, New Jersey (collectively, the "Properties").

Redwood Realty Advisors, LLC ("Redwood Realty") is a real estate firm engaged as a business broker for real estate investment in New Jersey, and Steven Matovski ("Matovski") is employed with Redwood Realty as a real estate broker (collectively, the "Broker Defendants"). In March of 2015, defendant Oleg Langbort ("Langbort") asked Matovski to assist Bayonne Oval, LLC ("Bayonne Oval") in purchasing certain defaulted loans secured by four properties, three of which are the subject of the instant lawsuit. At that time, the Properties were in foreclosure with a court-appointed rent receiver, Cooper Real Estate Management, LLC.

In March of 2015, Langbort asked Matovski to assist Bayonne Oval by submitting an Open Public Records Act ("OPRA") request with Union City to obtain the rent registrations and other related information for the Properties to determine if they were rent-controlled. Several weeks after Matovski made the OPRA request, he received Union City's response in a sealed envelope, which he thereafter delivered to Langbort. In April 2015, Langbort purchased the defaulted loans secured by the Properties on behalf of Bayonne Oval, LLC.

I. The Broker Listing Agreement

In October 2015, Bayonne Oval prepared the Properties for resale. Bayonne Oval, through Langbort, forwarded to Matovski the Properties' financial information and rent rolls, and asked that he prepare an offering memorandum (the "Offering Memorandum") for prospective private buyers, listing the Properties' financials. Such financials included the number of units and the rental information for each unit.

Sometime around October 25, 2015, Bayonne Oval and Redwood Realty signed a broker's listing agreement (the "Listing Agreement") for the sale and marketing of the Properties. The Listing Agreement stated that the Properties were to be listed for sale at $3 million.

II. The Sale of the Properties and the Due Diligence Period

On April 27, 2016, Matovski sent an email to a number of investors marketing the Properties, attaching the Offering Memorandum. Plaintiffs' agent, third-party defendants Tal Steinberg ("Steinberg") of SELA Realty Investments, LLC ("SELA") were in receipt of the aforementioned email and Offering Memorandum, and touted the properties on behalf of Levin. The first page of the Offering Agreement included the following disclaimers:

> Neither Redwood Realty Advisors, its directors, officers, agents, advisors or affiliates make any representations or warrant, express or implied, as to accuracy or completeness of any materials or information provided, derived, or received. Materials or information from any source, whether written or verbal, that may be furnished for review are not a substitute for a party's active conduct of its own due diligence to determine these and other matters of significance to such party. Redwood Advisors will not investigate or verify any such matters or conduct due diligence for a party unless otherwise agreed in writing.
>
> EACH PARTY SHALL CONDUCT ITS OWN INDEPENDENT INVESTIGATION AND DUE DILIGENCE.
>
> Any party contemplating or under contract or in escrow for a transaction is urged to verify all information and to conduct their own inspections and investigations including through appropriate third-party independent professional selected by such party. All financial data should be verified by the party including by obtaining and reading applicable documents and reports and consulting appropriate independent professionals. Redwood Realty Advisors makes no warranties or representations regarding the veracity, completeness or relevance of any financial data or assumptions. Redwood Realty Advisors do not serve as a financial advisor to any party regarding any proposed transaction. All data and assumptions regarding financial performance, including that use for financial modeling purposes, may differ from actual data or

> performance. Any estimate of market rents and/or projected rents that may be provided to a party does not necessarily mean that rents can be established at or increased to that level. Parties must evaluate any applicable contractual and governmental limitations as well as well as market conditions, they can see factors and other issues in order to determine rents from or for the property.

On April 29, 2016, Levin and Langbort entered into a letter of intent for a sale price of $2.65 million for the Properties. Levin did not conduct any due diligence, but instead primarily relied on the due diligence performed by Steinberg in purchasing the Properties. The Broker Defendants claim that Steinberg never asked Matovski if the rents on the registrations were the legal rents for the Properties, claiming that Steinberg only asked if the rents were "legit." Plaintiffs contend that Steinberg made several requests as to the legal rents. Furthermore, the Broker Defendants state that the rents listed on the registration were considered "legit" because they were very close to what the tenants were actually paying. However, Plaintiffs argue that the rents represented on the registration were not "legit" because they were far less than the legal rents.

On May 11, 2016, Steinberg submitted OPRA requests to Union City requesting each of the Properties' rent registrations and any violations or open permits. Steinberg performed the OPRA requests on his own, and the Broker Defendants never saw copies of these requests. On May 18, 2016, Steinberg received Union City's response, including the "Rent Levelling Board City of Union City Annual Registration Statement," which specifically informed him that the rents listed on the registration were not the legal rents charged by Union City, stating the following:

> NOTE; the filing of rent registration statement does not constitute the finding by the Rent Levelling Board Administrator of the Rent Levelling Board that the rent contained in the statement is the legal rent for the apartment.

The contract of sale of the Properties between Levin and Bayonne Oval was executed on June 23, 2016 (the "Contract of Sale"). The Contract of Sale provided for a fifteen-day due diligence period, sixty-day closing, and set forth the parties' respective rights and obligations, including the key terms and conditions related to the "as-is" purchase of the Properties. The Contract of Sale also included respective due diligence requirements, disclaimers, representations, merger clauses, and exceptions. In the Contract of Sale, Plaintiffs acknowledged and agreed that the parties would not be liable or bound by any oral or written statements from any real estate broker, agent, employee, officer, servant, or any other person unless set forth in this agreement.

The parties also agreed to various provisions in the Contract of Sale related to the lack of warranties and representations of Bayonne Oval in light of the "as-is" nature of the transaction. By Section 23(f) of the Contract of Sale, Levin specifically acknowledged and agreed that "all prior understandings, agreements, representations and warranties, oral or written between Seller and Purchaser are merged" into this contract and that "it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this Contract."

Plaintiffs argue that the Contract of Sale included representations and statements as to the rent and included the rent roll. They claim that this information, together with the leases, lease renewals, ledger sheets, brokers' brochures, and oral representations were all incorrect, and entitle Plaintiffs to monetary damages.

On July 13, 2016, as per Plaintiffs' counsels' request, the parties executed the First Addendum to the Contract of Sale, which extended the due diligence period in order to preserve the buyers' rights under the due diligence contingency. The due diligence requirements were set forth in Schedule D of the Contract of Sale for each of the Properties, and included signed leases

in the possession of Cooper Real Estate and/or Bayonne Oval, rent registration statements, utility statements, operating statements, and related records for the Properties. Matovski, as the broker for Bayonne Oval, supplied the due diligence materials to Levin as set forth in Schedule D. Plaintiff contends that while these materials were in fact set forth in Schedule D, the information provided was incorrect and the legal rents were omitted from it.

Steinberg, on behalf of Levin, made the specific due diligence requests and conducted due diligence for the Properties. In doing the due diligence, Steinberg was tasked with ensuring the rents were both legal and accurate. On July 29, 2016, through various addendums, the Contract of Sale was reinstated and due diligence was noted as being concluded. Upon the conclusion of the due diligence period, Levin did not exercise his right to cancel the Contract of Sale.

III. Closing and Allegations Relating to Events After Closing

The closing was held on October 31, 2016. On that same date, Bayonne Oval conveyed the respective deeds to the Properties to the corporate Plaintiffs and non-party Emanuel Realty, LLC for the total sum of $2.65 million, consummating the sale of the Properties. From November 2016 until July 2017, none of the Plaintiffs raised any issues with the Broker Defendants regarding the Properties. On or about May 12, 2017, Steinberg filed another OPRA request with the Union City Rent Levelling Board office, requesting the entire rent control file, including all rent calculation letters which purportedly provided him with the legal rents of 1217 Bergenline Avenue.

The Broker Defendants contend that because the entire rent control files, including the rent calculation letters of the Properties, was a matter of public record, and Steinberg had been tasked with the due diligence, there was no reason Steinberg could not have obtained the legal rents of the Properties prior to their purchase other than his own lack of due diligence. Plaintiffs

base their claim for damages on the fact that they relied upon the Broker Defendants' representations and statements made regarding the "legitimacy" of the rents while negotiating the Contract of Sale. On July 5, 2017, nine months after the closing, Steinberg then met with Matovski and advised him that some tenants complained to him that they were supposed to pay less rent.

The Broker Defendants now move for summary judgment, seeking dismissal of Plaintiffs' amended complaint with prejudice. As previously stated, prior to purchase, Levin, through his agent Steinberg, was tasked with his own obligation to perform independent due diligence on the properties for purposes of conducting a comprehensive appraisal so as to evaluate their commercial potential, including determining what the actual rents were for each of the rent-controlled units.

However, Steinberg never bothered to perform the due diligence, as he never made the necessary inquiry with Union City to find out the legal rents of the rent-controlled units. Instead, Steinberg simply relied on the rent registrations expressly noting that the rents listed are not the same as the legal rents set by Union City. Steinberg admitted at his deposition that he could have received information regarding the legal rents of the Properties prior to purchase if he inquired with Union City, or demanded that Bayonne Oval provide warranties or make representations as to the legal rental information during the due diligence period. However, he failed to take any such action.

The Broker Defendants argue that summary judgment is appropriate in light of the foregoing, because Steinberg, as an agent of Levin, simply failed to properly conduct the required due diligence. That Steinberg knew there were no contractual warranties or representations being made as to any potentially incorrect information, including information provided in marketing materials or by the Broker Defendants.

Plaintiffs cross-move for summary judgment, arguing that the Broker Defendants' had actual knowledge as to the legal rents of the Properties eighteen months prior to the closing date, and this somehow negates their own failure to appropriately conduct due diligence and inquire with Union City as to the publically-available legal rents. They claim that the Broker Defendants had actual knowledge of the rent discrepancy because the legal rents were substantially lower than the rents set forth on the brokers' brochure, upon which Plaintiffs relied.

For the reasons set forth below, the Broker Defendants' motion for summary judgment is hereby **GRANTED** and Plaintiffs' cross-motion for summary judgment is **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. Plaintiffs' Claim for Violation of the New Jersey Consumer Fraud Act is Dismissed

A. The New Jersey Consumer Fraud Act Does Not Apply to Disputes Involving Two Sophisticated Parties Involved in the Sale of Commercial Properties

As a threshold matter, Plaintiffs' claim for a violation of the New Jersey Consumer Fraud Act ("NJCFA") fails because it is inapplicable to the matter at hand. Specifically, the NJCFA is inapplicable in disputes between sophisticated parties in the same field.

The NJCFA does not apply to every type of sale or transaction in the marketplace, but instead its application turns on the nature of the transaction. Papergraphics Intern., Inc. v. Correa, 389 N.J. Super. 8, 12 (App. Div. 2006). The NJCFA in not applicable to private commercial transactions between sophisticated commercial entities. See, e.g., J&R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259 (3d Cir. 1994) (holding that purchase of a commercial restaurant franchise is not covered by the NJCFA); Princeton Healthcare Svs. v. Netsmart New York, Inc., 422 N.J. Super. 467, 474 (App. Div. 2011) ("[A] heavily negotiated contract between two sophisticated corporate entities does not constitute a 'sale of merchandise' within the intent of the [NJ]CFA."); Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co., 226 F.Supp. 2d 557 (D.N.J. 2002) (accounting, inventory, and chargeback processing services are not covered under the NJCFA). Furthermore, New Jersey courts have narrowly construed the applicability of the NJCFA to parties to real estate transactions. See, 539 Absecon Boulevard, LLC v. Shan Enters. Ltd. P'ship, 405 N.J. Super. 242, 274-75 (App. Div. 2009); Di Bernardo v. Mosley, 206 N.J. Super. 371, 374 (App. Div. 1986).

In this instance, there is no doubt that the parties here were experienced, sophisticated entities of relatively equal bargaining power, which engaged in negotiations to purchase the

Properties through experienced counsel. The Broker Defendants are licensed real estate brokers engaged in the business of brokering commercial real estate in New Jersey. Plaintiffs are sophisticated commercial real estate investment purchasers who own thirty-four properties, consisting of 815 commercial units, valued at over $123,040,000. The parties spent four months negotiating and performing due diligence on the sale of the Properties.

Therefore, because the transaction involved sophisticated parties with extensive experience engaged in a highly negotiated, arms-length transaction involving the execution of a contract for commercial properties, the NJCFA is inapplicable, and summary judgment is granted in favor of the Broker Defendants with respect to Plaintiffs' claim for a violation of the NJCFA.

B. The New Jersey Consumer Fraud Act is Inapplicable Because Plaintiffs Cannot Demonstrate Intent or Reliance

A plaintiff must set forth sufficient facts to prove the following factors for a viable NJCFA claim: (1) unlawful conduct by the defendant; (2) an ascertainable loss by the plaintiff; and (3) a causal connection between the defendant's unlawful conduct and the plaintiff's ascertainable loss. N.J.S.A. 56:8-2. Pursuant to the statute, a practice is "unlawful" whether or not a person was misled, deceived, or damaged. Id. Unlawful conduct as defined by the NJCFA has been interpreted to fall into three general categories: (1) affirmative acts, (2) knowing omissions, and (3) the violation of regulations promulgated under the NJCFA. Cox v. Sears Roebuck & Co., 138 N.J. 2, 17-18 (1994). However, an unlawful act comprised of an omission requires a showing that it was *knowing and intentional.* Id. (emphasis added).

Furthermore, the NJCFA requires that a plaintiff show that a defendant concealed material information so that the plaintiff would rely on the concealment in agreeing to the commercial transaction. N.J.S.A. 56:8-2; Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 377

(1977); Leon v. Rite Aid Corp., 340 N.J. Super. 462, 469 (2001). While a broker may be liable under the NJCFA for failure to disclose a material fact, the client must demonstrate that the broker had knowledge of the fact. Mango v. Pierce-Coombs, 370 N.J. Super. 239, 254 (App. Div. 2004).

In this instance, Plaintiffs cannot raise an issue of fact with regard to this element of an NJCFA claim. The record shows that the Broker Defendants had no knowledge at any point as to the Properties' legal rents. In or around March 2015, at least a year before the Contract of Sale, Langbort on behalf of Bayonne Oval asked Matovski to submit an OPRA request to Union City, to obtain the rent registrations and related information for the Properties. While the parties disagree as to whether Matovski ever opened the envelope containing Union City's response to the OPRA request, this fact is immaterial and of no moment. This is because Plaintiffs performed their own due diligence without the assistance of the Broker Defendants, and therefore, there can be no reliance by Plaintiffs upon the Broker Defendants.

It is illogical that Plaintiffs relied on the Offering Memorandum, or any other representations the Broker Defendants may have made verbally or through marketing materials, when Plaintiffs were responsible for reaffirming all material information for themselves by conducting their own due diligence, or seeking publically-available information through their own OPRA requests.

Therefore, Plaintiffs have failed to show that the Broker Defendants had any knowledge of the legal rents, and more importantly, have failed to show any intentional concealment by the Broker Defendants or any reliance by Plaintiffs upon such concealment. Therefore, Plaintiffs claim for a violation of the NJCFA must fail for this reason as well.

II. Plaintiffs' Expert Report is an Inadmissible Net Opinion, and Must be Stricken

To establish a negligence claim, a plaintiff must prove the following: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached such a duty; (3) the defendant's breach was the proximate cause of the plaintiff's damages; and (4) the plaintiff suffered actual damages. Weinberg v. Dinger, 106 N.J. 469, 484 (1987). New Jersey requires that a plaintiff proffer appropriate expert testimony to establish the duties owed by a real estate broker. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 444-45 (1993) (holding that expert testimony is needed to establish the implied duties owed by a real estate broker).

It is well-established that an expert may not provide an opinion at trial that constitutes a "mere net opinion." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011). "The rule prohibiting net opinions is a 'corollary' of New Jersey Rule of Evidence 703, which provides that an expert's testimony 'may be based on facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts in forming opinions on the same subject.'" State v. Townsend, 186 N.J. 473, 494 (2006).

The net opinion rule "require[es] that the expert 'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Pomerantz Paper Corp., 207 N.J. at 372. Therefore, an expert report will be deemed an inadmissible net opinion if the expert "cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is 'personal.'" Id. In addition, a court should reject expert opinions when they directly contradict the evidence presented. Smith v. Estate of Kelly, 343 N.J. Super. 480, 497 (App. Div. 2001).

Plaintiffs have proffered an expert report from Michelle Streicher (the "Streicher Report") which is inadmissible as net opinion, because it contradicts the record, contains bald speculation, and contains an improper and misapplied standard of care.

A. Plaintiffs' Expert Report Contradicts the Record

A party's burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert's speculation that contradicts that record. Townsend v. Pierre, 221 N.J. 36, 55 (2015). Courts should reject expert opinions when they directly contradict the evidence presented. Smith, 343 N.J. Super. at 497.

In this instance, the Streicher Report relies on proof which is contradicted by the record, and therefore, must be stricken. First, the Streicher Report states the following: "Matovsky [sic], obtained the legal determined rents for the [Properties] and failed to disclose this information to the buyers of the [P]roperties. This information was relevant and material to the buyers' purchase of the [P]roperties. Failing to disclose this information, constitutes a breach of the brokers' duties."

The conclusion set forth above is directly contradicted by testimony in the record. As detailed above in Section II, Matovski never had knowledge of the legal rents of the Properties, as he testified he never opened the envelope containing the responses from the OPRA request filed with Union City. Without having actual knowledge that the Properties were subject to rent control, there could be no information that Matovski failed to disclose.

Second, the Streicher Report claims that Steinberg verbally requested the "legal rents" from Matovski when he was provided only "registered rents." However, this directly contradicts the deposition testimony of Steinberg, who admitted that he never asked Matovski whether the listed rents on the Offering Memorandum were legal, but only whether the rents were "legit."

Finally, the Streicher Report asserts that Matovski was aware that there was an extra required step in Union City for obtaining the rent determination. However, Matovski testified that he made the OPRA request seeking the rent registration file at the direction of Langbort. He never testified that he was aware that Union City required an extra step different from other towns in New Jersey.

Therefore, because the liability assessment of the Streicher Report relies on proofs contradicted by the record, it must be stricken from the record as a net opinion.

B. Plaintiffs' Expert Report Fails to Establish the Standard of Care

The Streicher Report also fails to establish or rely upon a bona fide standard of care, and instead merely identifies a statute and then supplies alleged facts to make bare conclusions that the Broker Defendants breached their duty. As such, the Streicher Report is an inadmissible net opinion. The Streicher Report focuses on the Broker Defendants' supposed violations of N.J.S.A. 45:15-17(e), which authorizes the New Jersey Real Estate Commission to suspend or revoke the license of a real estate broker, or to impose fines on a real estate broker, who engages in certain prohibited activities identified in the statute.

However, the Streicher Report is inadmissible insofar as it relies on this statute. The Supreme Court of New Jersey has held that a statute cannot be utilized to supply the basis for a duty of care in a private dispute, absent a demonstration that the alleged standard of care or obligation is a widely-accepted, objective baseline requirement within the industry. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 401 (2014). The Streicher Report fails to do so. Furthermore, it does not point to any written industry standards, or expressly show what the various specific duties are of a real estate broker, which have been widely adopted by others in the field, or what commercial real estate brokers routinely do.

Additionally, the Streicher Report fails to identify any written or unwritten rule that imposes a duty upon a commercial real estate broker to investigate and disclose the financial conditions on the property. The report's opinion rests solely on Matovski's purported breach of a duty in failing to disclose the legal rents of the Properties, but ignores the fact that the Broker Defendants never knew the legal rents.

N.J.S.A. 45:15-17 also cannot form the basis for the purported standard of care. While the Broker Defendants fall within the scope of the statute, it does not provide for private enforcement actions. Not only do Plaintiffs not have a private right of action under this statute, nothing in the legislative history of it directly or indirectly references creating a standard of care.

Finally, the Streicher Report also opines that the Broker Defendants breached their fiduciary duty. In fact, Plaintiffs do not assert a claim for breach of fiduciary duty. Even if they did, the facts set forth above would require rejection on the basis of the claim, since the Broker Defendants were not Plaintiffs' agents and did not engage in actionable conduct.

C. Plaintiffs Fail to Establish Damages

A necessary element of a negligence action is the ability to prove damages. The "preferred valuation method for apartment buildings is the capitalization of income, since investors purchase apartment buildings as income producing properties." Brunetti v. City of Clifton, 7 N.J. Tax 161, 180 (1984). "[C]apitalization rates should be determined by the marketplace." Id. at 178. Expert testimony is required for the purpose of establishing the valuation of real property, and courts are cautioned against "fixing market value of real property without the benefit of expert appraisal evidence." N.J. Highway Auth. v. Rule, 41 N.J. Super. 385, 389-90 (App. Div. 1956).

However, Plaintiffs have not provided any expert to opine as to their purported damages. During Ms. Streicher's deposition, Plaintiffs withdrew her report to the extent that she opined as

to damages as they stated, on the record, they will no longer be using her as their damages expert. Without an expert to properly establish damages, or an expert appraiser that is qualified to provide their opinion as to valuation, Plaintiffs cannot identify any damages proximately caused by the Broker Defendants' alleged actions. Therefore, summary judgment as to Plaintiffs' negligence claims is granted.

III. Plaintiffs Fail to Establish *Prima Facie* Claims for Tortious Interference with Prospective Economic Advantage, Fraudulent Inducement, Negligent Misrepresentation, and Negligence Against the Broker Defendants

Plaintiffs' claims for tortious interference with prospective economic advantage, fraudulent inducement, negligent misrepresentation, and negligence fail for several independent reasons.

A. Plaintiffs Have Failed to Show the Broker Defendants had Intent to Commit the Aforementioned Torts

The elements for *prima facie* fraudulent inducement are as follows: (1) a misrepresentation of material fact; (2) knowledge of belief by the defendant of its falsity; (3) intent that the other parties rely on the misrepresentation; and (4) reasonable reliance thereon by the other party. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). Fraud in the inducement does not differ materially from common-law fraud, as it provides a cognizable basis for equitable relief in the event a false promise induced reliance. Lipsit v. Leonard, 64 N.J. 276, 283 (1974). Fraud must be proven by clear and convincing evidence. Albright v. Burns, 206 N.J. Super. 625, 636 (App. Div. 1986).

To establish a cause of action for tortious interference with prospective economic benefit, a party must show that: (1) there was an existing contractual relationship or reasonable expectation of economic advantage; (2) the interference was intentional; (3) the interference was without justification or excuse, often described as malice; (4) the interference caused the loss of

the prospective gain of the contract, or at least that there was a reasonable probability that if the wrongful acts had not occurred, the agreement would have been performed to the party's benefit; and (5) the interference resulted in damage. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 752 (1989).

Plaintiffs allege that the Broker Defendants acted fraudulently when they allegedly induced Plaintiffs to sign the Contract of Sale and purchased the Properties when they failed and refused to disclose the fact that the tenants had and would be filing complaints for unlawfully high rent. In alleging tortious interference, Plaintiffs assert that the Broker Defendants interfered with the Contract of Sale by failing and refusing to disclose that the rents in the Offering Memorandum and Contract of Sale were not the legal rents.

However, the record lacks any evidence that the Broker Defendants had any intent to defraud or interfere, or that they purposely withheld the legal rents. As previously stated, Plaintiffs cannot raise an issue of fact because the Broker Defendants never had knowledge that the rents provided to Plaintiffs in the Offering Memorandum were not the legal rents set by Union City. In creating the Offering Memorandum, Matovski had used the rent rolls and lease information supplied by Bayonne Oval. Matovski believed the information supplied by Bayonne Oval to be accurate in that it reflected the rents tenants were paying, which was correct. Because Matovski testified he never saw the contents of Union City's response to the OPRA request, he had no way of knowing that the rents reflected in the Offering Memorandum were not the supposed legal rents.

Because there is no evidence of intent, let alone malice, on the part of the Broker Defendants, Plaintiffs' causes of action for fraud and tortious interference are dismissed, and summary judgment is granted in favor of the Broker Defendants.

B. Plaintiffs Have Failed to Show That They Reasonably Relied on the Broker Defendants' Material Representations

Claims for fraud or negligence must fail if a plaintiff did not reasonably rely on the defendant's conduct. Banco Popular v. Gandi, 184 N.J. 161, 172-73 (2005); Kaufman v. I-Stat Com., 165 N.J. 94, 109 (2000); Kuhnel v. CAN Ins. Cos., 322 N.J. Super. 568, 581 (App. Div. 1999). A party is not justified in relying on representations made when it had ample opportunity to ascertain the truth before acting. Fleming Cos., Inc. v. Thriftway Medford Lakes, Inc., 913 F. Supp. 837, 844 (D.N.J. 1995). If a party to whom representations are made nevertheless chooses to investigate the relevant state of facts for itself, it should be deemed to have relied on its own investigations (or lack thereof) and will be charged with knowledge of whatever it could have discovered by a reasonable investigation. DSK Enter., Inc. v. United Jersey Bank, 189 N.J. Super. 242, 251 (App. Div. 1983); Byrne v. Weichert Realtors, 290 N.J. Super. 126, 137 (App. Div. 1996) ("[I]n instances in which a party undertakes an independent investigation and relies on it, there can be no reliance.").

Here, Plaintiffs' claims fail as they could not have reasonably relied on the Broker Defendants' representations as to the rents of the Properties. First, the Offering Memorandum specifically disclaimed any representation as to the accuracy of the information, apprising every prospective buyer that they must conduct their own due diligence to verify all financial information, and they must review any applicable governmental limitations in order to determine rents from or for the Properties. Second, pursuant to the Contract of Sale, Plaintiffs engaged in a four-month due diligence period, which enabled them to opt-out of the transaction if their due diligence revealed adverse information. Third, the rent registration Steinberg received pursuant to his OPRA request expressly informed Plaintiffs that the rental information on the form was not the same as the legal rents. Fourth, the legal rental information was a matter of public

record, which Plaintiffs could have obtained prior to the closing if they simply inquired with Union City. Finally, the Contract of Sale, which Plaintiffs heavily negotiated, specifically stated that Plaintiffs were conducting their own due diligence, and were not relying on any statements from third parties.

In sum, the burden was on Plaintiffs to satisfy themselves as to what information they needed to confirm before finalizing the Contract of Sale. Plaintiffs cannot now be permitted to attack the Broker Defendants because of their own oversight, as their reliance was unjustifiable. See, Nappe v. Anschelewitz, Barr, Ansell & Bonello, 189 N.J. Super. 347, 355 (App. Div. 1983) (rejecting the plaintiff's fraud claim, holding that reliance was unjustifiable because the plaintiff did not pursue further investigation of readily apparent information that, if pursued, would have revealed that falsity of the representation).

Furthermore, to the extent Plaintiffs contend that they relied on the advice of the Broker Defendants, as noted above, neither Steinberg nor Plaintiffs ever asked Matovski whether the listed rents on the Offering Memorandum were legal. According to Steinberg's testimony, he asked Matovski if the rents were "legit," for which Matovski allegedly affirmed. Steinberg did not dispute that the rent regulations were "legit" in that the tenants were in fact paying rents that closely matched the document. Accordingly, Plaintiffs could not have reasonably relied on the statements made by the Broker Defendants to sustain a claim for damages.

C. The Broker Defendants Had No Independent Duty to Uncover Legal Rents

Plaintiffs' tort-based claims require an expert to establish a standard of care. Since Plaintiffs have failed to produce an expert to do so, these claims must be dismissed. However, even if Plaintiffs did produce an expert to opine as to a standard of care, there is no authority holding that a commercial real estate broker is obligated to disclose financial conditions of a

property absent an express agreement to do so. It is the purchaser who must undertake due diligence in commercial transactions, as was the case here. The New Jersey Supreme Court has held that a commercial real estate broker can be liable for the nondisclosure of off-site defective physical conditions only if those conditions were known to the broker, and unknown and not readily observable by the buyer. Strawn v. Canuso, 140 N.J. 43, 65 (1995).

The record is clear that the Broker Defendants had no knowledge of the Properties' true legal rents prior to the purchase, and had no knowledge of tenants complaining, or planning to make complaints, as to the higher rents they were being charged. As stated repeatedly above, Plaintiffs had access to the legal rents of the Properties, and any complaints regarding the legal rents because they were public information readily accessible before the closing date. Therefore, summary judgment must be granted as to Plaintiffs' negligence claim for these reasons as well.

D. Assuming **Arguendo** *a Duty to Investigate Legal Rents, the Due Diligence Undertaken by Steinberg was a Superseding Intervening Cause Which Undercuts Liability as to the Broker Defendants*

With respect to establishing proximate cause for a negligence claim, a causal connection may be broken by a superseding intervening cause. Davis v. Brooks, 280 N.J. Super. 406, 412 (App. Div. 1993). Such a cause must be one that entirely supersedes the operation of the first tortfeasor's negligence that it alone caused the injury, without the first tortfeasor's negligence contributing thereto in any material way. Id. However, when the original tortfeasor's negligence is an essential link in the chain of causation, such a causal connection is not broken if the intervening cause is one which might, in the natural and ordinary course of things, be anticipated if not entirely improbable. Id.

Here, the record shows that Matovski had no knowledge that the rents represented in the certified rent roll and the rents provided by Bayonne Oval for use in the Offering Memorandum were not the legal rents for the Properties. The third-party defendants were charged with the sole

responsibility of conducting due diligence, and their failure to properly do so and uncover the legality of the rents, which was public knowledge, is a superseding intervening conduct which alone caused the injuries claimed by Plaintiff. Therefore, summary judgment must be granted as to Plaintiffs' negligence claims for this reason as well.

IV. Plaintiffs' Claim for Unjust Enrichment is Dismissed, as it is Inapplicable to the Circumstances in this Matter

The doctrine of unjust enrichment "rests on the equitable principal that a person shall not be allowed to enrich himself unjustly at the expense of another." Goldsmith v. Camden Cnty. Surrogate's Office, 408 N.J. Super. 376, 382 (App. Div. 2009). The unjust enrichment doctrine requires that a plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on the defendant, and that the failure of remuneration enriched the defendant beyond its contractual rights. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994).

In this instance. Plaintiffs' claim for unjust enrichment rests on allegations that the Broker Defendants received a higher payment than they were entitled to under the Contract of Sale due to fraud or negligence in misrepresenting the rents of the units. Plaintiffs did not perform any services, or otherwise benefit the Broker Defendants, and they did not expect remuneration from the Broker Defendants. To the extent that the Broker Defendants were paid for brokering the sale of the Properties, that amount was paid by the seller, Bayonne Oval, from the sale price as per the Listing Agreement and the Contract of Sale. Therefore, the doctrine of unjust enrichment is inapplicable, and summary judgment is granted as to this claim.

V. Plaintiffs' Claims for Breach of the Third-Party Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing Are Dismissed, as there was no Contract or Agreement Between Plaintiffs and the Broker Defendants

"Breach of a third-party complaint" is not a recognized cause of action in the State of New Jersey. To the extent that Plaintiffs intended to plead breach of contract, the claim must be dismissed as there was no contract or agreement between the Plaintiffs and Broker Defendants. See, EnviroFinance Group, LLC v. Environmental Barrier Co., LLC, 440 N.J. Super. 325, 345 (App. Div. 2015) (to prevail on a breach of contract claim, a party must prove a valid contract existed between itself and the opposing party). Furthermore, a claim for breach of the implied covenant of good faith and fair dealing cannot prevail if there is no valid contract between the parties. Sons of Thunder v. Borden, Inc., 148 N.J. 396 (1997).

To the extent Plaintiffs attempt to assert rights as intended third-party beneficiaries to the Listing Agreement between Bayonne Oval and Redwood Realty, this claim must also fail. In New Jersey, third-party beneficiaries may sue for breach of contract even without privity. Houdaille Constr. Materials, Inc. v. American Tel. & Tel. Co., 166 N.J. Super. 172, 184-85 (Law Div. 1979). However, "[w]hen a court determines the existence of 'third-party beneficiary' status, the inquiry focuses on whether the parties to the contract intended others to benefit from the existence of the contract, or whether the benefit so derived arises merely as an unintended incident of the agreement. Ross v. Lowitz, 222 N.J. 494, 513 (2015) (quoting Broadway Maint. Corp. v. Rutgers, 90 N.J. 253, 259 (1982).

Here, the Listing Agreement makes it clear that the only intended parties of the contract are Redwood Realty and Bayonne Oval. The Listing Agreement gives no indication or mention of any other party who is to benefit from it, including Plaintiffs. Therefore, summary judgment is granted, and Plaintiffs' claim for breach of a third-party contract is dismissed.

VI. Plaintiffs' Claim for Civil Conspiracy Fails as the Record is Devoid of Evidence to Support Such a Claim

A claim for civil conspiracy requires proof of "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." Banco Popular, 184 N.J. at 177. For liability to be imposed, the parties must "understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do their part to further them." Id. "Most importantly, the gist of the claim is not the unlawful agreement, but the underlying wrong which, absent the conspiracy, would give a right of action." Id. at 177-78.

The record is devoid of any information or documentation that would show that the Broker Defendants knew of the legal rents set by Union City prior to the closing, or that tenants had complained of violations of the rent laws and regulations. Based upon the complete absence of any evidence of a civil conspiracy to which the Broker Defendants were a party, the Court must dismiss this count, and grant summary judgment in favor of the Broker Defendants.

VII. Plaintiffs' Claims for "Recklessness" and "Punitive Damages" are Dismissed, as they are not Recognized Causes of Action in the State of New Jersey

Plaintiffs' causes of action for "recklessness" and "punitive damages" are not recognized in New Jersey, and are dismissed. Recklessness is merely an element to an underlying claim or a standard of care. See, Dare v. Freefall Adventures, 349 N.J. Super. 205 (App. Div. 2002); Draney v. Bachman, 138 N.J. Super. 503 (Law Div. 1976). Similarly, punitive damages are a remedy, not a substantive cause of action. Gautam v. De Luca, 215 N.J. Super. 388, 395-96 (App. Div. 1987).

CONCLUSION

For the aforementioned reasons, the Broker Defendants' Motion for summary judgment is **GRANTED** and Plaintiffs' cross-motion for summary judgment is **DENIED**.