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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2354-21

INVESTORS COMMERCIAL
CAPITAL, LLC,

Plaintiff-Appellant,

v.

JARIVETTE ANDUJAR, a/k/a
JARIVETTE SWOPE, a/k/a
JARIVETTE ANDUJAR
SWOPE, BRIAN F. SWOPE, and
OAK LEAF FINANCIAL, LLC,

Defendants-Respondents,

and

KIRKLAND FINANCIAL,
LLC,

Defendant.

Argued March 20, 2023 – Decided May 26, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law
Division, Atlantic County, Docket No. L-0195-19.

William P. Rubley argued the cause for appellant (Cooper Levenson, PA, attorneys; William P. Rubley, on the briefs).

Justin R. White argued the cause for respondent Jarivette Andujar (Testa Heck Testa & White, PA, attorneys; Justin R. White, on the brief).

Brian F. Swope, respondent, argued the cause pro se.

PER CURIAM

Plaintiff Investors Commercial Capital, LLC appeals from the March 2, 2022 Law Division orders granting summary judgment in favor of defendants Jarivette Andujar and her husband, Brian Swope, thereby dismissing with prejudice plaintiff's complaint seeking priority of its money judgment lien on defendants' real property over the second mortgage lien of a third party, defendant Oak Leaf Financial, LLC (OLF). We affirm.

I.

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in the light most favorable to plaintiff. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

The complaint stemmed from plaintiff's dispute over the order of priority of security interests in Andujar's and Swope's marital property purchased on September 30, 2015, four months after the couple married. Before the marriage, on November 16, 2007, plaintiff had obtained a judgment in the Superior Court, Law Division, against Andujar in her maiden name, "Jarivette Andujar," in the amount of \$332,492.15, after Andujar defaulted on a commercial note. On December 11, 2007, the judgment was docketed as a statewide lien.

After the couple married, they jointly purchased a marital home located in Folsom. The couple financed the \$649,900 purchase price with a thirty-year mortgage through AnnieMac Home Mortgage (AMHM). During the application process, Andujar submitted a uniform residential loan application to AMHM on August 24, 2015. Under "Borrower's Name," Andujar's first name was misspelled by the omission of the second "e." She also used her maiden name, rather than her married name, because she had not yet changed her name. In total, the AMHM loan application included twenty-seven separate documents where Andujar used her maiden name to sign the documents. Nonetheless, Andujar provided AMHM with her correct date of birth, social security number, and other personal identifiers.

Despite Andujar's use of her maiden name on the application paperwork, during the loan processing, on September 14, 2015, State Capital Title & Abstract Co. certified to Dominion Title Services/Bridgeton, Inc. that it had conducted a twenty-year judgment search and there were no outstanding judgments against "Brian F. Swope" or "Jarivette Swope." Shortly thereafter, AMHM approved the couple's application, providing a loan in the amount of \$417,000 to finance the purchase of the Folsom property. The remaining balance of the purchase price was paid by Swope from his savings.

The closing occurred on September 30, 2015. To secure repayment of the loan, the couple executed a purchase money mortgage in favor of AMHM on the same date. The AMHM mortgage documents contained the same misspelling of Andujar's first name, but listed Andujar's married name, rather than her maiden name, as used in the application. Thus, the "Mortgage Cover Page" listed the names of the "[g]rantor/[b]orrower" as "BRIAN F. SWOPE AND JARIVETT SWOPE," and the signature page reflected the same names as the cover page. The deed specified that the couple held title to the Folsom property as "BRIAN F. SWOPE and JARIVETTE SWOPE, husband and wife."

Despite the misspelling of her first name and the omission of her maiden name in the closing documents, as part of the closing process, Andujar executed

a "Signature/Name Affidavit" which attested that "Jarivette Swope and Jarivette Andujar [were] one and the same person." In addition, during her deposition testimony, Andujar testified that when they closed on the Folsom property, a representative of Dominion Title Services advised her that it was acceptable for her name to appear as "Jarivette Swope" on the deed given her recent marriage. The AMHM mortgage and deed to the Folsom property were subsequently recorded on October 8, 2015. The AMHM mortgage loan was later assigned to Kirkland Financial, LLC.

Following the purchase of the marital property, around March 2016, Andujar applied for a \$250,000 commercial loan from OLF, a private lender, to expand and cover expenses for her daycare business, ABC Learning Academy, LLC. Andujar was the sole and managing member of the business. In lieu of a formal loan application, the couple provided OLF with a personal financial statement. On the statement, Andujar used her maiden name rather than her married name because she still had not yet legally changed her name.

On March 10, 2016, Charles Jones Search, a vendor for OLF's title company, MidLantic Title, conducted a twenty-year judgment search. Although Andujar had applied for the OLF loan using her maiden name, the vendor conducted the judgment search using her married name and certified to

MidLantic Title that a search of applicable indices and docketts from March 10, 1996, to March 10, 2016, did not reveal any judgments under the names "Brian Swope" or "Jarivette Swope." Shortly thereafter, on March 12, 2016, Swope and Andujar, as personal guarantors, and Andujar, on behalf of her business, accepted OLF's offer to loan ABC Learning Academy \$250,000 by executing a term sheet.

On March 23, 2016, the closing on the OLF loan occurred. Present at the closing were Andujar, Swope, an OLF representative, and a title agent from MidLantic Title. As security for the repayment of the OLF loan, Swope and Andujar executed a second mortgage on their Folsom property in favor of OLF for \$250,000. The OLF mortgage was subordinate to the AMHM mortgage. During the closing, Andujar signed at least five documents prepared by OLF which identified her as the borrower using the name "Jarivette Andujar n/k/a/ Jarivette Swope." Andujar also executed a "Same Name Affidavit" in which she attested that "Jarivette Swope" and "Jarivette Andujar" were "one and the same person."

In addition, Andujar and Swope executed an affidavit of title in which they attested to: never having "used any other names"; that there were "no pending lawsuits or judgments against [them] or other legal obligations which

may be enforced against the [p]roperty"; and that there were no prior marriages. Despite the affidavit of title providing a section for "[e]xceptions and [a]dditions," Andujar and Swope failed to disclose that Andujar previously went by her maiden name, that plaintiff had an outstanding judgment against her under her maiden name, and that Andujar had been married before.

When Andujar and Swope were purchasing their marital property, Andujar started the process of selling her preexisting home, a property located in Malaga that Andujar had purchased in 2013. When Andujar had purchased the Malaga property, plaintiff's 2007 judgment had attached as a lien against the property. Plaintiff's 2007 judgment lien was brought to Andujar's attention during negotiations with a potential buyer, who demanded that the judgment be satisfied. As a result of negotiations between plaintiff and Andujar's title company, on April 4, 2016, plaintiff and Andujar reached an agreement to release the judgment lien on the Malaga property upon payment of \$25,000. The release was finalized at the April 4, 2016 closing of the Malaga property and memorialized on the HUD-1 settlement statement executed by Andujar and the buyers of the Malaga property.

After discovering that its judgment lien was subordinate to the AMHM and OLF mortgages, on January 28, 2019, plaintiff filed a four-count complaint

against Andujar, Swope, OLF, and Kirkland, AMHM's assignee. In the complaint, as to Andujar and Swope, plaintiff alleged common law fraud (count one), civil conspiracy to commit fraud (count two), and negligent misrepresentation (count three). Plaintiff claimed that Andujar and Swope "made . . . false statements and misrepresentations on the AMHM and OLF mortgage documents knowing [the mortgagees] would rely on it" in order "to induce AMHM and OLF to make the loans."

Specifically, plaintiff alleged that Andujar and Swope falsely certified to both AMHM and OLF that "'there [were] no pending lawsuits or judgments against [Andujar].'" Plaintiff claimed Andujar had known about the 2007 judgment since November 21, 2007, when "she was sent notice," and Swope became "aware of the 2007 . . . [j]udgment against his wife" after being included in an "email chain dated February 27, 2016," in connection with the sale of the Malaga property, approximately one month before the OLF loan closed. Plaintiff also asserted that Andujar and Swope "knew that [Andujar's] last name was never legally changed to Swope" when she "sign[ed] all documents under the alias 'Jarivette Swope.'"

In count four, plaintiff demanded declaratory judgment against all four defendants so that its "2007 [f]inal [j]udgment lien takes priority over the

AMHM mortgage . . . as well as priority over the second OLF mortgage." Plaintiff claimed that due to Andujar's and Swope's tortious conduct, "the 2007 [f]inal [j]udgment [l]ien failed to attach at the time of closing" to the Folsom property, placing plaintiff in a junior lien position in relation to the AMHM and OLF mortgages. In addition to seeking declaratory relief, plaintiff requested monetary damages as well as "attorney's fees and costs." On March 5, 2019, plaintiff voluntarily dismissed its claim against Kirkland.

During discovery, in addition to Andujar and Swope, Donald Young, OLF's managing member and Barry Sharer, plaintiff's sole member, were deposed. During his deposition, Sharer conceded that Swope never "made any false statements to [him] or [his] company." Swope testified that he did not learn about plaintiff's judgment against his wife until "the end of March, beginning of April [2016]." Swope admitted that he read an email dated March 23, 2016, that made "a reference to [plaintiff's] judgment," but he did not "inquire any further as to what that was in reference to" because he thought "it was just something that [Andujar] had already taken care of." Swope also explained that he was under the impression that the "email dated March 23, 2016[, was] related to [an] IRS lien[,] not [plaintiff's] lien."

When questioned about the omission of Andujar's maiden name under the "marital history" section of the affidavit of title executed during the closing of the OLF loan, Swope admitted that "[i]n hindsight[,] it's not technically true" that Andujar "never used any other names," and that Andujar "should [have] list[ed] her maiden name." However, Swope stated that he left the section blank because the title company "prepared" the document and he believed Andujar was "allowed to use [his] last name." He also claimed that he "didn't notice it at the time" because it was "one line of [fifty] some documents [they] signed" during the closing, and it was "not [his] job" to prepare the documents. Nonetheless, he admitted that he filled in the section that "sa[id they] were married on [5]/22/15," which was immediately above the maiden-name line he omitted to address.

Andujar's deposition testimony both confirmed and contradicted parts of Swope's testimony. Andujar testified that Swope may have been aware of plaintiff's judgment as early as February 27, 2016, based on an email exchange he was included on regarding unrelated issues involving the closing of her Malaga property. However, she stated he did not know "[t]hat th[e] judgment was still in place." Andujar also claimed that when she signed the OLF affidavit of title on March 23, 2016, "[she] assumed that [she] didn't have a judgment

anymore because . . . the HUD[-1] sheets . . . said release of judgment" and listed the \$25,000 payment to plaintiff. Thus, Andujar was under the impression that the \$25,000 settlement payment releasing plaintiff's judgment lien from the Malaga property was a release of the entire judgment, and she "didn't know that [she] was still going to be held responsible for anything else."

When questioned about the use of her married name on the OLF mortgage, Andujar testified that "[t]here were two sets of document[s] . . . at th[e] settlement table." She explained that "all of the paperwork was drawn up [using] Jarivette Andujar," but her name was later changed on the closing documents to "Jarivette Andujar [n/k/a] Jarivette Swope" to match the name listed on the "[d]eed of the house." Andujar claimed that "[she] submitted everything in [her] maiden name," and that if there was an error, it was on the part of "the title company or the loan company" because she was told by them to use her married name. Andujar testified that at the OLF closing, she presented the title company representative with her driver's license showing her maiden name and asked whether the omission of her maiden name on the documents was "going to be a problem." According to Andujar, the title company representative responded that it was not a problem because Andujar and Swope were "husband and wife."

At his deposition, Young explained that OLF did not have a "formal loan application" for prospective borrowers. Rather, when OLF was considering whether to approve a loan, the "three . . . considerations" were "[t]he ability to service debt, the collateral, and the exit strategy," with the "primary consideration [being] the value of the collateral." Young testified that OLF did not "run a credit search," "a title report, [or] a judgment search for [Andujar] when it offered th[e] term sheet." Instead, OLF "rel[ie]d on the title company" to determine "what [OLF's lien] position [was]." Young stated that OLF was not aware of plaintiff's judgment against Andujar until "February or March of [2019]." According to Young, had OLF been aware of plaintiff's judgment against Andujar, "it would [have been] a factor" in its decision to approve the loan, but it would not have been dispositive.

Prior to the close of discovery, OLF moved for partial summary judgment on count four. On February 14, 2020, the motion judge entered an order denying OLF's request "for partial summary judgment . . . concerning the priority issue of [p]laintiff's [j]udgment and [OLF's] mortgage" but granting OLF's request for "partial summary judgment . . . concerning [p]laintiff's monetary damages claims against [OLF]."

After discovery ended, Swope moved for partial summary judgment, seeking to dismiss plaintiff's complaint against him. In support, Swope submitted various exhibits, including Sharer's deposition and four credit reports for Andujar, none of which showed plaintiff's 2007 judgment. Andujar cross-moved for partial summary judgment, seeking to dismiss counts one, two, and three of plaintiff's complaint against her. OLF moved for reconsideration of the February 14, 2020 order that denied in part OLF's partial summary judgment motion on count four.

Plaintiff opposed all three motions. In supplemental briefing submitted at the judge's request, plaintiff conceded that it failed to make a prima facie showing that it detrimentally relied on statements Andujar and Swope made to OLF. Plaintiff also raised for the first time the "tort of another" doctrine as a theory for recovery of attorneys' fees as compensatory damages. In that regard, plaintiff wrote:

As reliance is a necessary element to any fraud claim, whether [plaintiff] actually relied on the statements made by Andujar and Swope to [OLF] to [plaintiff's] detriment would appear to be a critical flaw in [plaintiff's] claim against Andujar and Swope.

However, that theory is not what [plaintiff] is alleging in this matter. [Plaintiff] cannot show that it relied on any statements made by Andujar and Swope to OLF. In fact, it cannot even show that any of the

alleged misrepresentations were ever transmitted to [plaintiff] except through this litigation. It may be that the pleadings were inartfully drafted, but [plaintiff's] claims against Swope and Andujar are grounded on the "tort of another" doctrine or "third party litigation exception"

On February 25, 2022, the judge heard oral arguments on all three motions. On March 2, 2022, the judge entered three orders granting summary judgment to all three defendants. In an oral opinion placed on the record on the same date, the judge first addressed OLF's reconsideration motion. Relying on Jones v. Parker, 107 N.J. Super. 235 (App. Div. 1969), the judge concluded that "OLF's mortgage ha[d] priority over [plaintiff's] judgment" because plaintiff's judgment was issued under Andujar's maiden name while title to the Folsom property was held in Andujar's married name. The judge explained that unless the judgment is entered using the same name as the recorded title to the property, it does not constitute notice to a subsequent purchaser or encumbrancer and is not a lien on the real estate. See id. at 242 ("The lien given a judgment creditor is purely statutory. Unless the judgment entered is against the same name as that in which record title to real estate stands, the statute does not come into operation and no lien exists." (citation omitted)).

Turning to Swope's and Andujar's motions, the judge acknowledged "that fact issues exist[ed] with respect to" Swope's and Andujar's

"representations . . . on the affidavits of title as to . . . Andujar's maiden name and the failure to disclose prior judgments." However, relying on plaintiff's concessions in its supplemental brief, the judge found that "Swope and . . . Andujar did not make any misrepresentations to [plaintiff]." According to the judge, plaintiff admitted that any misrepresentations "were made to OLF or to [AMHM]" and "[i]n fact, [plaintiff] had no involvement whatsoever in the transaction between . . . Swope, . . . Andujar, . . . OLF and [AMHM]."

Thus, [plaintiff] has failed to establish that it relied directly or indirectly on the alleged mis-statements of . . . Swope and . . . Andujar. Therefore, under the traditional standard of proof for reliance and even indirect reliance, plaintiff has failed to show reliance for either the fraud or [negligent] misrepresentation claim and therefore those claims have to be dismissed.

In addition, because the civil conspiracy claims require an underlying tort and because the fraud and misrepresentation claims have not been established, the civil conspiracy claims also fail.

The judge declined to consider plaintiff's "attempt[] to advance a new theory" – the tort of another doctrine – because "it was not pled and it was not raised until a supplemental brief." The judge acknowledged "plaintiff's concerns about the inconsistent disclosures made by Andujar and Swope with respect to the completions of the affidavit of title," but explained that it would be improper to consider the argument both in terms of "fairness to [defendants]

and pursuant to [the court rules]" because the doctrine was not a theory of recovery in plaintiff's complaint and an amendment was not permissible at that late juncture.

Plaintiff filed a notice of appeal from all three March 2, 2022 orders. While the appeal was pending, plaintiff settled the case against OLF by entering into a subordination agreement in which plaintiff and OLF "agree[d] that in exchange for [a \$40,000] payment . . . and [plaintiff's] dismissal of its appeal of the [March 2, 2022 order], . . . the [j]udgment shall remain subordinate to [OLF's] mortgage." As a result, only the March 2, 2022 orders granting summary judgment to Andujar and Swope are the subject of this appeal.

II.

Our analysis begins with some basic rules regarding our standard of review. "[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). That standard is well-settled.

[I]f the evidence of record—the pleadings, depositions, answers to interrogatories, and affidavits—"together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. On the other hand, when no genuine issue

of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted.

[Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016) (citations omitted) (quoting R. 4:46-2(c)).]

See also Brill, 142 N.J. at 523 (holding that whether a genuine issue of material fact exists depends on "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party").

If there is no genuine issue of material fact, "we must then 'decide whether the trial court correctly interpreted the law.'" DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). "We review issues of law de novo and accord no deference to the trial judge's [legal] conclusions" MTK Food Servs., Inc. v. Sirius Am. Ins. Co., 455 N.J. Super. 307, 312 (App. Div. 2018).

Turning to the substantive principles at issue in this appeal, plaintiff argues the judge erred in finding it "failed to timely plead" the tort of another doctrine. Plaintiff contends the tort of another doctrine is "merely an additional

element of damages for an underlying tort claim," "not a separate cause of action." Alternatively, plaintiff argues it should have been allowed "to amend the [c]omplaint as no prejudice would have been incurred by Andujar or Swope."

Under the "tort of another" doctrine:

One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.

That exception reflects the principle that those fees incurred in an action against a third party are merely an additional element of "damages flowing from the tort."

[DiMisa v. Acquaviva, 198 N.J. 547, 554 (2009) (first quoting Restatement (Second) of Torts § 914(2) (Am. Law Inst. 1979); and then quoting State, Dep't of Env't Prot. v. Ventron Corp., 94 N.J. 473, 505 (1983)).]

The DiMisa Court delimited the doctrine by requiring as "a prerequisite to an award of counsel fees . . . litigation with a third party precipitated by another party's wrongful act." Ibid. The Court emphasized that "[i]t is only the requirement of litigation against a stranger that calls the exception into play." Ibid.

In this case, plaintiff correctly asserts that the tort of another doctrine is an additional element of damages and not an independent cause of action. Indeed, in Jugan v. Friedman, 275 N.J. Super. 556 (App. Div. 1994), we recognized the doctrine in a case where it was not specifically pled and permitted the plaintiff to recover attorneys' fees from a defendant who had fraudulently transferred assets to family members to prevent the plaintiff from collecting an earlier judgment debt against the defendant. Id. at 571-73. We held that although the plaintiff "may not recover his litigation expenses for litigating with [the defendant] to establish that his transfers were fraudulent, he [was] entitled to reimbursement for reasonable attorneys' fees expended in litigating with third parties, including the other defendants, to void or set aside the transfers." Id. at 573.

Here, plaintiff pled damages in its complaint, seeking, among other forms of relief, "compensatory" damages and "attorney's fees and costs." Similar to the plaintiff in Jugan, plaintiff is seeking attorney's fees incurred from litigating the order of lien priority between itself and OLF due to Andujar's and Swope's alleged fraudulent and negligent conduct. Thus, plaintiff's failure to explicitly plead "the tort of another" as a basis for relief does not preclude its recovery if it can prevail on its claims against Andujar and Swope. Stated differently,

plaintiff is only entitled to damages under the tort of another doctrine if the underlying torts are sustainable. See Daibo v. Kirsch, 316 N.J. Super. 580, 592 (App. Div. 1998) (reversing trial court that "improperly awarded . . . money damages and prejudgment interest" when "there was no basis for a finding of . . . fraud"). However, plaintiff's inability to sustain the underlying torts against Andujar and Swope as a matter of law is fatal to the viability of its tort of another doctrine claim.

Pertinent to this appeal, the elements of common law fraud are: "(1) a 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 N. Am. v. Gandi, 184 N.J. 161, 172-73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). Importantly, "fraud is never presumed," Weil v. Express Container Corp., 360 N.J. Super. 599, 613 (App. Div. 2003), and the "plaintiff must prove each element by 'clear and convincing evidence,'" DepoLink, 430 N.J. Super. at 336 (quoting Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989)).

"A cause of action for negligent misrepresentation may exist when a party negligently provides false information." Singer v. Beach Trading Co., 379 N.J. Super. 63, 73 (App. Div. 2005) (quoting Karu v. Feldman, 119 N.J. 135, 146 (1990)). More specifically, a negligent misrepresentation is ""[a]n incorrect statement, negligently made and justifiably relied on, [and] may be the basis for recovery of damages for economic loss . . . sustained as a consequence of that reliance."" Id. at 74. (alterations in original) (quoting McClellan v. Feit, 376 N.J. Super. 305, 317 (App. Div. 2005)).

"Incorrect statement and misstatement of fact are elements of both common law fraud and negligent misrepresentation." Union Ink Co. v. AT&T Corp., 352 N.J. Super. 617, 645 (App. Div. 2002) (citing Kaufman v. i-Stat Corp., 165 N.J. 94, 109 (2000)). Further, "[t]he element of reliance is the same for fraud and negligent misrepresentation." Kaufman, 165 N.J. at 109. Under both, a plaintiff's reliance on an alleged misrepresentation "must be actual, as well as justifiable." Walid v. Yolanda for Irene Couture, Inc., 425 N.J. Super. 171, 181 (App. Div. 2012) (citing Restatement (Second) of Torts § 537 (Am. Law Inst. 1977)).

A civil conspiracy occurs when "two or more persons act[] 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, 184 N.J. at 177 (quoting Morgan v. Union Cnty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993)). Because civil conspiracy requires "an underlying wrong," we have recognized that a claim of civil conspiracy to commit fraud is untenable if the underlying claim of fraud fails. Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 122 (App. Div. 2011) (quoting Banco, 184 N.J. at 178); see also G.D. v. Kenny, 205 N.J. 275, 312 (2011) (dismissing a civil conspiracy claim where the plaintiff could not "establish that [the] defendants committed an unlawful act or a wrong against him that constitutes a tort entitling him to a recovery").

Applying these principles, we are satisfied that plaintiff's claims against Andujar and Swope fail because plaintiff cannot establish the elements of either common law fraud or negligent misrepresentation as a matter of law. See Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) (explaining that "an appellate court can[not] ignore the elements of the cause of action or the evidential standard governing the cause of action"). Critically, as the judge found, plaintiff failed to establish that it justifiably relied, either directly or indirectly, on the alleged misstatements Andujar and Swope made to AMHM and OLF. See Kaufman,

165 N.J. at 109 ("The actual receipt and consideration of any misstatement remains central to the case of any plaintiff seeking to prove that he or she was deceived by the misstatement or omission."). Most significantly, plaintiff conceded that it never relied on any statements Andujar and Swope made to OLF. Although plaintiff has set forth disputed material facts that cannot be reconciled on a motion record for summary judgment, plaintiff's concessions are fatal to their causes of action.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION