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DRY CLEAN EXPRESS II, LLC and MATSAMY VASQUEZ, Plaintiffs, v. RIVER BOULDER, LLC, EVAN DELIKOURAS and ANASTASIOS BOULOUTAS, Defendants.	SUPERIOR COURT OF NEW JERSEY PASSAIC COUNTY LAW DIVISION DOCKET NO.: PAS L-2685-21 CIVIL ACTION - CBLP **OPINION**

Decided September 25, 2024

Ronald L. Daugherty, Esq. of Salmon, Ricchezza, Singer & Turchi, LLP, counsel for Plaintiffs Dry Clean Express II, LLC and Matsamy Vasquez.

Frederick C. Biehl, III, Esq. and Matthew G. Wapner, Esq. of McCarter & English, LLP, counsel for Defendants River Boulder, LLC, Evan Delikouras and Anastasios Bouloutas.

Hon. Darren J. Del Sardo, P.J. Cv.

Pending before the Court is Defendants River Boulder, LLC, Evan Delikouras and Anastasios Bouloutas Motion for Summary Judgment filed on August 1, 2024. Plaintiffs, Dry Clean Express II ("DCE II") submitted opposition to the Defendant's motion on August 20, 2024. Thereafter the Defendants submitted a Reply Brief on August 26, 2024, and Oral argument occurred on August 30, 2024, and September 13, 2024. After careful consideration of the foregoing, the Court relies upon the within Statement of Reasons in support of its decision.

Background

This matter arises out of an alleged breach of a contract, specifically a Promissory Note signed on April 17, 2014, related to the sale of a dry-cleaning business. The Promissory Note entered between Plaintiff and Defendants River Boulder LLC had a maturity date of May 15, 2017, and allegedly included provisions for a default interest rate in the event of late payments. It is alleged that the Plaintiffs defaulted almost immediately by failing to make timely payments, triggering the default interest rate.

Plaintiffs allege in their Complaint that the original purchase price pursuant to the Promissory note was Eight Hundred Fifty-Five Thousand Dollars ($855,000.00). Thereafter, Defendant received a $25,000 deposit and "a few payments under the Note." (Certification of Matsamy Vasquez., ¶ 7). Plaintiff contends that the Note was then cancelled and DCE II entered into a new agreement to pay Anastasio Bouloutas the sum of $5,001.23 per month and Evangelos Delikouras $2,692.97 per month. Ibid. Plaintiff alleges that the Note and the second agreement were independent of each other and were not enforceable by the other. Ibid. It is the Plaintiff's contention that payments to Bouloutas and Delikouras were to be made until the sum totaled $806,918.09. Ibid.

Defendants argue in their Motion papers that there was no formal cancelation of the promissory note, but instead a modification of the payment plan. The change in payment recipients does not meet the legal requirements for novation, as it merely modifies the contract rather than extinguishing it, and the Plaintiffs have failed to provide clear evidence of intent by all parties to create a new contract that replaces the original agreement. Thereafter, when the Promissory Note was not fully paid off by its maturity date, the parties agreed on June 13, 2017, to split the profits of the business until it was sold, and the amount owed was paid. However, the

Plaintiffs claim that the Defendants breached the contract by refusing to extend the Note's term, falsely claiming the debt was in default, extracting amounts in excess of the true amount due, and failing to apply the agreed-upon profit payments towards the outstanding debt owed by the Plaintiffs.

The Defendants further allege that they did not breach any terms of the Promissory Note and that the Plaintiffs' claims of breach of contract, breach of the covenant of good faith and fair dealing, and consumer fraud are without merit. They assert that the Plaintiffs failed to provide any relevant evidence supporting their claims and that the economic loss doctrine precludes the fraud claim, as no physical harm to people or property was alleged.

Plaintiff argues that contrary to the claim that River Boulder was paid $855,000, it is argued that River Boulder only received $25,000 and a few payments before the note was canceled. The new agreement involved separate payments to Delikouras and Bouloutas. Additionally, it's disputed that $830,000 was paid through a Promissory Note. Plaintiff asserts that the original note was canceled, and the payments were restructured under the new agreement which required $7,694.20 monthly payments, asserting instead that after the cancellation, the new payment arrangement involved $5,001.23 to Bouloutas and $2,692.97 to Delikouras.

It is also argued that there was no provision for a late charge of 5%, default terms, and an 18% interest upon default under the new payment arrangement since the original note was canceled, and separate payments were made to Bouloutas and Delikouras. Additionally, Plaintiff argues that the original note was not personally guaranteed by Matsamy and Tanya Vasquez after the original note was canceled, and the new agreement did not involve such guarantees.

The Plaintiffs further allege that, under the terms of the new agreement, where payments were to be directed to Bouloutas and Delikouras, instead of River Boulder, Plaintiffs could not have defaulted on the payments required by the original agreement, as those payments were no longer designated for River Boulder. Plaintiff further alleges that they were not in default on May 15, 2017, because Anastasios Bouloutas agreed to extend the note.

The Plaintiffs assert that the Defendants have blatantly breached the covenant of good faith and fair dealing by demanding payments not owed. Furthermore, the Defendants refused to accept the scheduled payments and improperly claimed that all future payments, along with additional fees, were immediately due. The exact amount demanded by the Defendants was not specified, making it impossible to determine the sum they claimed at that time.

In support of Plaintiff's arguments in opposition to Defendants' Motion for Summary Judgment, Plaintiffs submit the Certification of Matsamy Vasquez and the Certification of Liliane Tietjen. The Defendants counter that the Plaintiffs' submission of the Certification of Matsamy Vasquez, in opposition to the Defendants' Motion for Summary Judgment, should be dismissed by the Court under the "Sham Affidavit Doctrine." They assert that the affidavit's claims of a new agreement via novation are false and unsupported by earlier testimony, and thus, should not prevent the Court from granting Summary Judgment.

Standard

Summary Judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c), Templo Fuente De Vida Corp. v. Nat'l Union

Fire Ins.Co. of Pittsburgh, 224 N.J. 189, 199 (2016); Henry v. N.J. Dept of Human Servs., 201 N.J. 320, 329 (2010). A judge does not act as the fact-finder when deciding a motion for summary judgment. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73 (1954). The motion judge should never resolve a "dispute on the merits that should have been decided by a jury." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 50 (2012). The court must view the facts from the record, in the "light most favorable to … the non-movant[]." Schiavo v. Marina Dist. Dev. Co., 442 N.J. Super. 346, 366 (App. Div. 2015) (citation omitted).

Pursuant to R. 4:46-2(c), the moving party must "show that there is no genuine issue as to any material fact challenged." In Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), the Court stated:

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party.

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540, (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 214 (1986), Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014).

Under the Brill standard, the court must determine based upon the evidence submitted if there are sufficient facts to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving part[ies]. Townsend v. Pierre, 429 N.J. Super. 522, 525 (App. Div. 2013) (quoting Brill, 142 N.J. at 540).

The “essence of the inquiry” is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Mayo, Lynch & Assocs., Inc. v. Pollack, 351 N.J. Super. 486, 494-95 (App. Div. 2002) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). “At this stage of the proceedings, the competent evidential materials must be viewed in the light most favorable to plaintiff, the non-moving party, and [plaintiff] is entitled to the benefit of all favorable inferences in support of [the] claim.” Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016); R. 4:46-2(c); Bagnana v. Wolfinger, 385 N.J. Super. 1, 8 (App. Div. 2006) (citing R. 4:46-2(c); Brill, 142 N.J. at 540); *See also* In re Estate of Sasson, 387 N.J. Super. 459, 462-63 (App. Div.), certif. denied, 189 N.J. 103 (2006). Robinson v. Vivirito, 217 N.J. 199, 203 (2014).

“To defeat a motion for summary judgment, the opponent must ‘come forward with evidence that creates a genuine issue of material fact.’” Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div.), certif. denied, 211 N.J. 608 (2012)), certif. denied, 220 N.J. 269 (2015). “[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion.” Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted). "'(U)nsubstantiated inferences and feelings' are not sufficient to support or defeat a motion for summary judgment." Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011) (quoting Oakley v. Wianecki, 345 N.J. Super. 194, 201 (App. Div. 2001)). “In addition, ‘[b]are conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment.’” Ibid. (quoting U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961)).

Discussion

1. *Breach of Contract*

The Plaintiffs, Dry Clean Express II, LLC ("DCE-II") and Matsamy Vasquez ("Vasquez"), filed a breach of contract claim against the Defendants, River Boulder, LLC ("River"), Evan Delikouras, and Anastasios Bouloutas. The claim arises from a dispute regarding a Promissory Note executed by DCE-II and River, which had a maturity date of May 15, 2017. The Plaintiffs contend that the Defendants breached the contract by failing to extend the maturity date of the original promissory note, as allegedly represented by the Defendants, and by subsequently enforcing the note in full, along with additional penalties.

The party seeking to prove a breach of contract claim must prove "first, that '[t]he parties entered into a contract containing certain terms'; second, that '[the non-breaching party] did what the contract required [it] to do'; third, that '[the breaching party] did not do what the contract required [it] to do[,]' defined as a 'breach of the contract'; and fourth, that '[the breaching party's] breach, or failure to do what the contract required, caused a loss to the [non-breaching party].'" Globe Motor Co. v. Igdalev, 225 N.J. 469, 482, 139 A.3d 57 (2016) (first alteration in original) (sixth alteration in original) (quoting *Model Jury Charges* (Civil),§ 4.10A, "The Contract Claim-Generally" (approved May 1998)).

Here, the promissory note contained a no-oral modification provision. Defendant argues that the provision contained in the note is a "clear and unequivocal prohibition" and must be enforced. Furthermore, Defendant argues that there is no evidence presented, other than self-serving affidavits, providing support to indicate that the parties entered into a new agreement in which the original note's maturity date was no longer enforceable.

While the promissory note includes a provision that it may not be changed in any other manner than by an agreement in writing, "the mere presence of a no oral modification provision does not end the inquiry." *See* Lewis v. Travelers Ins. Co., 51 N.J. 244, 253, 239 A.2d 4 (1968) ("The parties did not thereby disable themselves from amending, supplementing or replacing the contract [provision] by a later agreement made orally or by conduct objectively manifesting a new understanding"); Home Owners Constr. Co. v. Glen Rock, 34 N.J. 305, 316, 169 A.2d 129 (1961) ("the writing requirement may be expressly or impliedly waived by the clear conduct or agreement of the parties . . . .").

A waiver under New Jersey law is the voluntary and intentional relinquishment of a known right. Knorr v. Smeal, 178 N.J. 169, 177, 836 A.2d 794 (2003). An effective waiver requires a party to have full knowledge of his [or her] legal rights and intent to surrender those rights. Ibid. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. Ibid. The party waiving a known right must do so clearly, unequivocally, and decisively. Ibid. Establishing waiver of the no writing provision must be proved by "clear and convincing evidence." Home Owners, 34 N.J. at 316-17; *See also* Headley v. Cavileer, 82 N.J.L. 635, 640, 82 A. 908 (E. & A. 1912) ("waiver will not be inferred unless the evidence is clear and convincing").

A waiver of a legal right requires the presence of "a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part"; "A waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition." Aron v. Rialto Realty Co., 100 N.J. Eq. 513 (Ch. 1927),

affirmed 102 N.J. Eq. 331 (E. & A. 1928). W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144, 153 (1958).

It must be established that the parties entered into a subsequent oral agreement, notwithstanding the written Lease term regarding the rent amount, by clear and convincing evidence. "It is established that a subsequent verbal agreement should be proved by very clear and satisfactory evidence." Finocchiaro v. D'Amico, 8 N.J. Super. 29, 31, 73 A.2d 260 (App. Div. 1950). In Finocchario, the court concluded that the defendant's testimony, the only evidence in the case, "was neither clear nor convincing." Id. at 31-32.

The Plaintiffs' primary contention is that Bouloutas verbally indicated that he may extend the maturity date of the promissory note, contingent upon Mr. Vasquez providing sufficient collateral. However, this oral representation does not meet the standards required to modify or extend the terms of the promissory note. The promissory note explicitly precludes any modifications unless made in writing and signed by the parties. Plaintiffs admit that the extension was contingent upon offering sufficient collateral, which Mr. Vasquez failed to provide. The collateral offered, a house worth approximately $125,000, was significantly less than the $830,000 principal balance of the note. As a result, Bouloutas declined to extend the maturity date, and this alone negates the Plaintiffs' argument that a new agreement was reached.

This case is directly supported by the principles established in Finocchiaro v. D’Amico, 8 N.J. Super. 29, 73 A.2d 260 (App. Div. 1950), where the court held that any subsequent verbal agreement intended to modify or replace a written contract must be proven by clear and convincing evidence. In Finocchiaro, the court rejected the defendant’s vague and unconvincing testimony about an alleged oral modification because it lacked sufficient clarity and proof.

Similarly, in this case, Plaintiffs' claim of an oral extension of the promissory note's maturity date fails to meet the "clear and convincing" evidence standard set forth in Finocchiaro.

Moreover, Finocchiaro emphasized that valid modifications must be supported by sufficient consideration. In this case, the plaintiffs have not demonstrated any new or valid consideration that would support the alleged oral modification. The terms of the original agreement, including the maturity date, remained intact. Without clear and convincing evidence of an enforceable oral agreement and valid consideration, there is no issue of material fact for the factfinder to consider to prove that the maturity date was extended.

Defendants presented a document (attached as Exhibit 9 to the opposition), which clearly sets forth the payment schedule under the existing promissory note. The document, signed by Anastasios Bouloutas, Evan Delikouras, Matsamy Vasquez, and Tanya Vasquez, specifically states, "With regard to payment on the Promissory Note, please issue two checks as follows: 1) Anastasio & Zoe Bouloutas in the amount of $5,001.23 and 2) Evangelous Delikouras in the amount of $2,692.97." This document unequivocally refers to the original promissory note and reflects only a change in the method of payment, not any other substantive term, including the maturity date. There is no credible evidence to support Plaintiffs' claim that any further modifications were made outside of the terms of the aforementioned document.

In accordance with the holding in Finocchiaro, the court finds that Plaintiffs have failed to present clear and convincing evidence that the parties waived the writing requirement or agreed to a new oral agreement that modified the promissory note's maturity date. The standard for proving a waiver or modification is stringent, requiring clear and direct evidence that leaves no doubt as to the parties' intent. Plaintiffs' evidence in support of the alleged oral modification does not rise to this level.

Accordingly, this Court finds that the alleged oral agreement to extend the note's maturity date is unenforceable. The Plaintiffs have failed to proffer evidence sufficient to establish a clear and convincing waiver of the writing requirement, and any claim based on an alleged oral agreement is invalid.

2. *Novation vs Modification*

After forming a contract, the parties may, by mutual assent, modify it. Cty. of Morris v. Fauver, 153 N.J. 80, 99, 707 A.2d 958 (1998). A modification can be proved by an explicit agreement to modify or by the actions and conduct of the parties if the intention to modify is mutual and clear. DeAngelis v. Rose, 320 N.J. Super. 263, 280, 727 A.2d 61 (App. Div. 1999). Parties to a contract may orally agree to modify contract provisions, even when the original agreement precludes oral modifications. Sodora v. Sodora, 338 N.J. Super. 308, 312, 768 A.2d 840 (Ch. Div. 2000). For a proposed modification to a contract to be valid, it must be accepted by the other party, thereby establishing mutual assent to the modification. Cty. of Morris v. Fauver, 153 N.J. 80, 87 (1998). Unilateral actions or statements made after the contract has been finalized do not alter the original terms, particularly when the other party is unaware of the changes. Ibid. Knowledge and assent are critical components for a modification to be effective. Ibid.

A novation is the substitution of a new contract for an existing one, effectively extinguishing the original obligation. Wells Reit II-80 Park Plaza, LLC v. Director, Div. of Taxation, 414 N.J. Super. 453, 457 (App. Div. 2010). For a novation to occur, there must be "a clear and definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well settled principle that novation is never to be presumed." Ibid. The burden of proving a novation lies with the party alleging it. Ibid. In contrast, a modification merely alters

certain provisions of an existing contract while leaving the original agreement otherwise intact. Ibid.

Regarding novation, there are four elements required: (1) a valid pre-existing contract; (2) an agreement to create a new contract; (3) a valid new contract; and (4) intent to extinguish the original contract. T&N., plc v. Penn. Ins. Guar. Ass'n, 44 F.3d 174, 186 (3d Cir.1994); In re Timberline Property Dev., Inc., 115 B.R. 787, 790 (Bankr.D.N.J.1990). When the evidence is "one-sided" regarding whether the parties entered a novation, Summary Judgment is appropriate. Wells Reit II-80 Park Plaza, LLC v. Dir., Div. of Taxation, 414 N.J. Super. 453, 457 (App. Div. 2010).

It is critical to understand the intent of the parties when determining whether a novation occurred. Morecraft v. Allen, 78 N.J.L. 729, 732, 75 A. 920 (E. & A.1910). Given that intent is the primary consideration, whether a novation occurred is typically a factual question for the jury, making summary judgment inappropriate. Alexander v. Manza, 22 N.J. Misc. 88, 99, 36 A.2d 142 (Sup.Ct.1944). *See also* Fanucchi & Limi Farms v. United Agri Prods., 414 F.3d 1075, 1082 (9th Cir.2005). However, summary judgment may be appropriate when the evidence regarding the parties' intent to enter a novation is "one-sided." Tung v. Briant Park Homes, Inc., 287 N.J. Super. 232, 239, 670 A.2d 1092 (App.Div.1996). Where a contract is modified to only change the payee, there is not a novation because the duty of the payor remains the same. *See* Newtown Title & Tr. Co. v. Admiral Farragut Acad., 84 F. Supp. 527, 530 (D.N.J. 1949).

Mr. Vasquez testified in his deposition that the change of payees constituted a “modification” to the parties’ existing agreement. Wapner Cert., Ex. 24, at 7:18-8:15; 43:15-23. The agreement to pay Bouloutas and Delikouras separately, rather than making payments directly to River Boulder, states: “With regard to payment on the Promissory Note.” *See* Wapner

Cert., Ex. 9. This document clearly asserts that the updated payment schedule is in "regard to payment on the Promissory Note." Ibid. The Plaintiff provides no evidence that supports a novation other than the certifications of Liliane Tietjen and Matsamy Vasquez.

The Vasquez Certification offers a combination of factual assertions and conclusions regarding the existence of a novation. It fails to point to specific factual changes that support the argument for novation, though much of it remains conclusory without offering detailed documentation or direct evidence beyond Vasquez's own statements.

Vasquez claims that under the new agreement, payments were made directly to Anastasio Bouloutas and Evangelos Delikouras in separate amounts, and that the debts were independent of each other and not enforceable by the other. This alteration in the payment structure suggests a significant modification from the original note. He also asserts that the original note with River Boulder was cancelled and replaced with a new agreement with different terms. If backed by additional documentation or testimony, this could help establish a novation. Furthermore, the certification mentions that River Boulder effectively dissolved after the new agreement, with its principals no longer following corporate formalities. This could imply that River Boulder's obligations under the original agreement were terminated. Vasquez also states that the new agreement removed provisions related to late fees, interest, and defaults, further distinguishing it from the original note.

However, these claims lack direct supporting evidence. While Vasquez repeatedly states that the note and related documents were cancelled, this assertion is not supported by any documentation in the certification, weakening the claim. Additionally, his discussion of the terms of the new agreement appears to be based on his own understanding rather than any formal written agreements or other evidence.

While the Vasquez Certification includes assertions that support the claim of a novation, it primarily relies on Vasquez's conclusions and lacks concrete documentary evidence. The restructuring of payments and the cancellation of the original note, if corroborated by other evidence, could support the novation argument. However, as it stands, the certification is largely conclusory, and more than Vasquez's assertions would be needed to prove that the parties had any intent to create a novation.

Similarly, the Liliane Tietjen certification includes several factual assertions that align with the Plaintiff's claim of a novation but largely lacks concrete evidence beyond her personal statements. Tietjen asserts that, following a falling out between the principals of River Boulder, Evan Delikouras and Anastasios Bouloutas, a new agreement was formed between them and DCE II. This new agreement purportedly cancelled the original note and related documents governing the sale of the dry cleaner. Additionally, Tietjen notes that under the new arrangement, DCE II was required to make independent payments to Bouloutas and Delikouras, and that these debts were not enforceable by each other. These assertions suggest a significant modification of the original obligations, supporting the claim of a novation.

However, much of Tietjen's certification relies on conclusions without direct evidence supporting any conclusion. Although she claims that the original note was cancelled, she does not provide documentation, written amendments, oral representations, or cite to any other evidence to substantiate this claim. Instead, her statements are based on personal recollection and informal discussions where she drew a conclusion that is not directly supported by same.

Additionally, Tietjen refers to her suggestion that DCE II make payments to Bouloutas and Delikouras while the dry cleaner was being sold, but this appears to be an informal solution rather than evidence of a binding novation. In conclusion, while Tietjen's certification provides

some support for the novation claim, such as the alleged cancellation of the original note and the creation of separate obligations, it is largely based on personal conclusions and lacks clear evidence necessary to prove the novation.

Viewing the evidence most favorable to the Plaintiff, the Court does not find a factual dispute that supports Plaintiffs' argument that the original Promissory note was ultimately cancelled by the new agreement.

The new agreement fails to provide a "clear and definite" intention by the parties to create a novation, and the novation cannot be presumed. The evidence is one-sided and there is no indication that the parties intended to extinguish the original agreement. The change in payees alone does not rise to the level of novation, especially given the lack of evidence showing an intent to void all prior agreements.

The actions and conduct of the parties in this case demonstrate a valid modification of the original promissory note. Based on the facts, the Plaintiff explicitly stated in his deposition that a new agreement was formed, altering the recipients of the payments, which he subsequently made to Bouloutas and Delikouras. Wapner Cert., Ex. 24, at 7:18-8:15; 43:15-23. This agreement reflects mutual assent and knowledge of the modification, satisfying the requirements under Cty. of Morris v. Fauver, 153 N.J. 80 (1998), as both parties clearly agreed to change the payment recipients while leaving the remainder of the promissory note intact. There is no evidence to suggest that the parties intended to completely cancel the original promissory note, and thus the modification merely altered the specific provision related to payment recipients. Under DeAngelis v. Rose, 320 N.J. Super. 263 (App. Div. 1999), a modification can be proven through explicit agreement or conduct, and here, the parties' actions sufficiently establish the mutual intention to modify the payment terms, making the modification valid.

The Court rejects the Plaintiffs' argument that they could not have defaulted on the payment obligations under the original agreement due to a novation, which they claim replaced and nullified the original terms. Accordingly, the terms and conditions, including guarantees and late-charge provisions, from the original promissory note remained enforceable.

Furthermore, Plaintiffs dispute that they did not default on the original promissory note. It is argued that Defendants breached the terms of the promissory note by falsely claiming the debt was in default, extracted amounts in excess of the true amount due and failed to apply the agreed-upon profit payments towards the outstanding debt owed by the Plaintiffs. Defendants argue that the profit payments were to be made in lieu of additional interest. According to the Plaintiffs, the Defendants were to split the profits evenly between the parties and apply half of those profits towards the debt until all business assets were sold. However, the Defendants failed to meet this obligation and instead retained more funds than they were entitled to under the original promissory note. This includes late fees, despite the Plaintiff's good faith attempts to make timely payments that were not accepted, as well as unwarranted attorney's fees in the process of collecting on the note. The Plaintiffs assert that these attorney fees were unjustified and in violation of the original terms of the promissory note. In addition, there is a dispute regarding the additional terms regarding the profit-sharing agreement.

Accordingly, the Court finds that the Plaintiff has presented sufficient evidence to establish a genuine dispute of material fact regarding whether the Defendants breached the original promissory note.

3. *Sham Affidavit Doctrine*

Defendants argue that Vasquez's Certification should be disregarded as a "Sham Affidavit" because it contradicts his prior deposition testimony, where he characterized the change in payment recipients as a modification, rather than a novation of the contract. Defendants assert that the Certification introduces a false issue of fact to avoid summary judgment. However, the Court has already ruled that the agreement in question was modified, not replaced by a novation. This ruling remains binding, and therefore the issue of whether Vasquez's Certification suggests a novation is irrelevant to the material facts of the case.

Under New Jersey law, the Sham Affidavit Doctrine allows a trial court to disregard an affidavit that directly contradicts prior deposition testimony when determining if a genuine issue of material fact exists. The doctrine, as explained in Shelcusky v. Garjulio, 172 N.J. 185, 201 (2002), aims to prevent parties from manufacturing factual disputes by submitting affidavits that contradict earlier sworn testimony without reasonable explanation. Courts are empowered to disregard affidavits that lack credibility and thus create a false factual dispute.

In this case, Vasquez's Certification states that the parties entered into a new agreement that canceled the promissory note, effectively creating a novation. However, as previously established by the Court, the contract was modified, not extinguished or replaced. The Court has already found no credible evidence of a novation, and Vasquez's deposition, which described the arrangement as a modification, supports this conclusion. The Court has already considered the affidavits and, despite their content, ruled that no novation took place.

Accordingly, the Court denies Defendants' argument and allows the Certification to stand, albeit without affecting the underlying decision that the contract was modified and not replaced by a novation.

4. *Duty of Good Faith and Fair Dealing*

Every party to a contract, including one with an option provision, is bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract. *See* Wilson v. Amerada Hess Corp., 168 N.J. 236, 241, 244, (2001) (holding that "[a] covenant of good faith and fair dealing is implied in every contract," including contract granting party unilateral discretion over pricing); *See also* Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420-21, (1997) (holding same for contract granting party unilateral right of termination); *Restatement (Second) of Contracts* § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); 23 *Williston on Contracts* § 63:22, at 506 (Lord ed. 2002) (same).

Good faith is a concept that defies precise definition. The Uniform Commercial Code, as codified in New Jersey, defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." N.J.S.A. 12A:2-103(1)(b). Good faith conduct is conduct that does not "'violate community standards of decency, fairness or reasonableness.'" Wilson, *supra*, 168 N.J. at 245, (quoting *Restatement (Second) of Contracts*, *supra*, § 205 comment a). "'Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" Ibid. (quoting *Restatement (Second) of Contracts*, *supra*, § 205 comment a). The covenant of good faith and fair dealing calls for parties to a contract to refrain

from doing "anything which will have the effect of destroying or injuring the right of the other party to receive" the benefits of the contract. Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130, (1965) (internal quotations omitted); *See also* Wade v. Kessler Institute, 172 N.J. 327, 340 (2002) (same).

Proof of "bad motive or intention" is vital to an action for breach of the covenant. Wilson, *supra*, 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." *Williston, supra,* § 63:22, at 513-14 (footnotes omitted); *See also* Wilson, *supra*, 168 N.J. at 251; Sons of Thunder, *supra*, 148 N.J. at 420. As a general rule, "[s]ubterfuges and evasions" in the performance of a contract violate the covenant of good faith and fair dealing "even though the actor believes his conduct to be justified." *Restatement (Second) of Contracts*, *supra*, § 205 comment d. Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224-25 (2005).

Defendants argue in their motion papers that the Plaintiffs have not provided sufficient evidence to support their claim that the Defendants acted in a manner that destroyed or injured Plaintiffs' rights to receive the benefits of the contract. It is argued that any alleged promise to potentially extend the maturity date of the promissory note is vague and lacks the necessary specificity to be enforceable.

Furthermore, this Court has determined that there is no credible evidence of an enforceable Oral Contract.

Therefore, pursuant to the provisions of the promissory note, including the clause that prohibits any modification unless it is in writing and signed, Plaintiffs have not provided any evidence of a written and signed agreement to extend the maturity date. The lack of such evidence reinforces the conclusion that there was no mutual assent or consideration for the alleged modification.

Plaintiffs further argue that Defendants violated the implied covenant by claiming payments that were not due, refusing to accept regular payments, and by asserting that the entire debt had matured. Plaintiffs also dispute Defendants' claim that "profit payments" did not reduce the debt but were additional amounts owed. Plaintiffs allege that these actions were part of a scheme to extract more money than was owed under the contract, thus depriving them of the benefit of their bargain.

Plaintiffs assert that the provided evidence, including the testimony of Matasmy Vasquez, suggests that Defendants' actions were designed to increase the amount claimed as due, potentially constituting bad faith. Specifically, the Plaintiff argues that the claim that Defendants refused to accept regular payments, refused to apply the profit payments towards the debt, falsely claimed the debt was in default, unjustifiably collected attorney fees, and demanded a lump sum that was indeterminate at the time could be seen as an attempt to manipulate the terms of the contract to Plaintiffs' detriment.

The Court finds that the Plaintiff has presented sufficient evidence to establish a genuine dispute of material fact regarding whether the Defendants' actions breached the covenant of good faith and fair dealing by extracting payments in excess of the contract provisions and demanding payments that were not contractually due.

5. *Unjust Enrichment*

Defendants argue that Plaintiffs fail to allege the essential elements of a claim for unjust enrichment.

To establish unjust enrichment, a Plaintiff must show both that Defendant received a benefit and that retention of that benefit without payment would be unjust. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). The unjust enrichment doctrine requires that Plaintiff show that it expected remuneration from the Defendant at the time it performed or conferred a benefit on Defendant and that the failure of remuneration enriched Defendant beyond its contractual rights. Ibid.

Unlike an express contract or a contract implied-in-fact, "a quasi-contractual obligation is created by the law, 'for reasons of justice,' 'without regard to expressions of assent by either words or acts.'" Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9, 28, (1958) (quoting 1 Corbin on Contracts § 19 (1950)). While an express contract or one implied-in-fact defines the obligations of the contractors in accordance with their expressions of assent, the relations of the parties in a quasi-contract are not dependent upon an actual agreement, but instead are derived from considerations of "equity and morality." Id. at 29. A constructive or quasi-contract is the formula by which a court enforces a duty "to prevent unjust enrichment or unconscionable benefit or advantage." Ibid. To recover on the theory of quasi-contract, the plaintiff must prove that the defendant received a benefit and that its retention without payment would be unjust. Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 109, (App. Div. 1966).

It has been said that "[q]uasi-contract liability [should] not be imposed . . . if an express contract exists concerning the identical subject matter." Suburban Transfer Serv. v. Beech Holdings, Inc., 716 F.2d 220, 226-27 (3d Cir. 1983); *See also* C.B. Snyder Realty Co. v. National Newark & Essex Banking Co., 14 N.J. 146, 162-63, (1953); Moser v. Milner Hotels, Inc., 6 N.J. 278, 280-81, (1951). However, there are exceptions to this rule. A quasi-contract rests on the equitable principle that a person should not be allowed to enrich himself unjustly at the expense of another and is sometimes imposed "even against a clear expression of dissent." St. Paul Fire & Marine Ins. Co. v. Indemnity Ins. Co. of North America, 32 N.J. 17, 22, (1960); Power-Matics, Inc. v. Ligotti, 79 N.J. Super. 294, 305-06, (App.Div.1963); Deskovick v. Porzio, 78 N.J. Super. 82, 87-88, (App.Div.1963); *1 Corbin on Contracts § 19*; *1 Williston on Contracts § 3A* (3d ed. 1957). However, generally, the parties are bound by their agreement, and there is no ground for imposing an additional obligation where there is a valid contract that governs their rights. Suburban Transfer Serv., Inc. v. Beech Holdings, Inc., 716 F.2d 220, 222 (3d Cir. 1983)

Here, the promissory note and the agreement to split profits expressly govern the financial arrangements between the parties. *See* Wapner Cert., Exs. 2, 16. These contracts cover the identical subject matter that forms the basis of Plaintiffs' unjust enrichment claim. However, a jury could conclude that no contract existed between the parties, finding a lack of mutual agreement, consideration, or certainty. Alternatively, the jury may determine that the Defendant was unjustly enriched by receiving benefits, such as profits, without proper justification.

Under New Jersey law, a claim under the quasi-contractual theory of unjust enrichment has only two essential elements: “(1) that the defendant has received a benefit from the plaintiff, and (2) that the retention of the benefit by the defendant is inequitable.” Wanaque Borough Sewerage Auth. v. West Milford, 144 N.J. 564, 575 (1996) (internal citations omitted). There is

ample evidence in the record that creates an issue of material fact as to whether the Defendant received a benefit-sharing of profits and whether the retention of those profits was inequitable, as the Plaintiff did not receive anything in return.

6. *Fraud/Tort Claims*

A claim for fraud cannot stand when it merely replicates the basis for a breach-of-contract claim, particularly when the relationship between the parties is purely contractual. The court in Saltiel v. GSI Consultants, Inc. determined that tort remedies do not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 309 (2002). Here, the Plaintiffs have failed to demonstrate any independent legal duty on the part of the Defendants that would justify a tort claim. The Defendants' alleged misrepresentations are tied directly to their obligations under the contract, and as such, this claim cannot be sustained as a tort.

The economic loss doctrine further bars the Plaintiffs' tort claims. This doctrine prohibits recovery in tort for purely economic losses that are not connected to physical harm to persons or property.

New Jersey recognizes the economic loss doctrine, which prevents a party from recovering pure economic losses in tort when such losses stem from a contract. Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555, 561 (N.J. 1985). "New Jersey District Courts still hold that fraud claims not extrinsic to underlying contract claims are not maintainable as separate causes of action." Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co., 226 F. Supp. 2d 557, 564 (D.N.J. 2002). In New Jersey it has therefore "consistently been held that an independent tort action is not cognizable where there is no duty owed to the plaintiff other than the duty

arising out of the contract itself." Int'l Minerals & Mining Corp. v. Citicorp N.A., Inc., 736 F. Supp. 587, 597 (D.N.J. 1990).

The Plaintiffs have not alleged any physical injury or property damage but are seeking recovery for economic losses arising solely from the Defendants' alleged breach of contractual duties. New Jersey courts, as evidenced in cases such as Int'l Ass'n of Bridge v. Kearney and SRC Construction Corp. v. Atlantic City Housing Authority, consistently apply the economic loss doctrine to bar tort claims in contexts where the relationship between the parties is governed by a contract. Since the relationship here is governed by a "lengthy and comprehensive contractual arrangement," any economic losses must be addressed within the framework of contract law, not tort law.

7. *Consumer Fraud Act*

Plaintiffs argue that the Consumer Fraud Act ("CFA") applies to their business-to-business transaction and that the Defendants' conduct caused an ascertainable loss. However, merely asserting that the CFA applies to business transactions does not suffice to establish its relevance without more substantive support. The Plaintiffs failed to address the precedent set in 539 Absecon Blvd., L.L.C. v. Shan Enterprise Ltd. Partnership, which is directly applicable to the present case. In Absecon, the New Jersey Appellate Division held that the CFA does not apply to transactions primarily involving the sale of an ongoing business, particularly when the fraud claim pertains to the business itself, rather than to the sale of goods, services, or real estate offered to the public. 539 Absecon Boulevard, L.L.C. v. Shan Enters. Ltd. P'ship, 406 N.J. Super. 242, 275 (App. Div. 2009).

The facts of the current case closely mirror those in Absecon. The primary purpose of the transaction, as evidenced by the Asset Purchase Agreement ("APA"), the promissory note, and other related agreements, was the sale of the dry-cleaning business. The real property involved was incidental to the business transaction. The Plaintiffs' fraud claims are centered on alleged misrepresentations about the operation of the dry-cleaning business, specifically regarding the extension of the note's maturity date. This parallels the Absecon case, where the Court determined that the CFA did not apply because the transaction was primarily for the sale of a business, with real estate being only a secondary aspect. Absecon, 406 N.J. Super. 242, 275 (App. Div. 2009).

The first page of the APA clearly states that the purpose of the agreement was the sale of the dry-cleaning business, not the sale of goods, wares, or real property to the public. This further supports the conclusion that the CFA does not apply in this case. Therefore, based on the precedent set by Absecon and the facts of the case at hand, the Court concludes, as a matter of law, that the CFA is not applicable to the transaction between the parties.

TO SUMMARIZE, consistent with the within decision, the Plaintiff has demonstrated that a genuine issue of material fact remains for the jury to resolve regarding the Defendant's alleged breach of contract, unjust enrichment, and breach of the duty of good faith and fair dealing. All other claims brought by the Plaintiff are unsupported and cannot be sustained and are hereby dismissed.