AMERESTATE HOLDINGS, LLC., BROADWAY WEST, LLC., and 811 ASSOCIATES, LLC.,

Plaintiffs,

v.

CBRE, INC., GRID REAL ESTATE, LLC, GRID COMMERCIAL REAL ESTATE, LLC, CHARLES BERGER, ELLI KLAPPER, ROBERT ANTONICELLO, BACA REAL ESTATE INVESTMENT CORP., 1064 REALTY CORP., WESLEY REALTY CORP. AND B=WAY REALTY CORP., DRESDNER ROBIN ENVIRONMENTAL MANAGEMENT and EDWARD V. KOLLING

Defendants,

AND

DRESDNER ROBIN ENVIRONMENTAL MANAGEMENT and EDWARD V. KOLLING

Third Party Plaintiffs,

v.

FEINSTEIN, RAISS, KELIN & BOOKER, LLC and RICHARD S. KELIN, ESQ.

Third Party Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

DOCKET NO. HUD-L-3012-15

Judge Anthony V. D'Elia

Civil Action

OPINION

Pending before this Court is Defendants CBRE, Inc., Charles Berger and Elli Klapper (Defendants) Motion for Summary Judgment seeking dismissal of Plaintiff's Amended Complaint in its entirety, with prejudice. After hearing argument on the issues presented and considering the moving briefs, the Court issues the following Opinion.

PROCEDURAL HISTORY

This litigation is premised upon Plaintiff's claims that it was defrauded by various representations made by the Defendants and that Plaintiff reasonably relied upon those misrepresentations (as to the number of units) which could be built at the property site As of Right ("AOR"), to its detriment. Plaintiff also asserts that the Defendants conspired to defraud the Plaintiff because of its reliance on the alleged misrepresentations.

Initially it must be noted that the Defendants previously sought dismissal of Plaintiffs' claims for the reasons expressed in this motion on a number of occasions. As previously summarized by this Court on the record, the Hon. Judges Mary Costello and Jeffrey Jablonski denied Defendants' motions to dismiss and instead held that the question of whether the Defendants materially misrepresented essential facts and whether the Plaintiff reasonably relied upon those misrepresentations, were questions for the jury. Both Judges also denied motions to reconsider filed by the Defendants. This Court previously refused to reconsider those opinions. However, the Plaintiff also sought reconsideration of those opinions; most recently by moving to bar the testimony of Defendants' expert which summarized the various reasons why Plaintiff could not have reasonably relied upon any misrepresentations by the Defendants, listing the various failures by the Plaintiff to exercise due diligence prior to entering into the Purchasing Agreement for the property and ultimately closing on this real estate transaction. During that argument, Plaintiff asserted that Defendant's expert should be barred from opining on those matters because, amongst other reasons, the question of Plaintiff's reasonableness in relying upon the misrepresentations should not be a question for the jury because Plaintiff had never "undertaken an investigation" into the question of the number of AOR units which could be built prior to executing the contract and/or closing on the transaction.

This Court denied Plaintiff's request to bar Defendants' expert but found that, in the interests of justice, and since the Plaintiff had made multiple attempts to readdress the rulings that Judges

Costello, Jablonski and this Court made on the issue, the Defendants should be given an opportunity to reconsider that question as well. This motion followed. [1]

FACTS

Plaintiff and the seller of the real estate executed a Purchase Agreement (Agreement) on September 3, 2014, to purchase a number of unentitled properties in Jersey City for development as commercial residential apartment units. There were various properties identified for sale in the transaction consisting of six tax lots and a portion of a vacated street. A number of the lots needed to be consolidated, and the portion of the vacated street also needed to be addressed so that the entire transaction could be considered for development of the overall site for residential units. The moving Defendants here were engaged as brokers with regard to the sale of the property site. [2]

Well before signing the Agreement in September of 2014, Plaintiff retained experts to investigate various issues relating to the property site; and it is undisputed that the most significant issue to be investigated by Plaintiff's consultants was the question of how many AOR units could be developed by Plaintiff after purchase.

Those consultants included Richard Kelin, Esq. of Feinstein Raiss, Kelin and Booker (counsel regarding the purchase); Frances X. Regan of the DeCotis, Fitzpatrick law firm (land use/zoning counsel) and (most significantly for the purposes of this motion) licensed planners and architects, MHS. MHS' employees/principals were Dean Marchetto and Bruce Stieve.

Plaintiff's offer to purchase the property was verbally accepted by the seller in or around July of 2014. As noted above, the Agreement was executed on September 3, 2014.

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[1] Plaintiff had opposed Defendants' prior motions, consistently arguing the question of whether Plaintiff reasonably relied on Defendant's misrepresentation was not a question for the Jury. Plaintiff's arguments were also rejected by the previous rulings.

[2] Jack Salamon was the sole owner of the Plaintiff Amerestate. He was a sophisticated purchaser at the time of this transaction as he was a practicing attorney who had previously purchased and developed properties for commercial use. He was also represented by experienced counsel in negotiating/executing the Agreement and closing on the transaction.

The Plaintiff had engaged the above consultants prior to executing the Agreement and, in fact, engaged MHS on July 3, 2014 for $20,000 to, among other things, "review the existing documents (at that time) for various properties involved in the transaction and advise Amerestate as to the developmental potential of the properties for the number of units that may be approved by Jersey City". MHS was later tasked (in November of 2014) to further assess the potential to increase the number of units that might be developed at the site.

The transaction ultimately closed in February of 2015.

Defendants now move to dismiss for a number of reasons. Defendant acknowledges that the Court should apply the general law regarding summary judgment motions to the facts presented at this time and the Court acknowledges that it is now applying the standard enunciated in Brill v. Guardian Life Ins., 142 N.J. 520 (1995) to this motion.

Defendant correctly asserts that the Plaintiff, at the time of trial, will have the burden of proving by clear and convincing evidence, that the Defendants materially misrepresented a than existing or past fact, with knowledge or belief of its falsity, intending that Amerestate rely upon it and that Plaintiff's reliance (on any alleged misrepresentation) must not only have been actual, but also reasonable/justifiable.

Defendant argues that the undisputed facts at this time could only lead this Court to conclude that no rational juror would expect that Plaintiff could satisfy the clear and convincing burden of proof required under this standard.

Defendant argues that the Plaintiff, by signing the Agreement, specifically promised that it was only relying upon the advice and counsel of its own consultants, agents, counsel, and officers entering into the transaction. Indeed, the Agreement specifically contains a clause wherein the Plaintiff acknowledged that it was relying "strictly and solely" upon the advice and counsel of its own consultants, agents, counsel and officers, regarding all issues of the transaction.

While these Defendants were not a party to that Agreement, that would certainly be admissible to establish that Plaintiff was not relying upon anything else but its own consultants, agents, counsel, and officers for issues relating to this purchase.

Defendant further argues that by retaining MHS in July of 2014; Mr. Kelin, and Mr. Regan, Plaintiff obviously undertook its own investigation of relevant facts – specifically in relation to the number of units which might, or might not, be able to be built AOR at the site.

Thus, (Defendant argues) the question of whether Plaintiff's reliance upon any alleged misrepresentations were unreasonable is clearly – at a minimum – a question for the jury. Defendant's argument goes further by alleging that the undisputed facts in this case could only lead to one conclusion: No rational juror could find that the Plaintiff's reliance upon Defendant's alleged misrepresentations were reasonable or justifiable and, therefore, Plaintiff's Complaint should be dismissed in its entirety.

Defendants also argue that the sellers specifically disclaimed any representations or warranties in the Purchasing Agreement. Such disclaimer included any which may have been made by the seller or its agents, concerning the property's developmental potential. Obviously, the Defendants argue that they were the sellers' agents (as brokers) and that that clause of the Agreement should also operate to bar Plaintiff's claims.

For all of those reasons, (and a few more), Defendants seek to dismiss Plaintiffs' Complaint. It should be noted that the Defendants' Motion assumes, for the purposes of this motion, that the Plaintiff will be able to prove that Defendants materially misrepresented than existing or past facts with the knowledge or belief by the Defendant of their falsity, intending the Plaintiff (Amerestate's principal, Mr. Salamon) to rely upon them.

PLAINTIFF'S OPPOSITION

While it is true that the Plaintiff opposed the Defendant's motions before Judges Costello and Jablonski when the Defendant sought to dismiss Plaintiff's Complaint on these questions by arguing that it, instead, was entitled to a ruling that the question of its reliance upon the alleged misrepresentation should not be presented to the jury, Judges Costello, Jablonski (and this Court initially) rejected Plaintiff's arguments.

Plaintiff again attempted to obtain the same result when it raised the same argument in its most recent motion to bar Defendants' expert; a motion which was denied by this Court.

So after having repeatedly lost its argument, Plaintiff's opposition now essentially boils down to this: the question of whether the Plaintiff reasonably relied upon misrepresentations made by the Defendant should now go to the jury and the Plaintiff relies upon the general rule that the question of reasonable reliance for fraud claims is generally a question of fact for the jury.

Plaintiff argues that it may have retained consultants to investigate these issues prior to entering into a Purchase Agreement and/or closing on the transaction but that Defendant has "selectively" utilized the deposition testimony of Messrs. Marchetto and Stieve of MHS to make it appear that they had reported their conclusions (as to the number of units which could be built) to the Plaintiff prior to Plaintiff executing the Purchase Agreement and/or closing on the property. Plaintiff argues that it did not "investigate" the question of the number of AOR units which could be built at the property prior to entering into the Agreement or closing on the property, and that, therefore, the general rule should apply, and the question of Plaintiff's reliance must be presented to the jury as a question of fact.

It appears that Plaintiff also argues that the Defendant's motion focuses unfairly upon "only one aspect" of Plaintiff's fraud claims, i.e. whether CBRE's Offering Memorandum contains fraudulent representations as to the number of units which could be built at the site. Plaintiff's opposition then summarizes the various alleged fraudulent misrepresentations, including, for example,

the Defendant Berger telling the Plaintiff that communications he had obtained from a planner (Mr. Kolling) as to the number of units that could be built at the site could be "taken to the bank".

Plaintiff also argues that CBRE's representation that it would do "due diligence" somehow supports Plaintiff's fraud claims.

Thus, Plaintiff argues that there are enough fraudulent misrepresentations which would justify denying Defendant's motion. Plaintiff argues that the conclusion must be, at least for summary judgment purposes, that the Plaintiff's reliance was reasonable.

As an example of the Plaintiff's (dogged) refusal to "give up the ghost", the Plaintiff again argues in its opposition brief (at page 3) that "...in the circumstances of this case, as a matter of law, reasonable reliance is not even an issue".

To be clear, this Court agrees with the previous rulings of Judges Costello and Jablonski, to the extent that the question of reasonable reliance is (at least) a factual issue for the jury. The only question presented in this motion is whether any rational juror could conclude that the Plaintiff's reliance was reasonable or justifiable.

PLAINTIFF'S ALLEGED ACTS OF FRAUD

The Court recognizes that Plaintiff alleges various acts of fraud beyond simply the CBRE Offering Memorandum.

The alleged acts are:

- The CBRE Offering Memorandum, which states that the "...site provides an incredible opportunity to construct over 500 as – of – right units". (Bate stamp number Amerestate 892). It further states that the total development could yield "+/-"580 residential units. (Amerestate 895).

- Plaintiff also asserts that Defendant Berger solicited a number of communications from CBRE's licensed professional planner, Edward Kolling, and that Mr. Berger had somehow altered or

modified Kolling's communication so as to mislead the Plaintiff in connection with the number of units that could be built at the site.

- Plaintiff also argues that the Defendants provided a "Broker's Opinion of Value" which (somehow) either misrepresented the number of units that could be built on the site or misled the Plaintiff into relying upon CBRE to confirm the actual number of units that could be built at the site.

- Finally, and as noted above, Plaintiff alleges that Berger orally represented he could take the Kolling communication "to the bank" as to the number of units that could be built at the site.

This motion does not turn on whether the Defendants unfairly focused upon only one aspect of the alleged fraud asserted by the Plaintiff or whether the Defendants' arguments relate to all of the above acts. Whether there were one, two or six alleged acts of fraud, the only question that is relevant is whether any rational jury could conclude that the Plaintiff reasonably relied upon any of those misrepresentations.

In connection with that question, the Court will necessarily address each of the allegations raised by the Plaintiff above. Not only is Plaintiff's "investigation" relevant to the reasonable reliance question, but the actual alleged misrepresentations must be addressed. Were the misrepresentations actually misrepresentations as alleged by Plaintiff, or did he unreasonably rely upon representations when no other objective, sophisticated purchaser would have done so? In short, one of the relevant factors in determining whether Plaintiff reasonably relied upon these misrepresentations was whether, and to what extent, they actually were misrepresentations of either presently existing or past facts.

After reviewing each, as summarized below, the Court finds that even if one assumes that the representations were misleading or fraudulent, it is also clear that no rational juror could find that the Plaintiff's reliance upon those misrepresentations was reasonable, so as to present that question to a jury.

1. The Offering Memorandum:

The Memorandum, in a section entitled "Offering Overview", states that the site can provide an incredible opportunity to construct over 500 as – of – right unit" and, in another section, states that total development may be "+/ –" 580 residential units. It is therefore clear that those statements indicate that the development potential may be less than 580 residential units and that the number might be more or less than 580.

Moreover, when reviewing the Memorandum as a whole, the clear language (at pg. 1 of that Memorandum) makes clear that the above is not a representation of fact – but an approximation; not to be relied upon. That language is:

> This Memorandum contains selective information pertaining to the property and does not act or purport to be a representation of the state of affairs of the property or the owner of the property to be all inclusive or to contain all or part of the information which prospective investors may require to evaluate a purchase of real property. Therefore, all projections, assumptions and other information provided and made herein are subject to material variations. Interested parties are expected to review all such summaries and other documents of whatever nature independently and not rely on the contents of this Memorandum in any manner. Neither the owner of CBRE Inc. nor any of their respective directors, officers, affiliates, or representatives make any representation or warranty, express or implied, as to the accuracy and completeness of this Memorandum or any of its contents, and no legal commitment or obligation shall arise by reason of your receipt of this Memorandum or use of its contents, and you are to rely solely on your investigation and inspections of the property in evaluating a possible purchase of the real property. (Amerestate 887) (emphasis added).

The Memorandum was never intended to be a representation of any material fact as to the actual number of units which could be built at the property site. Moreover, the Memorandum specifically states it should not be relied upon by any prospective purchaser of the property for any projections, assumptions or other information provided therein.

- Plaintiff's claims regarding the "Kolling" communications:

It appears that Plaintiff is utilizing two separate emails in an attempt to prove that the Defendant Berger misled it regarding Kolling's representation as the number of units that could be

built at the site. One email was dated May 19, 2014, and the second, August 29, 2014. (which included an August letter from Kolling).

In the email of May 19th, which Mr. Berger received (through Bob Antonicello of Grid Real Estate) Kolling commented upon the number of units which might be built at the site in light of some number that had been presented by the Jersey City Planning Staff. The essence of that email clearly reflected that the number of units that could be built at the site were dependent upon a number of conditions. As stated by Mr. Kolling in that May 19th email, perhaps the City Planning Staff had deducted the vacated portions of West Side Avenue to reach a unit number which could be developed at the site. In that same email, he speculated that City Planning Staff may have been looking at different lots, versus the lots listed in the documents provided to him and the sellers, which then would result in a difference in the number of units to be built at the site. In that same email, he speculated that different unit numbers could be reached by calculating the area on a lot-by-lot basis and he specifically stated that the unit count calculation would vary significantly depending on how the individual lots are consolidated. [3]

In short, the May 19th email was so qualified and conditional that it was unclear as to how many units could or could not be built at the site.

The Plaintiff did not receive that email from Mr. Berger but, instead, received an August 29, 2014, email from Mr. Berger, which contained an August 29th letter from Mr. Kolling. That letter however, was not a definitive statement as to the number of units which could be built at the site, as Plaintiff alleges.

For example, in the 4th full paragraph of that letter, Mr. Kolling makes very clear that different unit counts could be reached and the "...count calculation could vary significantly depending

[3] As will be summarized further in this Opinion, the number of units clearly were based, in huge part, upon what lots could or could not be consolidated. The Planners hired by Amerestate advised Amerestate that it could not determine an accurate number of units that could be built at the site without the lots being consolidated and after first obtaining a consolidated survey, with other qualifiers.

on how the individual lots are consolidated". (emphasis added). He made it clear in that letter that the only reasonable way to arrive at a total unit count was to consolidate the parcels as one developmental unit, but if they were developed individually the total unit count would be less than the maximum of 567 units.

Significantly, there was never any representation made by these Defendants or the Sellers (or anyone for that matter) that the lots could or would be consolidated. There were never any conclusive facts presented to the Plaintiff that the property sites could be consolidated for development. Thus, the August 29, 2014, letter from Mr. Kolling makes clear that the total number of units might be "significantly" less than 567 units.

Contrary to Plaintiff's argument, this was not a definitive "misrepresentation of a fact as to the number of units which could be built at the site".

THE LAW

The Court is mindful of the standard to be applied in connection with this motion enunciated in Brill, supra. and N.J. Court Rule 4:46-2, the Court must evaluate whether there is a genuine issue of material fact; in this case whether the Plaintiff actually relied upon any alleged misrepresentation by the Defendant, and, if so, whether that reliance was justified or reasonable. This Court must then consider both the burden of persuasion and the standard of proof because "an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the party on the motion, together with all the legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier fact". R.4:46-2 (c). This Court must consider the elements of the cause of action Plaintiff is pursuing as well as the evidential standard governing Plaintiff's cause of action (in this case "clear and convincing"). See; Bhagat v. Bhagat, 217 N.J. 22, 38 (2014).

If the motion record establishes that a single, unavoidable resolution of the alleged disputed issue of fact has been established, then that issue should be considered insufficient to constitute a

genuine issue of material fact for purposes of R. 4:46-2. Brill, supra. at 540. When the evidence is so one sided that one party must prevail as a matter of law ... the trial court should not hesitate to grant summary judgment. Id.

The Court recognizes that the Plaintiff will need to prove, via clear and convincing evidence, each of the elements of common law fraud including, (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). A Plaintiff's reliance on a 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).

In instances where a commercial purchaser (like Plaintiff herein) undertakes its own investigation, that purchaser will be deemed to know what that investigation would have uncovered. See DSK Enterprises Inc. v. United Jersey Bank, 189 N.J. Super 242, 251 (App. Div. 1983) ("[I]f a party to whom representations are made nevertheless chooses to investigate the relevant state of facts for himself, he will be deemed to have relied on his own investigation and will be charged with knowledge of whatever he could have discovered by that reasonable investigation"); Berman v. Gurwicz, 189 N.J. Super 89, 123 (Ch. Div.1981), aff'd 189 N.J. Super 49 (App. Div. 1983) ("where the representee undertakes an independent investigation he is ordinarily chargeable with knowledge of all of the facts which an investigation should disclose and has no right to rely upon the representors statement").

In ACBB-bits, LLC. v. 550 Broad St., L.P. (Unpub., 211 N.J. Super (App. Div.) LEXIS 2875) the Appellate Division stated that "...if a party to whom representations are made nevertheless choses to investigate the relevant state of fact for itself, after becoming aware of a potential discrepancy, it will be deemed to have relied on its own investigation and will be charged with knowledge of whatever

it could have discovered by that reasonable investigation. (Ibid*40; citing to DSK Enter, Inc., supra. at 251).

In Bayview Corp. Ctr. LLC. vs. Bayview Props, LLC. (Unrep, 2025 N.J Super LEXIS 194) The Defendant had counter claimed when Plaintiff failed to appear at a closing for a residential real estate purchase. The Defendant claimed that Plaintiff had misrepresented certain information regarding rent rolls and leases.

The Trial Court held that the Defendant could not, as a matter of law, have reasonably relied upon Plaintiff's alleged misrepresentations regarding rent rolls because Defendant had had an opportunity to do his own investigation but chose not to do so. The Defendant, according to the Trial Court, did nothing to further investigate the representations made by the Plaintiff. The Trial Court, thus granted summary judgment to the Plaintiff and dismissed Defendant's counterclaims finding that the Defendant could not establish "reasonable reliance" on any alleged misrepresentations by the Plaintiff because "there cannot be fraud in a contract action when the party has been provided with an opportunity to perform an independent inspection pursuant to due diligence".

The Appellate Division reversed the Trial Court's ruling. Yet, for purposes much more relevant to the matter before this Court, it reaffirmed that where a buyer "undertakes" an independent investigation and relies upon that, rather than any statement from the seller, there cannot be reliance as a matter of law. Bayview Corp. at *21; citing Walid v. Yolanda for Irene Couture Inc., supra at pg. 180.

The Appellate court emphasized that "when a buyer undertakes an inspection, after learning of potential misrepresentations by the seller, yet nevertheless proceeds in reliance on the sellers allegedly false information, the buyer waives any future claims of reasonable reliance. Ibid at *21. (emphasis added). The Appellate Division emphasized, however, that (a) neither party alleged that the Defendant knew or had reason to suspect that the rent rolls provided by the Plaintiff were incorrect at

the time of contract inception or prior thereto. Ibid. The Appellate Court also emphasized that neither party claimed that the Defendant had undertaken its own inspection prior to contract inception. Id at*22. (emphasis added).

By way of contrast, here, (and unlike the facts in Bayview Corp.), the Plaintiff clearly had reason to suspect that any representations as to the number of AOR units which might be built at the site (whatever those representations may have been) were not accurate or reliable because of the qualifying, conditional language, warnings and disclaimers contained in the Offering Memorandum; the Brokers Opinion of Value; the actual Purchase Agreement itself, and the seller's refusal to include a clause guaranteeing a minimum number of units which could be developed at the site etc., etc. And, unlike the parties in Bayview Corp., the Plaintiff here did undertake an independent investigation with the intention of relying upon its planner, MHS as to the numbers of units which could be built at the site. [4]

Defendants cite to a number of other cases which stand for the proposition that where a commercial buyer undertakes an investigation, after becoming aware of a potential discrepancy, then any fraud claim must fail if a reasonable investigation would have uncovered the matter allegedly misrepresented.

The Court also notes that Defendant correctly cites to an interlocutory Appellate Division ruling in this very same case (Amerestate Holdings LLC v. CBRE Inc., 2018 N.J. Super, Unpub. LEXIS 2025, *20 (App. Div. 2018)), where the Appellate Division emphasized that "[Although one who engages in fraud may not urge that the victim should have been more circumspect or astute, if the party to whom misrepresentations are made nevertheless choses to investigate the relevant state of

[4] While the cases stated above were unpublished, they do rely upon and specifically cite to reported decisions to support their statements of the law and are therefore very persuasive with this Court regarding this motion.

facts for himself, he will be deemed to have relied on his own investigation and will be charged with knowledge of whatever he could have discovered in a reasonable investigation").

- The CBRE Broker Opinion of Value:

Plaintiff argues that the following language somehow indicates that its reliance upon misrepresentations were reasonable. The Court does not believe the Plaintiff is arguing that the following language from the Broker's Opinion of Value is a misstatement of a fact; unless that "fact" is whether CBRE will "examine the property as if it were the purchaser".

The language cited by the Plaintiff is as follows:

> Our team will examine the property and record as if we were the purchaser. This will include ...surveys..... Furthermore, CBRE will verify all information incorporated into the Offering Memorandum. Following is a detailed list of items that will be reviewed .... Survey, zoning, land area calculations. (Broker Opinion of Value Bate stamp "Grid Defendant – all four – 1493".)

However, that same document clearly states that CBRE will verify the information incorporated into the Offering Memorandum which will be available to investors during the marketing period and specifically outlines the items that will be reviewed during the due diligence phase. (Grid Defendants – all four – 1493).

None of those items address or relate to the number of units which might be built at the site As of Right.

Moreover, even in that document, CBRE emphasizes that "... it is our understanding that 379 multifamily units could be built on this site "As of Right", however, the detail and specifics related to the redevelopment of this group of properties needs to be clarified. The areas which need further investigation relate to the density, lot setbacks, parking requirements, easements and street vacation, potential environmental issues, demolition cost, storm water management, tenancy issues or any other potential site-specific constraints. Perhaps most importantly, we must confirm the lots and vacated

streets to be included in a potential sale, with their corresponding site or acreage, for which a survey and back title would be helpful" (Grid Defendants – all four – 1488).

Thus, despite Plaintiff's "cherry picking" of the language in the Broker Opinion, that Opinion does not justify any reliance upon any allege misrepresentations as to anything in connection with the number of units which might be built at the site.

Again, this Court has examined the various alleged acts of fraud not to find whether, in this summary judgment motion, the question of whether Defendant actually committed fraud should or should not go to the jury: the Court recognizes that in the normal case that would not be decided in a summary judgment motion. The alleged acts, however, are noted by this Court because the Plaintiff argues that the question of whether it reasonably relied upon alleged acts of fraud is related to the number of alleged acts of frauds committed by the Defendant and (as Plaintiff argues) how "Plaintiff's fraud claim" is based on much more than that (the language of CBRE Offering of Memorandum)". See Plaintiff's opposition brief – pg. 2.

Plaintiff's Investigation

For the reasons that follow, this Court concludes that Plaintiff "undertook an investigation" into the number of units which could be built at the site prior to executing the Purchase Agreement in September of 2014 and then closing on the transaction in February of 2015. While, though for the reasons summarized supra, The Plaintiff clearly knew or should have known that further investigation would be needed to confirm the actual number of units that could be built at the site before committing to the Purchase, it is not actually necessary to decide that fact under the undisputed facts presented in this motion record.

The undisputed fact is that the Plaintiff, Mr. Salamon began his investigation months before signing the Contract, when he hired planners to specifically address how many units could be built at

the site and, despite retaining them to specifically do that, he executed the binding Agreement and then proceeded to close without waiting for an answer from his investigators.

Under those facts, Plaintiff "undertook an investigation" because it obviously was not relying upon any representation as to the number of units which had been provided by the Defendants; that uncertainty was his reason for hiring MHS in July 2014. The language of the Purchase Agreement itself clearly states that Plaintiff was not relying upon any representations from the seller, or any of the seller's agents (to include the moving Defendants) when it signed the Purchase Agreement, but that it was solely relying upon its own investigations and consultants in connection with the purchase.

Thus, for the reasons expressed below, no rational juror could conclude that, after beginning an investigation into this question by retaining MHS, any alleged reliance by the Plaintiff could be considered reasonable or justified; particularly when the Plaintiff has the burden of proving the issues by clear and convincing evidence.

This Court is mindful of the fact it must first find that the Plaintiff undertook an investigation before reaching the question of whether any rational juror could conclude that Plaintiff's alleged reliance was reasonable or appropriate. Moreover, the Court is also aware of the related question: Would Defendants be able to establish that the Plaintiff relied upon its investigation rather than any alleged misrepresentations by the party.

Simply undertaking an investigation in a case like this does not necessarily establish that the Plaintiff relied on its investigation rather than any alleged misrepresentations by the Defendant. This was the essential holding in Byrne v. Weichert Realtors, 290 N.J. Super 126 (App. Div. 1996).

There, the seller, in a residential transaction, allegedly misrepresented the extent of termite damage which had previously existed at the house calling it a "minimal/fixable". Ibid. at pg. 131. The purchaser retained an inspector only for the purpose of identifying whether there was any evidence of termite damage. Ibid. at pg. 139. The buyer's investigation did not address the extent of the termite

damage; thus, there was a fact question as to whether the buyer relied upon the sellers' representations as to the extent of the termite damage.

The Trial Court in Byrne dismissed Plaintiff's Complaint, finding that the Plaintiff had "undertaken an investigation" into termite infestation and, therefore, could not possibly had relied upon the sellers' representations regarding the extent of the termite damage.

The Appellate Division reversed, summarizing the general case law reflected in DSK Enterprises Inc. v. United Jersey Bank, 189 N.J. Super 242 (App. Div.), certf. denied, 94 N.J 598 (1983); Froehlich v. Walden, 66 N.J. Super 390 (Ch. Div. 1961) (and other cases) which concluded that an investigation either begun or completed by the Plaintiff suggested a lack of reliance by Plaintiff on any representations by the Defendants. But the Appellate Opinion emphasized a lack of reliance by Plaintiff on any representations made by the Defendants because the Plaintiff investigated the termite issues only to determine if there was visible termite damage, and not to address the extent of that termite damage. Thus, the Appellate Division found that whether Plaintiff reasonably relied on the sellers' misrepresentation about the extent of the termite damage needed to be resolved at trial.

Unlike in Byrne, Plaintiff here clearly hired planners to investigate the facts relating to the specific alleged misrepresentations by Defendants i.e.: the number of units which could be built at the site AOR. Thus, even the Appellate Division's ruling in Byrne supports the conclusion that once an investigation is begun to address a specific fact, there is evidence of non-reliance.

The Court believes that the testimony of Messr. Regan, Stieve, Marchitto, Kelin – and even the Plaintiff – establish beyond a doubt that the Plaintiff was investigating the question of how many units could be built at the site well before executing the Purchase Agreement. Thus, whether one believes that Mr. Salamon and his partner were advised in the summer of 2014 – before signing the Purchase Agreement – that further investigation (including obtaining a consolidated survey) was required before his consultants could give the accurate number of units that could be built at the site;

or whether Plaintiff began the investigation – and didn't get a firm answer from his consultants; Plaintiff chose to proceed with the transaction without waiting for a firm answer from his consultants – hired well before signing the Purchase Agreement, specifically to address that question.

Thus, in light of all the evidence to be summarized in this Opinion, no rational juror could find, by clear and convincing evidence, that the Plaintiff relied upon any alleged misrepresentations when entering into this transaction.

The Court also believes the facts establish that Plaintiff was advised in the summer (possibly August) of 2014, before entering into this Purchase Agreement, that no conclusive answer could be given as to the number of units which could be built AOR at the site and that, despite that opinion from his hired consultant, Plaintiff proceeded with the transaction. [5]

ELEMENT OF COMMON LAW FRAUD

For the purposes of this motion only, the Court will assume that the Defendants materially misrepresented any number of presently existing or past facts (the number of AOR units which could be developed at the site), and that the Defendants had knowledge or a belief of those false representations. For the reasons summarized below, however, the Court finds that the Plaintiff would not be able to establish, via clear and convincing evidence, (even considering all of the evidence on this motion record under the Brill standard), to any rational jury, that the Defendant intended the Plaintiff to rely upon those misrepresentations, or that Plaintiff's reliance was reasonable. The Court will address each finding separately below.

1. Did Defendant intend that Plaintiff rely upon the misrepresentations as asserted by the Plaintiff?

[5] It is also conceded by the Plaintiff – by Plaintiffs' counsel during oral arguments on a few occasions before this Court – that there were other purchasers out there "in the hunt" for this transaction and that the Plaintiff's intent was to buy these lots and develop the lots before he would lose the deal. This was clearly the reason why Plaintiff committed to the Purchase without getting the answer he sought from MHS prior to executing the contract.

For reasons summarized supra. the specific language of the Offering Memorandum and the Broker's Opinion of Value, when considered as a whole, clearly state that any representations as to any number of items – including the number of units which could be built at the site – were not accurate and should not be relied upon by any prospective purchaser. The language of those particular documents therefore also clearly indicate that the Defendants never intended a prospective purchaser to rely upon those estimations or approximations to be accurate "facts" – as alleged by the Plaintiff.

Moreover, for the reasons summarized supra., the Kolling letter, of August 2014 was not as deceptive as the Plaintiff alleges and was clearly couched in qualifying, conditional language such that no rational juror could believe that Plaintiff would be able to prove by clear and convincing evidence that the Defendant intended the Plaintiff to rely upon the numbers contained in that letter.

2. Did Plaintiff rely upon the alleged misrepresentations?

The Court recognizes that Mr. Salamon has consistently argued that he relied upon these alleged misrepresentations in executing the Purchase Agreement in September of 2014 and then subsequently closing on the property in February of 2015. For that reason alone, the Court finds that there is a genuine issue of material fact as to whether the Plaintiff actually relied upon these representations – fraudulent or otherwise; intended to be relied upon – or not.

3. Was Plaintiff aware of any discrepancies in the alleged misrepresentations regarding the number of units which might be developed at the site?

There is no genuine issue of material fact here. The specific language of the Offering Memorandum; of the Broker's Opinion of Value; and the fact that the seller refused to include clauses in the Purchasing Agreement, specifically requested by the Plaintiff; one of which would have permitted the Plaintiff to do due diligence regarding development at the site prior to closing and one which would have the seller guaranteeing a minimum amount of AOR units which could be built at the site – all would clearly alert any commercial buyer (particularly an attorney who has developed

commercial property previously) that there were questions about the number of units which might be built at the site.

4. Was Plaintiff advised, prior to executing the Purchase Agreement, that there were some questions regarding the number of units which could be built at the site and/or should Plaintiff be charged with the knowledge that his consultants' reasonable investigations would have uncovered questions regarding the number of AOR units that could be developed at the site?

There is no dispute that the Plaintiff undertook an investigation into the critical question presented prior to executing the Purchase Agreement – i.e. how many units could be built at the site.

Plaintiff retained MHS (professional planners) in July of 2014 (2 months prior to the date of the Purchase Agreement) specifically to obtain their professional opinion about the sites to be purchased in terms of its potential. (Salamon Dep., 10/23/17 103:10-16). Plaintiff admitted that the single most important thing that he focused on in this deal was the number of units that could be built. He testified that was the most important issue that led him to purchase the site. (Dep. 10/23/17 Pg. 371: 1-9). (emphasis added). During his deposition, he again emphasized that he engaged the MHS firm specifically to "consult with them; to get their professional opinions about the site in terms of its potential". (Salamon Dep. 10/23/17 pg. 103:10-16).

In his deposition of September 6, 2017, Mr. Stieve, of MHS, confirmed that the July 3, 2014, contract between MHS and the Plaintiff included, among other items, services relating to the review of the site survey and zoning regulations. (Stieve Dep. 9/6/17 Pg. 32).

That MHS "engagement letter" of July 3, 2014, listed responsibilities relating to the need to review the site; survey and zoning regulations with the goal to explore design options to maximize layout for the site ... while still achieving the maximum density of 565 units using mostly one and two bedroom apartments and to establish space allocation spreadsheets for all components, listing number of units, size of units, number of parking spaces and square footage calculations for the above.

While Mr. Kelin, Esq., was retained and first met with Plaintiff after the Purchase Agreement was signed, he confirmed that he was made aware that MHS was independently retained by the Plaintiff to "assess the number of units that could be built at the site". (Regan Dep. 6/11/19 Pg. 181:7/182:1). He also confirmed that the Purchase Agreement clearly stated that the buyer was relying only upon its own investigations and advice and counsel of its own consultants' agents, legal counsel and officers. (Kelin Dep. 5/17/19 Pg. 293-295).

It is abundantly clear, therefore, that the Plaintiff was aware of the need to conduct its own investigation – even prior to executing the Purchase Agreement – and did, in fact, at a minimum, begin that investigation, but decided to sign the Purchase Agreement without first obtaining a firm opinion from its consultants as to whether the requisite minimum number of AOR units could be developed at the site.

Plaintiff goes to great lengths to argue that the Defendant (and, perhaps, the Court during previous oral argument), focused too significantly on the sworn testimony of Mr. Stieve – the surveyor employed by MHS regarding statements that Mr. Stieve and his partner may or may have not have made to the Plaintiff in the summer prior to the Plaintiff executing the Purchase Agreement in September of 2014. It is understandable that the Plaintiff would make that argument because Mr. Sieve's testimony is very damming for the Plaintiff in connection with this motion.

Mr. Stieve's testimony establishes that some time in the summer of 2014 (probably August) he and his partner specifically told Mr. Salamon that they could not opine as to the minimum number of AOR units which could be developed at the site because so many other conditions needed to be satisfied, including, for example, the need to get a consolidated survey for the various lots and to clarify issues relating to vacation of a street; all issues that the Plaintiff was aware of prior to executing the Agreement, and which were not satisfied prior to Plaintiff executing the Purchase Agreement.

As the Court previously stated (and it stands by this statement) Plaintiff retained consultants to obtain either a "red or a green light" regarding the minimum number of units which could be built at the site and – at best – got a "yellow light" prior to committing to the Purchasing Agreement, (or possibly none at all).

While Mr. Stieve's specific (and repeated) deposition testimony with regard to these issues is summarized below, it is not really significant whether the conversations between Mr. Stieve and Mr. Salamon occurred in or about the summer of 2014. For the Court's purposes (and this is undisputed) Plaintiff undertook an investigation before entering into the Purchase Agreement with the specific intent to obtain an opinion from its consultants as to the number of units that could be built, but then did not wait for a final opinion before executing the Purchasing Agreement and then closing on the property.

Under either circumstance (the Plaintiff being specifically told by Mr. Stieve in the summer of 2014 or not), Plaintiff is deemed to waived its's right to claim that it reasonably relied on any alleged misrepresentations because it undertook an investigation regarding the critical issues prior to executing the Agreement.

And, for the record, the Court finds that Mr. Stieve's testimony establishes that Plaintiff was specifically advised that he could not rely upon any representations as to the number of units that could be built at the site in the summer 2014 conversations.

MR. STIEVE'S TESTIMONY AS TO REASONABLE RELIANCE

In his deposition of September 6, 2017, Mr. Stieve testified that MHS understood the project was to be a consolidation of several different lots but that when he obtained the job file initially, it did not have a survey relating to all the lots. (Dep. 9/6/17, Pgs. 34-35). He explained that until they received an updated certified survey actually configuring the total property, one could not know the actual configuration of the property, and you could not state with any certainty the number of units

that could be built at the property (Dep. 9/6/17, Pg. 38:1-17). This would have required a consolidated survey. (Dep. 9/6/17, Pg. 38:18-21). He testified that this type of survey would be needed for the Jersey City Planning Board to actually determine the number of units that could actually be built at the site. (Dep. 9/6/17, Pg. 43:2-44:1).

He testified that he was "sure" that he discussed with his partner Mr. Marchetto the number of units that could be built at the site and that he advised the Plaintiff at a meeting, in his office, in the summer of 2014 about that. (Dep. 9/6/17, Pgs. 63-66). He specifically testified that, at that meeting in the summer of 2014, he advised the Plaintiff that he would first need a consolidated survey to get accurate information regarding the development potential at the site. (Dep. 9/6/17, Pgs. 68:2-4; 68:5-7 and 68-69). He emphasized that he told the Plaintiff (Jack Salamon, his partner and an "Ely" from Amerestate) that they needed additional information to verify all of the calculations. (Dep. 9/6/17, Pg. 71:2-7). At that meeting, he asked them to first obtain an updated consolidated survey (Dep. 9/6/17, Pg. 71-72). He was again asked about the meeting and emphasized that he was "sure" that they discussed with Amerestate in "August of 2014" of the need for the consolidated, updated survey. (Dep. 9/6/17, Pg. 81-82). He testified that he was "sure" that he would have reinforced the need for an updated consolidated survey relative to development of the potential number of units that could be built at the site, at that meeting in August of 2014. (Dep. 9/6/17, Pg. 83:15-84:2). He again repeated that he was sure that that advice was given at the meeting in August. (Dep. 9/6/17, Pg. 85:7-14).

He emphasized that Amerestate and he and his partner were "always discussing" the number of units which might be built at the site. (Dep. 9/6/17, Pg. 89:23-90:9).

He testified specifically at his deposition that when he presented his calculations as to the number of units which could be built at the site in the meeting in August of 2014, he advised them that it was only an approximation. (Dep. 9/6/17, Pg. 97:6-11). He also specifically recalls that, in or around August of 2014, he discussed with Amerestate the right of way and the street vacation issues

which also impacted the number of units which could be developed at the site. He recalled those discussions also occurring in or around August of 2014. (Dep. 9/6/17, Pgs. 173-174). He confirmed again that he discussed with Amerestate, at the meeting in August of 2014, how a certified consolidated survey was first needed before they could address the actual number of units which could be developed at the site. (Dep. 9/6/17, Pgs. 175-176).

At that point it appears that there might have been some time of break in his testimony but, upon his return, he clarified that he does not actually recall if this meeting (where all of this was discussed with Amerestate) happened in "August" of 2014. (Dep. 9/6/17, Pgs. 274-275). Note: maybe not August).

Significantly, he did not say that it did not happen in the summer in 2014. Under oath, at his deposition, Mr. Stieve attempted to clarify multiple statements earlier in his deposition that this meeting occurred in August, by simply saying he was not sure that it occurred in "August".

Note: no other witnesses have confirmed Mr. Stieve's testimony about what advice was given to the Plaintiffs in the meeting of 2014, either in August or during that summer. However, no one denies it; except, the Court believes, for the Plaintiff. While many seem to have a "lack of recollection" about what was or was not discussed, all agree that the consolidated survey was needed before one could accurately assess the number of units that could be developed at the site. Indeed, even Mr. Kelin, who was retained after Plaintiff executed the Purchase Agreement, clarified that a consolidated survey and issues relating to vacation of the street, etc., needed to be resolved before one could have a clear picture from Jersey City as to the number of units which could be built.

The Court therefore finds that Mr. Stieve's testimony (at a minimum) establishes that there was a meeting in the summer of 2014 wherein Plaintiff was specifically advised that his consultants could not commit to a firm, minimum number of units which could be developed at the site.

Despite that, Plaintiff nevertheless signed the Purchase Agreement in September of 2014.

For these reasons, the Plaintiff is deemed to have waived it's right to claim reasonable reliance upon any alleged misrepresentations by these moving Defendants.

Even if there is some question as to whether this specific meeting with Mr. Stieve occurred prior to Plaintiff executing the Purchasing Agreement, the undisputed fact remains: Plaintiff began an investigation relating to the critical issue well before executing the Purchasing Agreement and did not wait for his planners opinion as to whether or not the requisite number of units could be built at the site before committing to the Purchase Agreement.

The Plaintiff clearly had many reasons to question any representations made by anybody prior to executing the Purchasing Agreement for the reasons summarized above; particularly when, as a sophisticated purchaser, he asked the seller to guarantee a minimum number of units in the contract or to permit him to do his due diligence prior to closing to assess the accurate number of units which could be built and the seller refused to do so.

This Court therefore finds that either (a) the Plaintiff actually knew of serious questions regarding the number of units that could be built at the site as reported by its consultants before executing the Agreement or (b) Should be charged with the knowledge of what their consultant planners knew or would have known if Plaintiff had insisted that their investigation be completed before committing to purchasing the property.

Therefore, the Court hereby *grants* Defendant's motion to dismiss Plaintiff's Complaint in its entirety, with prejudice.

So ordered,

Hon. Anthony V. D'Elia, J.S.C.

(Decided on April 20, 2026)