FILED, Clerk of the Appellate Division, February 20, 2024, **A-000699-23**, **AMENDED**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

WEDGEWOOD GARDENS CONDOMINIUM ASSOCIATION, INC., IN ITS INDIVIDUAL CAPACITY, AND ON BEHALF OF ITS MEMBERS, PLAINTIFF VS. WEDGEWOOD GARDENS DEVELOPERS, INC., ZYGMUNT WILF AND LEONARD A. WILF, DEFENDANTS	APPEAL NO. A-000699-23 **ON APPEAL FROM**: **SUPERIOR COURT OF NEW JERSEY ESSEX COUNTY LAW DIVISION, CIVIL PART DOCKET NO.: ESX-L-2132-22** **SAT BELOW:** **HON. ROBERT H. GARDNER, J.S.C.**

BRIEF FOR PLAINTIFF/APPELLANT, WEDGEWOOD GARDENS CONDOMINIUM ASSOCIATION, INC.

Heinkel Law LLC
Daniel W. Heinkel, Esq.
ID#116372015
3 Kirkpatrick Ln.
West Caldwell, NJ 07006
Ph: (973) 784-2088
Email: daniel@heinkellaw.com

On the Brief:

/s/ Daniel W. Heinkel______
Daniel W. Heinkel, Esq.

Dated: February 20, 2024

TABLE OF CONTENTS

Table of Contents. i

Table of Judgments, Orders and Rulings. iii

Table of Authorities. iv

Statement of Items Submitted to Trial Court in Support of Plaintiff's Motion for Partial Summary Judgment and Defendants' Cross-Motion for Summary Judgment. v

PRELIMINARY STATEMENT. 1

PROCEDURAL HISTORY. 3

STATEMENT OF FACTS. 4

LEGAL ARGUMENT. 7

I. The Trial Court's Dismissal of Count One Should be Reversed because it Incorrectly Concluded the Master Deed Authorized the Developer to Sell a Common Element to the Condominium Association (T1[1], p. 17, lns. 7-15). 7

Legal Standard. 8

Applicable Law. 9

A. The Trial Court Incorrectly Concluded that Section 8(e) Authorized the Sale of Unit 74, Which is a Common Element (T1, p. 17, lns. 10-15). 10

II. The Trial Court's Dismissal of Count Two Should Be Reversed Because the Court Failed to Adequately Explain its Basis for Dismissal (T1, p. 17, lns. 7-16). 13

III. The Dismissal of Count Three Should Be Reversed Because the Trial Court Incorrectly Concluded Section 8(e) of the Master Deed Authorized the Sale of Unit 74 (T1, p. 18, lns. 15-23). . . 14

[1] T1 refers to Transcript of Motion Hearing held on September 20, 2023.

FILED, Clerk of the Appellate Division, February 20, 2024, A-000699-23, AMENDED

IV. The Court's Dismissal of Count Four Should be Reversed Because Liability Can Be Imposed Upon the Individual Defendants Without Having to Pierce the Corporate Veil (T1, p. 17, lns. 16-20). 15

Applicable Law. 16

A. The Plaintiff Can Impose Liability Directly Upon the Individual Defendants for Their CFA Violations Without Having to Pierce the Corporate Veil (T1, p. 17, lns. 16-20). 17

V. The Dismissal of Count Five Should Be Reversed Because the Trial Court Incorrectly Determined the Defendants' Actions Were Authorized by Section 8(e) of the Master Deed (T1, p. 17, lns. 20-23). 17

VI. The Dismissal of Count Six Should Be Reversed Because the Court's Finding That the Plaintiff Slept on its Rights for 35 Years is Contrary to the Record (T1, p. 18, lns. 1-14). 18

CONCLUSION. 19

TABLE OF JUDGMENTS, ORDERS AND RULINGS APPEALED

Order Denying Plaintiff's Motion for Partial Summary Judgment (dated September 22, 2023) Pa273

Order Granting Defendants' Motion for Summary Judgment (dated September 22, 2023) Pa276

TABLE OF CITATIONS

Statutes:

N.J.S.A. 46:8B-3. 9
N.J.S.A. 46:8B-3d. 10
N.J.S.A. 46:8B-3h. 9
N.J.S.A. 46:8B-3m. 9
N.J.S.A. 46:8B-6. . . . . 9, 11, 14
N.J.S.A. 46:8B-12. 10
N.J.S.A. 46:8B-12.1d(9). 10
N.J.S.A. 46:8B-15(c) 10, 18

State Case Law

New Jersey Supreme Court Opinions:

Allen v. V&A Bros., Inc., 208 N.J. 114, 131 (2011). 12, 17
Gennari v. Weichert Co. Realtors, 148 N.J. 582, 608-10 (1997). 12
Jennings v. Pinto, 5 N.J. 562, 569-570 (1950). 8
Kiefer v. Best Buy, 205 N.J. 213, 222-223 (2011). 8
Manalapan Realty, L.P., v. Twp. Comm., 140 N.J. 366, 378 (1995). . 8

RULE 2:6-1 STATEMENT OF ITEMS SUBMITTED TO TRIAL COURT IN CONNECTION WITH PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Items Submitted by Plaintiff (Movant): **Page**

Plaintiff's Notice of Motion for Partial Summary Judgment dated August 25, 2023. . . . . Pa33

Plaintiff's Proposed Form of Order. Pa35

Plaintiff's Statement of Material Facts. Pa37

08/25/2023 Certification of Daniel W. Heinkel, Esq ("8/25/23 Heinkel Cert."). Pa45

Exhibit A to 8/25/23 Heinkel Cert. (Plaintiff's Amended Complaint) Pa1

Exhibit B to 8/25/23 Heinkel Cert. (Defendants' Answer to Plaintiff's Amended Complaint). Pa20

Exhibit C to 7/10/20 Heinkel Cert. (Leases between Plaintiff and Co-Defendant, Wedgewood Gardens Developers). Pa54

Exhibit D to 8/25/23 Heinkel Cert. (Unit 74 Tenant Account History from December 1998 through September 2008). Pa71

Exhibit E to 8/25/23 Heinkel Cert. (Unit 74 Tenant Account History from October 2007 through April 2016). Pa90

Exhibit F to 8/25/23 Heinkel Cert. (Deed to Unit 74 dated April 7, 2016). Pa96

Exhibit G to 8/25/23 Heinkel Cert. (Affidavit of Title Executed by Wedgewood Gardens Developers). Pa99

Exhibit H to 8/25/23 Heinkel Cert. (Promissory Note and Mortgage Given to Manasquan Savings Back by Plaintiff in Connection with Loan for Unit 74). Pa101

<u>Items Submitted by Plaintiff, *contd.*</u>: **<u>Page</u>**

Exhibit I to 8/25/23 Heinkel Cert. (Settlement Statement from April 7, 2016 closing of Unit 74). Pa109

Exhibit J to 8/25/23 Heinkel Cert. (2016 Annual Mortgage Statement from Manasquan Savings Bank). . . Pa113

Exhibit K to 8/25/23 Heinkel Cert. (2017 Annual Mortgage Statement from Manasquan Savings Bank). . . Pa116

Exhibit L to 8/25/23 Heinkel Cert. (2018 Annual Mortgage Statement from Manasquan Savings Bank). . . Pa119

Exhibit M to 8/25/23 Heinkel Cert. (2019 Annual Mortgage Statement from Manasquan Savings Bank). . . Pa122

Exhibit N to 8/25/23 Heinkel Cert. (2020 Annual Mortgage Statement from Manasquan Savings Bank). . . Pa126

Exhibit O to 8/25/23 Heinkel Cert. (2021 Annual Mortgage Statement from Manasquan Savings Bank). . . Pa129

Exhibit P to 8/25/23 Heinkel Cert. (2022 Annual Mortgage Statement from Manasquan Savings Bank). . . Pa133

Exhibit Q to 8/25/23 Heinkel Cert. (2023 Annual Mortgage Statement from Manasquan Savings Bank). . . Pa136

Exhibit R to 8/25/23 Heinkel Cert. (Master Deed for Wedgewood Gardens Condominium Association, Inc.). . Pa139

<u>Items Submitted by Defendants in Support of Opposition and Cross-Motion for Summary Judgment</u>: **<u>Page</u>**

Defendants' Notice of Cross-Motion for Summary Judgment dated September 12, 2023. . . . . Pa178

Defendants' Proposed Form of Order. Pa180

Defendants' Response to Plaintiff's Statement of Material Facts. Pa181

Defendants' Counter Statement of Material Facts. Pa187

Items Submitted by Defendants in Support of Opposition and Cross-Motion, *contd.*: **Page**

Affidavit of Irene Bartosh dated September 12, 2023 ("9/12/23 Bartosh Aff."). Pa196

Exhibit A to 9/12/23 Bartosh Aff. (Master Deed for Wedgewood Gardens). Pa139

Exhibit B to 9/12/23 Bartosh Aff. (Deed to Unit 74 dated April 7, 2016) Pa96

Exhibit C to 9/12/23 Bartosh Aff. (Unit 74 Leases). Pa54

Exhibit D to 9/12/23 Bartosh Aff. (Notice of Lease Termination dated November 6, 2015). Pa197

Exhibit E to 9/12/23 Bartosh Aff. (November 24, 2015 e-mail from Plaintiff's Counsel to Attorney for Wedgewood Gardens Developers). Pa198

Exhibit F to 9/12/23 Bartosh Aff. (December 23, 2015 e-mail from Plaintiff's Counsel to Attorney for Wedgewood Gardens Developers). Pa201

Exhibit G to 9/12/23 Bartosh Aff. (Unit 74 Contract of Sale dated February 1, 2016). Pa202

Exhibit H to 9/12/23 Bartosh Aff. Deed to Unit 74 dated April 7; 2016; Checks Remitted by Title Agency in Connection with April 2016 sale of Unit 74). Pa206

Certification of Mark Rothberg, Esq. dated September 12, 2023 ("9/12/23 Rothberg Cert.") Pa228

Exhibit A to 9/12/23 Rothberg Cert. (Master Deed for Wedgewood Gardens) Pa139

Exhibit B to 9/12/23 Rothberg Cert. (Deed to Unit 74 dated April 7, 2016) Pa96

Exhibit C to 9/12/23 Rothberg Cert. (Unit 74 Leases). . . Pa54

Exhibit D to 9/12/23 Rothberg Cert. (Notice of Lease Termination dated November 6, 2015 and email from Plaintiff's counsel) Pa197

Items Submitted by Defendants in Support of Opposition and Cross-Motion, *contd.*: **Page**

Exhibit E to 9/12/23 Rothberg Cert. (November 24, 2015 e-mail from Plaintiff's Counsel to Attorney for Wedgewood Gardens Developers). Pa198

Exhibit F to 9/12/23 Rothberg Cert. (December 23, 2015 e-mail from Plaintiff's Counsel to Attorney for Wedgewood Gardens Developers) Pa201

Exhibit G to 9/12/23 Bartosh Aff. (Unit 74 Contract of Sale dated February 1, 2016) Pa202

Exhibit H to 9/12/23 Rothberg Cert. (Deed to Unit 74 dated April 7; 2016; Checks Remitted by Title Agency in Connection with April 2016 sale of Unit 74). Pa206

Exhibit I to 9/12/23 Rothberg Cert. ("Transcript from March 29, 2023 Deposition of Robert DiGiovanni, former President of the Wedgewood Gardens Condominium Association) Pa231

Exhibit J to 9/12/23 Rothberg Cert. ("Defendants' Answers to Plaintiff's Discovery Demands"). Pa256

Items Submitted by Plaintiff in Support of Reply and Opposition to Defendants' Cross-Motion: **Page**

Plaintiff's Response to Defendants' Counter Statement of Material Facts Pa269

PRELIMINARY STATEMENT

The Wedgewood Gardens Developers ("Developer") created the Wedgewood Gardens Condominium – a residential condominium situated in Verona Township, County of Essex (the "Condominium"). According to the Condominium's Master Deed, the Developer is required to reserve an unsold condominium unit as a 'common element' to house the property's superintendent. The Developer designated Unit 74 as a common element for this purpose ("Unit 74"). Unit 74 has been used to house the superintendent since the Condominium's formation.

Under the New Jersey Condominium Act ("Condominium Act"), a condominium association has certain rights and powers in connection with the common elements. For instance, an association has the duty to operate and manage the common elements. An association has the exclusive right to lease or license the common elements to third parties. In this case, the Developer wrongfully leveraged its control over the Condominium Association to enter into a sweetheart (and unlawful) deal at the expense of the Association and its owners.

As set forth herein, the Developer controlled the Condominium Association from its formation in June 1983 through 1987 when control transitioned over to the unit owners. Prior to transition, the Developer controlled

Association and Developer entered into an agreement wherein the Association would pay rent to "lease" Unit 74 from the Developer. In turn, the Association would sublease the Unit to the building superintendent.

After control of the Association transitioned to the unit owners, the owners never challenged the validity of the leasing agreement between the Association and the Developer. From 1983 through April 7, 2016, the Developer continued to lease Unit 74 knowing it was a common element. Moreover, the Developer leased Unit 74 during this time knowing it did not possess marketable title thereto.

On November 15, 2015, the Developer notified the Association it was terminating the lease to Unit 74, but offered the option to purchase for $199,000.00. In connection with the sale, the Developer's corporate directors, Zygmunt Wilf and Leonard T. Wilf, represented the Developer held clean marketable title to Unit 74. Ultimately, the Developer conveyed its "title" to the Association on April 7, 2016.

The Plaintiff's subsequently filed the instant action against the Developer and Wilf Defendants alleging various causes of action, including breach of contract and violations of the New Jersey Consumer Fraud Act. After the close of discovery, the Plaintiff cross-moved for summary judgment as to Counts One,

Four, Five and Six of its Amended Complaint. The Defendants filed a cross-motion for summary judgment.

The trial court granted the Defendants' motion because it found the sale of Unit 74 was authorized by Section 8(e) of the Condominium's Master Deed. This finding was fatal to each of the Plaintiff's causes of action. Accordingly, the Plaintiff appeals from this determination, as well as the resulting Orders denying its motion for partial summary judgment and granting Defendants' cross-motion for summary judgment.

PROCEDURAL HISTORY

Plaintiff filed an Amended Complaint ("A.C.") against the Defendants on December 21, 2022. See Pa1. Count One of the A.C. alleges the Developer violated the New Jersey Consumer Fraud Act ("CFA") by misrepresenting its quality of title to Unit 74. See Pa10. Count 4 also alleges a CFA violation by the individual Wilf Defendants by mispresenting the quality of Developer's title to Unit 74. See Pa14. Similarly, Count Three alleges a breach of contract against the Developer. See Pa13.

Count Two alleges a separate CFA violation against the Developer for leasing Unit 74 from 1983 to 2016 while knowing it did not possess marketable title. See Pa12-13. Count Five alleges a breach of fiduciary duty claim against all Defendants out of their leasing and sale of Unit 74 to the Association. See

Pa15-16. Finally, Count Six sought an order reforming the Condominium's Master Deed to reflect Unit 74's status as a 'common element.' See Pa17-18.

After the close of discovery, the Plaintiff filed a motion for partial summary judgment as to Counts One, Four, Five and Six. In response, the Defendants filed a cross-motion for summary judgment. The trial court determined that Unit 74 is a common element. See T1 at p. 4, lns. 8-14. Notwithstanding Unit 74's status as a common element, the court determined the Developer held marketable title because the Section 8(e) of the Master Deed "allows for this particular issue." See T1 at p.17, lns. 10-15.

Based upon this finding, the Court denied Plaintiff's Motion for Partial Summary Judgment and granted the Defendants' Motion for Summary Judgment in its entirety. All six counts of Plaintiff's Amended Complaint were dismissed with prejudice. The Plaintiff appeals from these Orders, and, in particular, the trial court's conclusion that Section 8(e)authorized this particular transaction.

STATEMENT OF FACTS

The Wedgewood Gardens Condominium ("Condominium") is a residential condominium situated in Verona Township, New Jersey. See Plaintiff's Statement of Material Facts ("SOMF") at ¶¶2-3 (Pa39). The Condominium was originally constructed as garden style apartments. See SOMF at ¶1 (Pa38). The property and improvements were acquired in the early 1980's

by the co-defendant, Wedgewood Gardens Developers ("Developer"). See SOMF at ¶2 (Pa39).

The Condominium was created on June 29, 1983 when the Developer recorded a Master Deed ("Master Deed") submitting the property to the New Jersey Condominium Act ("Condominium Act") and condominium form of ownership. See SOMF at ¶¶3-4 (Pa39). The Master Deed identifies 136 condominium units ("Unit" or "Units") each with a corresponding interest in the common elements. See Pa173-177. However, Section 8(e) of the Master Deed requires that one of the unsold Units be reserved as a common element for purposes of housing the Condominium's superintendent. See SOMF at ¶12 (Pa40). The Developer designated Unit 74 as a common element for housing the superintendent ("Unit"). See SOMF at ¶13 (Pa40).

Contemporaneously therewith, the Developer formed the Wedgewood Gardens Condominium Association, Inc. ("Plaintiff" or "Association") to operate and maintain the Condominium, including its 'common elements.' See SOMF at ¶5 (Pa39). The Developer had full control over the Association from June 29, 183 until 1987. See SOMF at ¶6 (Pa39). The Developer and Developer-controlled Association entered into an agreement wherein the Association would pay rent to lease Unit 74 from the Developer. See SOMF at ¶16 (Pa41). This

arrangement continued for the entire time the Developer controlled the Association. See SOMF at ¶17 (Pa41).

After control of the Association transitioned to the unit owners, the leasing arrangement continued and was never questioned by the unit owners. Id. From 1983 to April 7, 2016, the Defendants leased Unit 74 to the Association knowing it was a 'common element' and that the Developer lacked marketable title thereto. See SOMF at ¶¶19-20 (Pa41). On November 6, 2015, the Developer sent the Association a notice to terminate the lease agreement because it was "electing to sell the unit to a third party." See Defendants' Counter Statement of Material Facts ("CSMOF") at ¶13 (Pa189). The notice conveniently provided the Association with the right to purchase Unit 74, and the parties subsequently entered into contract negotiations. See CSOMF at ¶14 (Pa189).

On November 24, 2015 the Association's counsel sent an e-mail to the Developer's counsel explaining a unit owner vote to approve the transaction would be held in December "per para. 8(e) of the Master Deed." See Pa198. On December 22, 2015, the unit owners held a meeting at which the purchase of Unit 74 was approved by 81% of those in attendance. See CSMOF at ¶17 (Pa195); see also Pa201. On April 7, 2016, the Developer executed a bargain and sale deed in consideration of $199,000.00. See SOMF at ¶21 (Pa42). In connection with the sale of Unit 74, co-defendants Zygmunt Wilf and Leonard

Wilf attested that no other persons have legal rights in Unit 74 except for utility companies. See SOMF at ¶27 (Pa42).

On April 6, 2022, the Association filed an action asserting various causes of action against the Developer and the individual Wilf Defendants, which was answered by the Defendants. The Plaintiff subsequently filed a six-count Amended Complaint on December 21, 2022 as to the same defendants. See Pa1. A responsive pleading was filed by the Defendants on February 15, 2023 ("Answer") See Pa20.

LEGAL ARGUMENT

I. THE TRIAL COURT'S DISMISSAL OF COUNT ONE SHOULD BE REVERSED BECAUSE IT INCORRECTLY CONCLUDED THE MASTER DEED AUTHORIZED THE DEVELOPER TO SELL A COMMON ELEMENT TO THE CONDOMINIUM ASSOCIATION (T1, p. 17, lns. 7-15).

Count X alleges the co-defendant, Wedgwood Gardens Developers violated the New Jersey Consumer Fraud Act in connection with the sale of Unit 74 – a housing unit located at Wedgewood Gardens Condominium. Although the Unit is a housing unit – it is not a 'condominium unit.' Instead, it is part of the Condominium's 'common elements.' As a common element, Unit 74 cannot be sold like other real property. The Plaintiff claims the Developer misrepresented its ability to convey marketable title to Unit 74 given its status as a 'common element.'

Through its motion for partial summary judgment, Plaintiff sought judgment as to Count One. Defendants opposed and cross-moved for summary judgment. Although the trial court concluded that Unit 74 is part of the Condominium's 'common elements,' it nevertheless determined the Developer held marketable title thereto because the transaction was authorized by Section 8(e) of the Condominium's Master Deed. See T1, p. 17, lns. 7-15. Based upon this finding, the Court determined there was no misrepresentation and dismissed Count One of Plaintiff's Amended Complaint. Id.

On this appeal, the Plaintiff contends the lower court incorrectly interpreted Section 8(e) of the Master Deed. Alternatively, even if the lower court correctly interpreted Section 8(e) to authorize the sale of Unit 74, its conclusion that the Developer conveyed marketable title is incorrect because the transaction is prohibited by the New Jersey Condominium Act.

LEGAL STANDARD

A lower court's interpretation of a contract is a matter of law and subject to *de novo* review. Kieffer v. Best Buy, 205 N.J. 213, 222-223 (2011) (citing Jennings v. Pinto, 5 N.J. 562, 569-70 (1950)). Indeed, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Id. at 223 (quoting Manalapan Realty, L.P., v. Twp. Comm., 140 N.J. 366, 378 (1995)).

APPLICABLE LAW

A condominium is created when the owner of real property records a "master deed" submitting his property to the Condominium Act and condominium form of ownership. N.J.S.A. 46:8B-3m. The term "condominium" is legal in nature and expressly defined by the Act as "…[a] form of ownership of real property under a master deed providing for ownership by one or more owners of units of improvements together with an undivided interest in common elements appurtenant to each such unit." N.J.S.A. 46:8B-3h. Generally speaking, a condominium's property consists of the 'condominium units' and the 'common elements.'

Under the condominium form of ownership, each 'condominium unit' has an appurtenant interest in the condominium's common elements. N.J.S.A. 46:8B-6. Each time a "condominium unit" is transferred, so to is that unit's appurtenant interest in the common elements. Id. In essence, each owner of a condominium unit has an undivided interest in the common elements.

The 'condominium units' may be sold like any other parcel of real property. N.J.S.A. 46:8B-3. The "common elements," however, "…shall remain undivided and shall not be the object of an action for partition or division." N.J.S.A. 46:8B-6. In this respect, the Condominium Act prohibits portions of the common elements from being sold.

The Condominium Act provides a non-exhaustive definition of the term "common elements." For instance, "common elements" include: (i) the land described in the condominium's master deed; (ii) parking lots; (iii) roofs; (iv) any improvement exclusively reserved for the management, operation or maintenance of the common elements or condominium property; and (v) any improvement designated as common pursuant to the master deed. N.J.S.A. 46:8B-3d. A condominium's developer is required to deliver to the Association all property of the unit owners, including "…property represented by the developer to be part of the common elements or ostensibly part of the common elements." N.J.S.A. 46:8B-12.1d(9).

The Condominium Act vests the condominium association with the exclusive authority to manage, maintain and operate those common elements. N.J.S.A. 46:8B-12. Significantly, a condominium association has the exclusive authority to "…lease or license the use of common elements in a manner not inconsistent with the rights of unit owners." N.J.S.A. 46:8B-15(c).

A. The Court Incorrectly Concluded that Section 8(e) Authorized the Sale of Unit 74, which is a Common Element (T1, p. 17 at lns. 10-15).

In this case, and pursuant to Section 8(e) of the Master Deed, the Developer designated Unit 74 as a common element for the purpose of housing the condominium's superintendent. The Developer cannot possibly possess marketable title to Unit 74 because it is a common element that cannot be

divided or separated from the other common elements. See N.J.S.A. 46:8B-6. Perhaps, more importantly, the Defendants have admitted the Developer lacked marketable title. See SOMF at 19-20 (Pa41). In this respect, the trial court erred by concluding that the Developer conveyed marketable title to Unit 74 because the transaction was sanctioned by Section 8(e) of the Master Deed.

The lower court's interpretation of Section 8(e) is inconsistent with the provision's plain language and at odds with the Condominium Act. Section 8(e) reads, in its entirety:

> The Board shall designate at least one but not more than three unsold Units for use by building personnel. Said Unit or Units shall be considered part of the Common Areas and shall be maintained by the Association shall be part of the Common Expense. By the affirmative vote of not less than three-fourths of the votes of Unit Owners present at a meeting duly called for that purpose, the Association may elect to purchase one or more Units or other residential quarters for building personnel.

See Pa148-149.

The final sentence of Section 8(e) authorizes the Association to purchase a Unit or other residential quarters for building personnel provided the purchase is approved by at least 75% of the owners present at a meeting called for that purpose. By itself, this does not authorize the sale of a common element; nor does it authorize the Developer to sell a common element to the Association.

The trial court's decision does not delve into its reasoning as to why it concluded Section 8(e) authorized the sale of Unit 74. During oral argument, the motion judge implied the transaction was authorized by Section 8(e) because the Plaintiff was represented by counsel during the closing process and no objection was made at the time. See T1 at p. 8, lns. 3-16. Similarly, Defendants' counsel argued the Plaintiff believed it was purchasing Unit 74 pursuant to Section 8(e). See T1 at p. 11, lns. 22-25; p. 12, lns. 1-5.

But even when the final section of Section 8(e) is read in *pari materia* with the preceding sentences, the provision cannot be interpreted to authorize the sale of Unit 74. For this interpretation is inconsistent with the Condominium Act, which prohibits the individual sale of a condominium's common elements. It is also inconsistent with the Defendants' admission that the Developer leased Unit 74 from 1983 to 2016 knowing it did not possess marketable title. See Pa41.

The Court's finding that Section 8(e) authorizes the Developer to convey marketable title to Unit 74 resulted in the dismissal of Count 1. Indeed, this Count was predicated upon Plaintiff's allegation that the Developer misrepresented its ability to convey marketable title to Unit 74. Since the Court found the Developer conveyed marketable title, this Count was dismissed with prejudice.

In sum, the dismissal of Count One should be reversed because it was premised upon the Court's erroneous conclusion that Section 8(e) authorized the sale of Unit 74.

II. THE DISMISSAL OF COUNT TWO SHOULD BE REVERSED BECAUSE THE COURT FAILED TO ADEQUATELY EXPLAIN ITS BASIS FOR DISMISSAL (T1, p. 17, lns. 7-16).

Count Two alleged a violation of the CFA against the Developer for its leasing of Unit 74 from 1983 through April 7, 2016. Its dismissal should be reversed because the lower court failed to explain its reasoning.

In this case, the Defendants admitted the Developer leased Unit 74 to the Association from June 1983 through April 7, 2016. The Defendants also admitted that, during this time, the Developer knew Unit 74 was a common element and that it lacked marketable title. Although the Court found that Section 8(e) authorized the sale of Unit 74, that does not necessarily speak to the issue of whether the Developer was authorized to lease Unit 74 to the Association.

According to the Condominium Act, the Plaintiff possesses the exclusive authority to manage and operate the common elements. It is also permitted to the lease or license the common elements. These rights belong only to the Association, and not to the Developer. The Developer's operation and leasing of Unit 74 to the Association is contrary to the Condominium Act.

The dismissal of Count Two should be reversed because the Developer lacked the authority to lease Unit 74, and the trial court did not provide any explanation justifying its dismissal.

III. THE DISMISSAL OF COUNT THREE SHOULD BE REVERSED BEACAUSE THE TRIAL COURT INCORRECTLY CONCLUDED SECTION 8(e) OF THE MASTER DEED AUTHORIZED THE SALE OF UNIT 74 (T1, p.18, lns. 15-23).

Count Three of the Amended Complaint pleads a breach of contract claim against the Developer for failing to convey marketable title to Unit 74. Defendants' cross-motion for summary judgment sought dismissal of this count. The trial court's oral decision does not expressly set forth its reasoning for granting dismissal. Presumably, however, dismissal was entered based upon the Court's conclusion that Section 8(e) of the Master Deed authorized the sale of Unit 74.

In this regard, the trial court's dismissal of Count Three should be reversed because it incorrectly interpreted Section 8(e) of the Master Deed to authorize the sale of Unit 74. As set forth in the preceding sections, Section 8(e) does not authorize the sale of Unit 74. Irrespectively, Unit 74 is part of the Condominium's common elements and is, therefore, unmarketable. <u>See</u> <u>N.J.S.A.</u> 46:8B-6.

Therefore, the Court's dismissal of Count Three should be reversed.

IV. THE COURT'S DISMISSAL OF COUNT FOUR SHOULD BE REVERSED BECAUSE LIABILITY CAN BE IMPOSED UPON THE INDIVIDUAL DEFENDANTS WITHOUT PIERCING THE CORPORATE VEIL (T1, p. 17, lns. 16-20).

Count Four alleged the individual Wilf Defendants violated the CFA by mispresenting the quality of Defendant's title to Unit 74. The Court dismissed this Count for two reasons. First, it found dismissal was appropriate because there were no misrepresentations concerning the Developer's ability to convey marketable title. See T1 at p. 17, lns. 7-20. Second, the Plaintiff could not pierce the corporate veil. Id.

The Court's decision should be reversed. As set forth above, the Developer did not possess marketable title. Therefore, there certainly was a misrepresentation as to Developer's ability to convey marketable title. Second, the Plaintiff is not seeking to impose liability upon the individual Defendants by 'piercing the corporate veil.' Instead, the Plaintiff seeks to impose liability directly upon these individuals for violating the CFA. The caselaw expressly permits the Plaintiff to impose liability upon a corporation's directors and officers for their individual violations of the CFA.

Here, the Plaintiff contends that each of the Wilfs violated the CFA by misrepresenting the quality of the Developer's title to Unit 74. Because the Wilfs actually made the misrepresentation on behalf of the Developer, they may be held individually liable under the CFA without having to 'pierce the corporate

veil.' Accordingly, the Court should reverse the dismissal of Count Four against the individual Wilf Defendants.

APPLICABLE LAW

On more than one occasion, our Supreme Court has held a corporation's officers and employees may be held individually liable under the CFA for misrepresentations made while acting in that corporate capacity. Allen v. V&A Bros., Inc., 208 N.J. 114, 131 (2011) (citing Gennari v. Weichert Co. Realtors, 148 N.J. 582, 608-10 (1997)).

The Allen Court also provided some examples from the Appellate Division and trial courts where individuals were held personally liable under the CFA for misrepresentation made while acting in a corporate capacity. Id. (citations omitted). The Court explained that although these individuals were acting on behalf of a corporation, they were held personally liable because they personally engaged in conduct prohibited by the CFA, i.e., making misrepresentations. Id.

Significantly, the Supreme Court expressly held a person may be individually liable without needing to pierce the corporate veil: "[a]lthough one might engage in an alternative veil-piercing approach, nothing in the CFA or the relevant precedents suggests that in the absence of veil-piercing the individual

employee or office will be shielded from the CFA violation he or she has committed." Id. at 131-32.

A. THE PLAINTIFF CAN IMPOSE LIABILITY DIRECTLY UPON THE INDIVIDUAL DEFENDANTS FOR THEIR CFA VIOLATIONS WITHOUT HAVING TO PIERCE THE CORPORATE VEIL (T1, p. 17, lns. 16-20).

The trial court erred when it concluded Count Four should be dismissed based upon the Plaintiff's inability to pierce the corporate veil. This was an error because the Plaintiff does not seek to impose liability upon the individual Wilf Defendants by 'piercing the corporate veil.' Instead, the Plaintiffs seek to impose liability directly upon them for their violations of the CFA while acting in the scope of their corporate capacities.

As set forth above, the caselaw expressly permits the Plaintiff to plead a direct cause of action under the CFA against the Wilfs for misrepresentations they made while acting on behalf of the Developer. See Allen, 208 N.J. at 131. Therefore, it was an error for the trial court to independently dismiss Count Four based upon an inability to pierce the corporate veil.

V. THE DISMISSAL OF COUNT FIVE SHOULD BE REVERSED BECAUSE THE TRIAL COURT INCORRECTLY DETERMINED THE DEFENDANTS' ACTIONS WERE AUTHORIZED BY SECTION 8(e) OF THE MASTER DEED (T1, p. 17, lns. 20-23).

Count Five alleged the Defendants breached their fiduciary duty to the Plaintiff by leasing and selling Unit 74 know it held no marketable title. The

trial court found there was no breach of a fiduciary duty "based upon the deed." See T1 at p. 17, lns. 20-23. Consequently, the Court dismissed Count 5 with prejudice.

Dismissal is inappropriate because it is based upon the trial court's incorrect conclusion that Section 8(e) authorized the sale of Unit 74. As set forth above, the Master Deed could not have authorized the sale of Unit 74 given its status as a 'common element.' Moreover, the Court failed to explain how Section 8(e) of the Master Deed (or any other provision) authorized the Developer to lease Unit 74 from June 1983 through April 7, 2016. See T1, p. 17, lns. 10-16.

The Developer's actions in this respect are anathema to the Condominium Act. Indeed, the Association has the exclusive authority to manage and operate the common elements, including the leasing or license common elements to third parties. See N.J.S.A. 46:8B-15(c).

For these reasons, the lower court erred by dismissing Count Five.

VI. THE DISMISSAL OF COUNT SIX SHOULD BE REVERSED BECAUSE THE COURT'S FINDING THAT THE PLAINTIFF SLEPT ON ITS RIGHTS FOR 35 YEARS IS CONTRARY TO THE RECORD (T1, p. 18, lns. 1-14).

In dismissing Count Six with prejudice, the court observed the Count sought equitable relief. See T1 at p. 18, lns. 1-5. Applying the maxim 'he who seeks equity must do equity,' the Court found Plaintiff could not obtain relief because it stood on its rights for 35 years. Id. at lns. 3-14. However, this finding

does not consider the fact the Developer admitted to leasing Unit for 35 years knowing it was a common element. See SOMF at ¶¶19-20 (Pa41).

Moreover, it fails to appreciate that the Developer is the one who wrongfully created the lease agreement in the first place by leveraging its control over the Condo Association. It is clear the unit owners were unaware the Developer lacked the authority to lease and sell Unit 74. In essence, the Court faulted the Plaintiff for mistakenly believing that the Developer was authorized to do all that it was doing. Id. at p. 18, lns. 7-14.

For these reasons, the dismissal of Count Six should be reversed.

CONCLUSION

The record makes clear that Unit 74 is a common element – not a condominium unit. As a common element, the Developer cannot have lawfully leased or licensed Unit 74 to the Association. The Developer wrongfully leveraged over its control of the Association to profit of the improper renting of Unit 74. This arrangement continued for 35 years until the Developer conveyed its 'title' to Unit 74 in consideration of $199,000.

The trial court's finding that the Developer conveyed marketable title to Unit 74 was fatal to each of the Plaintiff's causes of action. However, this brief shows that the trial court's conclusion is inconsistent with the New Jersey Condominium Act. As a common element, Unit 74 cannot be individual sold or

otherwise separated from the remaining common elements. As such, the Developer lacked marketable title to Unit 74.

For these reasons, the dismissal of the Plaintiff's Amended Complaint should be reversed.

Dated: February 20, 2024 ___/s/ Daniel W. Heinkel_________

Daniel W. Heinkel, Esq.

FILED, Clerk of the Appellate Division, April 22, 2024, **A-000699-23**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

WEDGEWOOD GARDENS CONDOMINIUM ASSOCIATION, INC., IN ITS INIDIVIDUAL CAPACITY, AND ON BEHALF OF ITS MEMBERS, Plaintiff/Appellant, v. WEDGEWOOD GARDENS DEVELOPERS, INC., ZYGMUNT WILF and LEONARD A. WILF, Defendants/Respondents.	APPEAL NO. A-000699-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY ESSEX COUNTY LAW DIVISION, CIVIL PART DOCKET NO.: ESX-L-002132-22 SAT BELOW: HON. ROBERT H. GARDNER, J.S.C.

BRIEF FOR DEFENDANT/RESPONDENTS,
WEDGEWOOD GARDENS DEVELOPERS, INC., ET AL.

Wilf Law Firm, LLP
Mark A. Rothberg, Esq.
ID#048001990
820 Morris Turnpike, Suite 101
Short Hills, New Jersey 07078
Ph: (973) 467-0300 (ext. 2213)
Email: Markr@wilf-law.com

On the Brief:
/s/ Mark A. Rothberg
Mark A. Rothberg, Esq.

TABLE OF CONTENTS

PRELIMINARY STATEMENT i

PROCEDURAL HISTORY... ii

STATEMENT OF FACTS.. iii

LEGAL ARGUMENT

I. The Trial Court correctly dismissed Count One of the Plaintiff's Complaint alleging Consumer Fraud and correctly concluded the 1983 Master Deed Authorized the Developer to Sell Unit 74 to The Association.. 9

II. The Trial Court correctly dismissed Count Two of the Plaintiff's Complaint alleging Consumer Fraud and adequately explained its Basis for Dismissal.. 14

III. The Trial Court correctly dismissed Count Three of the Plaintiff's Complaint for Breach of Contract and correctly concluded Section 8(e) of the Master Deed authorized the sale of Unit 74......... 17

IV. The Trial Court correctly dismissed the Plaintiff's Complaint against the Individual Defendants............................. 18

V. The Trial Court correctly dismissed Count Five of the Plaintiff's Complaint alleging Breach of Fiduciary Duty, concluding the Defendants' actions were authorized by Section 8(e) of the 1983 Master Deed.. 21

VI. The Trial Court correctly Dismissed Count Six of the Plaintiff's Complaint seeking Deed Reformation............................ 24

CONCLUSION... 25

TABLE OF JUDGMENTS, ORDERS AND RULINGS APPEALED

Order Denying Plaintiff's Motion for Partial Summary Judgment (dated September 22, 2023)………………………………………….. Pa 273

Order Granting Defendants' Motion for Summary Judgment (dated September 22, 2023)………………………………………………………. Pa 276

TABLE OF CITATIONS

Statutes:

N.J.S.A. 56:8-2………………………………………………. ……………10
N.J.S.A. 2A:14-1(c)……………………………………………… 15, 23
N.J.A.C. 5:10-1.1………………………………………………………19
N.J.S.A. 2A:14-1……………………………………………………… 21
N.J.S.A. 45:22A-47(c)………………………………………………… 23

Case Law:

Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009)………………… 10

W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144,152 (1958)……14

Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 425 (3rd Cir. 1999)……………………………………………..14

The Palisades At Fort Lee Condo. Ass'n, Inc., 230 N.J. at 454 (citing Lopez, 62 N.J. at 300(1973)…………………………………………………………15

State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983) (citing Trachman v. Trugman, 117 N.J. Eq. 167, 170 (Ch. 1934)………………….. 18

Jeffrey Rapaport M.D., P.A. v. Robin S. Weingast & Assocs., Inc., 859 F. Supp. 2d 706, 715 (D.N.J. 2012)…………………………………………….. 21

Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280, 296 (1995)………………………………………………………………………… 21

Commonwealth Land Title Ins. Co. v. Kurnos, 340 N.J. Super. 25, 29–30 (2001)…………………………………………………………………………..22

PRELIMINARY STATEMENT

This is an action filed by a Condominium Association against the Developer, thirty-five (35) plus years after transition was turned over to the homeowners, “reinterpreting” a provision in the Master Deed (paragraph 8e), concerning Unit 74, which had been designated for building personnel and rented to the Condominium Association for said use for at least the past seventeen (17) plus years.

In November 2015, the Association’s prior counsel negotiated the purchase of Unit 74 with the Developer’s counsel pursuant to paragraph 8(e) of the Master Deed and the unit owners conducted a vote on December 22, 2015 with their counsel, where 81% of unit owners approved the purchase of the Unit.

A Contract of Sale was finalized between counsel on February 1, 2016 and closing took place on April 7, 2016. Both parties were represented by counsel and marketable title was insured by the Association’s title company.

The Association’s “new” counsel is now seeking to nullify the sale, based on a “reinterpretation” of paragraph 8(e) of the Master Deed, over 35 years after transition was turned over to the Homeowners; over seventeen (17) plus years after the Association was leasing the Unit for building personnel from the Developer and over six (6) years after the Association, through prior

counsel, approved of the purchase of the Unit and entered into a Contract of Sale for the purchase.

The Statue of Limitations has long since expired on this "reinterpretation" of paragraph 8(e) by its new counsel and the Court properly granted the Defendants' motion for summary judgment, finding the sale of Unit 74 was authorized by Section 8(e) of the 1983 Master Deed.

PROCEDURAL HISTORY

Plaintiff Condominium Association filed an Amended Complaint on December 21, 2022, attempting to reinterpret the provisions of a 1983 Master Deed, thirty-five (35) plus years after transition was turned over to the homeowners. The Complaint additionally sought to nullify the sale of Unit 74 to the Association which was negotiated by counsel on February 1, 2016, which closing took place on April 7, 2016.

The Complaint additionally sought to hold Individual Defendants personally liable for executing a Deed and Affidavit of Title at the April 7, 2016 closing, claiming the developer did not have marketable title, despite the Plaintiff's obtaining a title insurance policy from its title company, insuring marketable title.

After the conclusion of discovery, the Plaintiff filed a motion for Partial Summary Judgment as to Counts One, Four, Five and Six of its Complaint. Defendants filed a cross-motion for Summary Judgment. See Pa 178.

The Trial Court denied Plaintiff's motion for Partial Summary Judgment in full and granted the Defendants' motion for Summary Judgment, finding the Master Deed specifically contemplated the sale of Unit 74 to the Association. See Pa 276.

STATEMENT OF FACTS

On April 6, 2022, Plaintiff, Wedgewood Gardens Condominium Association, Inc. (hereinafter the "Association"), filed a Complaint against the Defendant, Wedgewood Gardens Developers, Inc. (hereinafter the "Developer"), alleging consumer fraud, breach of contract, and breach of fiduciary duty, amended on December 21, 2022. See Pa 1.

It also alleges personal liability against Leonard and Zygmunt Wilf, the Developer's Vice President and President, respectively. Id.

As a way of background, on April 19, 1983, the Developer registered the Public Offering Statement for Wedgewood Gardens Condominiums, to consist of 136 units located at Wedgewood Drive, Verona, New Jersey. See Public Offering Statement with the Master Deed and By-Laws for "Wedgewood Gardens, A Condominium." See Pa 148-149.

On June 29, 1983, the Master Deed was recorded with the Office of Essex County's Register of Deeds in Deed Book 4791 at Pages 1-85, as amended in Deed Book 4813, Page 567; Deed Book 5179, Page 272; Deed Book 5723, Page 693; and Deed Book 12238, Page 8709. (See Deed for Unit 74, executed on April 7, 2016, and Plaintiff's Title Insurance Company's Schedule C, Legal Description for Unit 74). See Pa 97-100.

Pertinent to Plaintiff's Complaint, Paragraph 8(e) of the Master Deed specifically provides the following:

> [t]he Board shall designate at least one but not more than three unsold Units for use by building personnel. Said Unit or Units shall be considered **part** of the Common Areas and shall be maintained by the Association and shall be **part** of the Common Expense. By the affirmative vote of not less than three-fourths of the votes of Unit Owners present at a meeting duly called for that purpose, the Association may elect to **purchase** one or more Units or other residential quarters for building personnel. (emphasis added).

> See Pa 148-149, "Master Deed," Paragraph 8, "The Condominium Association and Operation of the Property," Section (e), "Apartments for Building Personnel."

As plainly stated, the Master Deed explicitly contemplated the sale of one or more units at the Association's election for building personnel, which shall be part of the Common Areas. Indeed, the Association's purpose is to administer, manage, maintain, repair, and operate the development. Id.

Furthermore, when 75% of the units were conveyed, in approximately 1987, the owners became entitled to elect the entire Board of Trustees, the body which controls the Association. Id., "By-Laws," Art. III, "Board of Trustees," Sect. 2(B). See Pa 147.

Pursuant to Paragraph 8(e) of the Master Deed, the Board designated Unit 74 for building personnel. See Pa 148.

After the Developer's control of the Board terminated and the owners comprised a majority of the Board, Unit 74 continued to be designated for building personnel.

On July 23, 1998, the Developer executed a Lease Agreement for Unit 74 with the Association who thereafter remitted monthly rental payments for the next seventeen plus (17+) years. See Unit 74 Lease Agreement and Unit 74 Annual Lease Renewals, with Residential Ledger. See Pa 54.

Rather than exercise the provision to purchase the Unit for building personnel pursuant to the Master Deed, the Association elected to continue paying rent for seventeen plus (17+) years. Id.

The Defendant paid Common Area Maintenance charges for the Unit for 35 plus years as well as real estate property taxes for the Unit. Id.

Then, on November 6, 2015, the Developer sent the Association a Notice of Intent to Terminate the Lease Agreement because they were electing to sell the unit to a third party. See Pa 197 - 198.

The Notice also provided the Association with the right to purchase, and the parties entered into contract negotiations. Id.

During this time, the Association was represented by counsel at the law offices of Price, Meese, Shulman & D'Arminio, P.C. Id.

On November 24, 2015, the Association's prior counsel confirmed a vote of the unit owners "as per paragraph 8(e) of the Master Deed**"** will be conducted. See Pa 198.

On December 23, 2015, the Association's prior counsel confirmed that:

> "at a meeting of unit owners conducted on December 22, 2015, the unit owners present at the meeting approved the purchase of the unit by a margin of 81%. Accordingly, now that the threshold vote has been conducted as per the master deed, please send a copy of your proposed contract so we can now begin the due diligence process and move forward." (emphasis added). See Pa 201.

After terms were negotiated at length between counsel, on February 1, 2016, the parties entered into a Contract of Sale for Unit 74 of Building 2 at Wedgewood Gardens Condominium, located at 23 Wedgewood Drive, Verona, New Jersey. See Pa 202.

Following the finalization of the Contract, on April 7, 2016, the Association purchased Unit 74 from the Developer at the purchase price of $199,000. See Pa 97-100 and Pa 206-213.

Now, over thirty-five (35) years after the Developer turned over control of the Association to the unit owners, the Association filed the within Complaint, reinterpreting paragraph 8(e) of the Master Deed, claiming that Unit 74 was theirs all along but were tricked into buying it, contrary to the irrefutable facts. See Pa 1.

In short, Plaintiff alleges violations of the Consumer Fraud Act, breach of contract, and breach of fiduciary duty. Id.

The President of the Condominium Association confirmed in his deposition the Association was represented by counsel in 2015 and 2016 with regards to the purchase; he did not know whose determination it was to try to litigate to undue the closing and confirmed the Superintendent was still residing in Unit 74. See Pa 250, lines 7-24.

The President of the Association additionally confirmed in his deposition testimony on March 29, 2023 that he never reviewed the Public Offering Statement nor Master Deed for the Condominium which was registered on April 19, 1983. See Pa 235, lines 13-22.

The President of the Association additionally confirmed he was not familiar with any agreements that were made between the sponsor and the homeowners with regard to the transition in 1987. See Pa 237, lines 11-16.

The President of the Association additionally confirmed he had no knowledge of the transition that took place in 1987 when control of the Homeowners Association was turned over to the homeowners (See Pa 237, line 2.); and that Unit 74 had been continuously leased to the Association for the superintendent's unit and renewed yearly pursuant to a Lease Agreement and then subsequent Lease Renewals for "many years". See Pa 237, lines 23 through Pa 238, line 6.

The Complaint also alleges personal liability against Leonard Wilf and Zygmunt Wilf for having signed a bargain and sale deed for Unit 74 to the Association, which was approved by the prior Association's counsel, its title company and mortgage lender. See Pa 97-98.

The Deed for Unit 74 provided for an aggregate .81% interest in the Common Elements of the Condominium (See Pa 97), pursuant to the Schedule of Interest in the 1983 Master Deed, recorded in Book 4791, Page 37. See Pa 175.

Plaintiff is additionally seeking to nullify the sale; reformation of the Deed; the return of the purchase price; return of it's total monthly rental

payments; and finally, the return of its property taxes and mortgage loan interest, among other legal and equitable relief, despite the fact that the Developer was paying monthly common area maintenance fees to the Association for the past seventeen plus (17+) years and property taxes for the Unit for the past 35 years.

The Trial Court on Summary Judgment correctly concluded Section 8(e) of the 1983 Master Deed contemplated and authorized the sale of Unit 74 to the Association, and the Defendant conveyed marketable title to the Association, as contemplated by the Master Deed. See T1 at Page 17, lines 10 through Page 19, line 10.

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED COUNT ONE OF THE PLAINTIFF'S COMPLAINT ALLEGING CONSUMER FRAUD AND CORRECTLY CONCLUDED THE 1983 MASTER DEED AUTHORIZED THE DEVELOPER TO SELL UNIT 74 TO THE ASSOCIATION.

The Trial Court correctly concluded the 1983 Master Deed specifically authorized the Developer to sell Unit 74 to the Association, pursuant to the express language in the 1983 Master Deed.

Paragraph 8(e) of the Master Deed specifically provides the following:

> [t]he Board shall designate at least one but not more than three unsold Units for use by building personnel. Said Unit or Units shall be considered **part** of the Common Areas and shall be maintained by the

> Association and shall be part of the Common Expense. By the affirmative vote of not less than three-fourths of the votes of Unit Owners present at a meeting duly called for that purpose, the Association may elect to **purchase** one or more Units or other residential quarters for building personnel. (emphasis added) ***
>
> See Pa 148-149, "Master Deed," Paragraph 8, "The Condominium Association and Operation of the Property," Section (e), "Apartments for Building Personnel."

As plainly stated, the Master Deed explicitly contemplated the sale of one or more units at the Association's election for building personnel, which shall be part of the Common Areas.

Pursuant to the New Jersey Supreme Court, a plaintiff must prove an "unlawful practice" by the defendant; an ascertainable loss by the plaintiff and a causal relationship between the unlawful conduct and ascertainable loss. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009).

An "unlawful practice pursuant to N.J.S.A. 56:8-2 is defined as "The act, use or employment by any person of any commercial practice that is unconscionable or abusive, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact, in connection with the sale or advertisement of any merchandise or real estate or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby."

In the present case, Plaintiff's contention that Defendant "misrepresented its color of title to Unit 74" has no merit.

Paragraph 8(e) of the Master Deed recorded on June 29, 1983 (See Pa 148-149), specifically provides that the Board designate at least one but not more than three unsold Units for use by building personnel, to be considered "part" of the Common Areas and shall be maintained by the Association and shall be part of the Common Expense.

In the present case, Unit 74 was designated for use by the Superintendent when control of the Association was turned over to the homeowners in 1987 (35 plus years ago) and had an .81% interest in the common elements. See Pa 97-100.

Paragraph 8(e) of the Master Deed additionally provides "By the affirmative vote of not less than three-fourths of the votes of Unit Owners present at a meeting duly called for that purpose, the Association may elect to purchase one or more Units or other residential quarters for building personnel." See Pa 148-149.

For the past 35 plus years, the Defendant paid common area maintenance fees to the Association for Unit 74, and paid all taxes for the Unit.

The parties for the past 35 plus years continued to designate Unit 74 for the Association's superintendent, and after renting the Unit for seventeen (17)

plus years, the parties entered into an agreement "through counsel", for Plaintiff's purchase of the unit as specifically provided for in paragraph 8(e) of the Master Deed. Pursuant to the Plaintiff's title company's legal description recorded with the Deed, Unit 74 comes with an aggregate .81% interest in the Common Elements of said Condominium. See Pa 97-100.

Plaintiff's prior counsel specifically confirmed in writing the Association voted "pursuant to paragraph 8(e) of the Master Deed" on December 22, 2015 to purchase the Unit by a margin of 81% of the unit owners, (See Pa 198-201), and finalized a Contract of Sale for the purchase on February 1, 2016. See Pa 202.

Plaintiff's claim that the Defendant committed "fraud", "deception", "unconscionable" and "abusive false pretense" by executing a bargain and sale deed to the Association is completely erroneous, and contrary to its own prior counsel's and title company's representations and warranties that it was receiving good and marketable title to the Unit.

The Association's counsel specifically referenced paragraph 8(e) as to the Association's authority for the purchase of the Unit. See Pa 198-202.

The Association additionally cannot claim "ascertainable loss" as the Association was receiving monthly common area charges from the Defendants for the past thirty (35) years and the Defendants were paying the taxes on the

unit for the past 35 years. In addition, the Association has title to the Unit which paragraph 8(e) of the Master Deed specifically contemplated and provided for via purchase.

Plaintiff's claims under the Consumer Fraud Act fail on each count as there was no fraud or deception in the conveyance and there was no ascertainable loss.

Paragraph 8(e) of the Master Deed dated June 29, 1983 specifically contemplated the Association's one day purchase of the Unit for building staff, which is exactly what was contracted for on February 1, 2016.

The Trial Court correctly found "marketable title was delivered" in this case as contemplated by paragraph 8(e) of the Master Deed. See T1, Page 17 lines 14-15.

The Deed provided for Unit 74 having an aggregate .81% interest in the Common Elements of the Condominium (See Pa 96), consistent to the Schedule of Percentage of Interest for Unit 74 listed in the Master Deed in Book 4792 Page 37. See Pa 175.

Plaintiff's contention that the Unit is a "Common Element" is misguided, as the Master Deed specifically lists Unit 74 as having a .81% interest in the Common Elements, as does the Deed conveyed to the

Association, approved by the Association's prior counsel, title company, lender and lender's counsel.

The Plaintiff has additionally waived any right to reinterpret provisions in the 1983 Master Deed after these 35 years. See W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144,152 (1958). All parties have complied with the terms of the Master Deed as it relates to Unit 74, and the Association purchased the Unit as expressly contemplated by paragraph 8(e) of the Master Deed.

The Trial Court was correct in concluding the 1983 Master Deed both authorized and contemplated the sale of the Unit to the Association.

II. THE TRIAL COURT CORRECTLY DISMISSED COUNT TWO OF THE PLAINTIFF'S COMPLAINT ALLEGING CONSUMER FRAUD AND ADEQUATELY EXPLAINED ITS BASIS FOR DISMISSAL.

The Trial Court correctly dismissed Count Two of the Plaintiff's Complaint alleging Consumer Fraud as to the Developer in connection with the Leasing of Unit 74 and adequately explained its basis for dismissal.

A claim for fraud accrues when the plaintiff knows or should know of its existence. Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 425 (3rd Cir. 1999). Plaintiff must also be aware of an injury and a causal relationship between the injury and an actor. Id. "When the gist of the action is fraud concealed from the plaintiff, the statute begins to

run on discovery of the wrong or of facts that reasonably should lead the plaintiff to inquire into the fraud." Id. (quoting Lopez, 62 N.J. 267, 300 (1973)). If the allegations, taken as true, allege facts sufficient to toll the statute of limitations, it must survive a motion to dismiss. Southern Cross Overseas Agencies, Inc., 181 F.3d at 425.

As provided in full above, N.J.S.A. 2A:14-1(c) specifically requires that the statute of limitations for actions filed by a planned real estate development association against a developer "shall be tolled until an election is held and the owners comprise a majority of the board." Here, the Developers relinquished control of the Board to the owners when 75% of the units were conveyed in approximately 1987, over three decades ago. As such, the Association's time period for filing a claim for fraud has long since expired.

Additionally, Plaintiff's Complaint fails to state a claim upon which relief can be granted even if equitable principles under the "discovery rule" are applied to the statute.

In this case, in approximately 1987, the Association transitioned control from the developer to the unit owners. Thus, the statute has clearly run. Furthermore, as Plaintiff's allegations fail to state when the alleged fraud was discovered which would toll the statute of limitations, the Complaint must be dismissed. See The Palisades At Fort Lee Condo. Ass'n, Inc., 230 N.J. at 454

(citing Lopez, 62 N.J. at 300). Further, Plaintiff fails to provide any reasons which explain how Unit 74 was fraudulently concealed to it, let alone why its reasonable diligence failed to discover the alleged injury. Rather, the Complaint operates within its own circular logic, namely, that "Common Elements" and "Units" are mutually exclusive and, therefore, the Developer was required to relinquish title for Unit 74 to the Association because of its designation under Paragraph 8(e) of the Master Deed.

As a matter of fact, ownership of each unit included a part of the common elements. Indeed, Unit 74 explicitly included an .81% interest in the common elements. (See Pa 97). Moreover, the owner-controlled Association maintained the designation.

Furthermore, throughout the course of the relevant events, the Association was represented by counsel. It also engaged a Title Insurance Company to establish chain of title. At no time did Plaintiff's counsel or title insurer indicate that title to Unit 74 was being fraudulently conveyed as a "Unit" rather than a "Common Element" as Plaintiff now argues. In addition, Paragraph 8(e) of the Master Deed expressly provides for the Association to purchase one or more units for building personnel. See Pa 148-149.

The Trial Court was correct is dismissing Plaintiff's Consumer Fraud claim against the Defendant, as the Court correctly concluded the 1983 Master Deed both authorized and contemplated the sale of the Unit to the Association.

III. THE TRIAL COURT CORRECLY DISMISSED COUNT THREE OF THE PLAINITIFF'S COMPLAINT FOR BREACH OF CONTRACT AND CORRECTLY CONLUDED SECTION 8(E) OF THE MASTER DEED AUTHORIZED THE SALE OF UNIT 74.

Plaintiff's contention that Defendants "misrepresented its color of title to Unit 74" and breached its Contract of Sale for the purchase of Unit 74 has no merit.

Plaintiff's claim that the Defendant committed "fraud", "deception", "unconscionable" and "abusive false pretense" by executing a bargain and sale deed is completely erroneous, and contrary to its own prior counsel's and title company's representations and warranties that it was receiving good and marketable title to the Unit.

The Association's counsel specifically referenced paragraph 8(e) as to the Association's authority for the purchase of the Unit. See Pa 198.

The Association has title to the Unit which paragraph 8(e) of the Master Deed specifically contemplated and provided for via purchase. The Association received a title commitment and policy, insuring "marketable title."

Paragraph 8(e) of the Master Deed dated June 29, 1983 specifically contemplated the Association's one day purchase of the Unit for building staff, which is exactly what was contracted for on February 1, 2016. [1]

IV. THE TRIAL COURT CORRECTLY DISMISSED THE PLAINTIFF'S COMPLAINT AGAINST THE INDIVIDUAL DEFENDANTS.

Under New Jersey law, a plaintiff can "pierce the corporate veil" – meaning the shareholders of a corporation can be held personally liable – when the corporation perpetuates fraud, engages in criminal activity, or evades the law. State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983) (citing Trachman v. Trugman, 117 N.J. Eq. 167, 170 (Ch. 1934)). Sometimes, courts may pierce the corporate veil by finding that a subsidiary was a "mere instrumentality of the parent corporation." Id. Often, however, "liability is generally imposed for corporate dominance only when the parent has abused the privilege of incorporation by using the subsidiary to perpetuate a fraud or injustice, or otherwise to circumvent the law." Id. at 501.

In Ventron, the lower court found a parent company liable to a wholly-owned subsidiary because its principals were involved in its day-day business. The Supreme Court reversed, finding that it is proper to establish a new

[1] Beyond the six (6) year statue of limitations, as the within complaint was filed on April 6, 2022.

corporation for the sole purpose of acquiring the assets of another corporation and continuing its business. Id.

Here, Plaintiff has failed to provide any evidence which would suggest that Leonard and Zygmunt Wilf, Vice President and President, respectively, of Wedgewood Gardens Developers, Inc., abused the privilege of incorporation by using the company to perpetuate a fraud or injustice, or otherwise violated the law. In fact, both followed New Jersey's Hotel and Multiple Dwelling Law and the administrative regulations promulgated by the Department of Community Affairs set forth at N.J.A.C. 5:10-1.1 et seq. They performed no act impeding the election of a majority of the owners to the Board in approximately 1987. Nor are any facts alleged that suggest they performed any unlawful act against the Association's counsel who represented them at all relevant times. Moreover, the Developers followed the rules set forth in the Master Deed as established by the Public Offering Statement when they leased and later sold Unit 74 to the Association.

The individual Defendants provided answers to discovery, confirming they relied on the advice of counsel with regard to the Sale of Unit 74 to the Association. It should be noted the Plaintiff did not even depose either of the individual Defendants in this action, as they had no personal knowledge of the

1987 terms of the transition of the Association to the homeowners. See Pa 256-268.

All parties to the sale of Unit 74 were represented by counsel and voluntarily entered into the Contract of Sale of the Unit on February 1, 2016, beyond the six (6) year statue of limitations, as the within complaint was filed on April 6, 2022.

In addition, the individual defendants confirmed in discovery they had "no personal knowledge or recollection of events that occurred in 1987 during the Board's transition of control from the Developers to the unit owners. Rental of the unit had been in place for the past two (2) decades and then the parties knowingly and voluntarily agreed to sell and purchase the unit in late 2015 through respective counsel."

The Trial Court was correct in holding "[t]he individuals here certainly are out… all the Wilfs did here were act as – on behalf of the Board and act on behalf of the Developer initially. And the Court does not find that their delivery of title in this particular case was fraudulent." See T1 page 17, lines 4-9.

The Court went on to clarify:

> "Clearly, the 8(e) paragraph that Counsel has been referring to, that the Court referred to as well, allows for this particular issue. And therefore, in this Court's opinion, marketable title was able to be delivered in this particular case. And therefore, I don't find there was a fraud here.

> Certainly, as the individuals acting on behalf of the Board. There's no piercing of the corporate veil here. That certainly is out. Consumer fraud as to the Developers, I said I don't find that. I don't find punitive damage to be appropriate here by breach of a fiduciary duty because I don't think there was a breach, based upon the deed." See T1 page 17, lines 10-23.

The Court correctly dismissed Count Four of the Plaintiff's Complaint against the Individual Defendants, finding there was no misrepresentation in conveying marketable title, as the Court found title to be marketable, as did Plaintiff's prior counsel, title insurance, mortgage lender and lender's counsel.

V. THE TRIAL COURT CORRECTLY DISMISSED COUNT FIVE OF THE PLAINTIFF'S COMPLAINT ALLEGING BREACH OF FIDUCIARY DUTY, CONCLUDING THE DEFENDANTS' ACTIONS WERE AUTHORIZED BY SECTION 8(E) OF THE 1983 MASTER DEED.

The Trial Court correctly dismissed Count Five of the Plaintiff's Complaint alleging Breach of Fiduciary Duty, concluding the Defendants' actions were authorized by Section 8(e) of the 1983 Master Deed.

Additionally, Plaintiff's allegations for breach of fiduciary duty are also barred by New Jersey's six-year Statute of Limitations. N.J.S.A. 2A:14-1. See Jeffrey Rapaport M.D., P.A. v. Robin S. Weingast & Assocs., Inc., 859 F. Supp. 2d 706, 715 (D.N.J. 2012). Under New Jersey law, a cause of action accrues when "a plaintiff knows or should know the facts underlying [the elements of the claim], not necessarily when a plaintiff learns of the consequences of the facts." Id. (quoting Circle Chevrolet Co. v. Giordano,

Halleran & Ciesla, 142 N.J. 280, 296 (1995). A claim for professional malpractice accrues when (1) the claimant suffers an injury or damages, and (2) the claimant knows or should know that its injury is attributable to the professional negligent advice. Id.

In Jeffrey Rapaport M.D., P.A., the court discussed claims of a professional corporation's breach of fiduciary duty and professional negligence under the six-year statute and held that those claims began to accrue when, after relying on defendants' tax advice, the plaintiff received notices of deficiency from the IRS. Id. at 716. In its analysis, the court found that "a cause of action may accrue when a party should know of an alleged injury or, more specifically, when that party has sufficient information of possible wrongdoing to place it on 'inquiry notice' or to excite 'storm warnings' of culpable activity." Id. (internal citation omitted). In brief, New Jersey law provides that "[a] cause of action does not accrue until an injury or damage attributable to the professional negligence occurs." Id. (quoting Commonwealth Land Title Ins. Co. v. Kurnos, 340 N.J. Super. 25, 29–30 (2001).

Here, as previously analyzed, the owners comprised a majority of the Board when 75% of the units were conveyed in approximately 1987. At that time, as required under the statute, the Developer delivered to the

Association all rules and regulations for the Condominium, including the Master Deed. See N.J.S.A. 45:22A-47(c). At that time, the Association was put on actual and constructive notice of the requirements under Paragraph 8(e) of the Master Deed, the provision which underlies the basis of Plaintiff's claims. Therefore, sixty days following the conveyance of 75% of the units, when the election was held and the owners comprised the majority of the Board, the cause of action for claims of a breach of fiduciary duty began to accrue. This is also consistent with the express terms of the six-year Statute of Limitations. See N.J.S.A. 2A:14-1(c).

In the present case, the Trial Court correctly noted the Association was "standing on its rights for 35 years" (See T1 page 18, lines 5-8), and concluded correctly there was no Breach of Fiduciary Duty as to the Defendants, as the Master Deed specifically contemplated the Association's one day purchase of the Unit for building staff, which is exactly what was contracted for on February 1, 2016.

As stated above, the Association was receiving monthly common area charges from the Defendants for the past thirty (35) years and the Defendants were paying the taxes on the unit for the past 35 years. In addition, the Association has title to the Unit which paragraph 8(e) of the Master Deed specifically contemplated and provided for via purchase.

Plaintiff's claim for breach of fiduciary duty fails on all accounts.

IV. THE TRIAL COURT CORRECTLY DISMISSED COUNT SIX OF THE PLAINTIFF'S COMPLAINT SEEKING DEED REFORMATION.

The Trial Court correctly dismissed Count Six of the Plaintiff's Complaint seeking deed reformation, clearly stating "I'm not reforming the deed because I don't think it needs to be reformed." See T1 page 18, lines 5-14.

The Trial Court noted the Plaintiff was "standing on its rights for 35 years (See T1 page 18, line 5) and concluded as a matter of equity, all parties "understood what the process was and they understood who owned what and what was conveyed. So I don't find that reformation is appropriate here." See T1 at page 18, lines 5-14.

Plaintiff was represented by counsel, retained a title agency who insured title to Unit 74 and has no basis for reformation relief as marketable title to Unit 74 was deeded to the Association as specifically contemplated in the 1983 Master Deed.

CONCLUSION

For the foregoing reasons, the dismissal of the Plaintiff's/Appellant's Amended Complaint should be affirmed, in addition to awarding Defendants/Respondents attorney fees and costs.

WILF LAW FIRM, LLP

BY: *Mark A. Rothberg*
Mark A. Rothberg, Esq.

Dated: April 22, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

WEDGEWOOD GARDENS CONDOMINIUM ASSOCIATION, INC., IN ITS INDIVIDUAL CAPACITY, AND ON BEHALF OF ITS MEMBERS, PLAINTIFF VS. WEDGEWOOD GARDENS DEVELOPERS, INC., ZYGMUNT WILF AND LEONARD A. WILF, DEFENDANTS	APPEAL NO. A-000699-23 **ON APPEAL FROM**: **SUPERIOR COURT OF NEW JERSEY ESSEX COUNTY LAW DIVISION, CIVIL PART DOCKET NO.: ESX-L-2132-22** **SAT BELOW:** **HON. ROBERT H. GARDNER, J.S.C.**

REPLY BRIEF FOR PLAINTIFF/APPELLANT, WEDGEWOOD GARDENS CONDOMINIUM ASSOCIATION, INC.

Heinkel Law LLC
Daniel W. Heinkel, Esq.
ID#116372015
3 Kirkpatrick Ln
West Caldwell, NJ 07006
Ph: (973) 784-2088
Email: daniel@heinkellaw.com

On the Brief:

/s/ Daniel W. Heinkel______
Daniel W. Heinkel, Esq.

Dated: May 22, 2024

FILED, Clerk of the Appellate Division, May 29, 2024, **A-000699-23**, **AMENDED**

TABLE OF CONTENTS

Table of Contents. i

I. WHETHER THE MASTER DEED CONTEMPALTED OR AUTHORIZED THE TRANSFER OF UNIT 74 IS IMMATERIAL TO THE DISPOSITION OF COUNT ONE'S CONSUMER FRAUD CLAIM. 1

a. The Record Below Shows Unit 74 is a Common Element. . . . 5

b. Even if the Master Deed authorized the Sale of Unit 74, that 'authorization' has no bearing on whether the Developer truthfully represented its quality of title, i.e, committed an unlawful practice... 6

II. THE TRIAL COURT FAILED TO PROVIDE ANY REASONS SUPPORTING ITS DISMISSAL OF COUNT II, AND THE DEFENDANTS' STATUTE OF LIMITATIONS ARGUMENT IS LEGALLY INCORRECT. 8

III. PLAINTIFF'S AMENDED COMPLAINT DOES NOT SEEK TO HOLD THE INDIVIDUAL DEFENDANTS LIABLE BY 'PIERCING THE CORPORATE VEIL'. 9

Conclusion. 11

I. WHETHER THE MASTER DEED CONTEMPLATED OR AUTHORIZED THE TRANSFER OF UNIT 74 IS IMMATERIAL TO THE DISPOSITION OF COUNT ONE'S CONSUMER FRAUD CLAIM.

The trial court concluded the Developer conveyed marketable title to Unit 74 because the transfer was contemplated by the Condominium's Master Deed. Based upon this finding, it concluded there was no fraud. The 'no fraud' determination served as the lower court's basis for dismissing the entirety of Plaintiff's Amended Complaint. The opposition filed by Defendants echoes the trial court's 'no fraud' argument, but it fails to address a fatal deficiency in the court's reasoning: the fact that the Master Deed authorized the sale of Unit 74 has nothing to do with whether the Developer committed an unlawful practice as defined by the Consumer Fraud Act ("CFA"). [1]

The crux of Count One's CFA claim is that Developer committed an unlawful practice in connection with the sale of Unit 74 by misrepresenting its quality of title thereto.[2] The Plaintiff contends the Developer cannot have

---

[1] Any misrepresentation of fact in connection with the sale of real estate is an unlawful practice regardless of whether the seller knew the statement was false or intended to deceive the buyer. See N.J.S.A. 56:8-2.

[2] According to an Affidavit of Title executed by the Wilf Defendants in connection with the sale of Unit 74, the Developer attested "[i]t has not allowed any interests (legal rights) to be created which affect its ownership or use of this property. No other persons have legal rights in this property, except the right of utility companies[.]" See Pa99 at ¶7. The Plaintiff uses the terms 'clean title' or 'marketable title' to reference the quality of title described in paragraph 7 of the Affidavit of Title.

possibly possessed the 'clean' title as described in its Affidavit of Title because it had previously designated Unit 74 as part of the Condominium's common elements. As set more fully set forth herein, and pursuant to the New Jersey Condominium Act ("Condominium Act" or "Act"), the designation of Unit 74 as part of the common elements created certain property rights in favor of the unit owners. In light of these facts, the Plaintiff asserts the Developer's Affidavit of Title misrepresented that (1) it has done nothing create any legal rights affecting the ownership or use of the property and (2) no other persons have legal rights with respect to the property.

Nevertheless, the trial court concluded the Developer conveyed marketable title because the transaction was contemplated or authorized by the Condominium's Master Deed.[3] But the opinion fails to explain exactly how this purported authorization was material to accuracy of the representations set forth in the Developer's Affidavit of Title. By concluding there was 'no fraud,' the lower court implicitly found the Plaintiff is unable to prove the Developer misrepresented its quality of title. In doing so, the opinion fails to appreciate the legal rights that were created by virtue of the Developer designating unit 74 as

[3] Based upon this finding, the trial court also dismissed Count Three alleging the Developer breached the February 2016 real estate contract by failing to convey marketable title. Similar to Count One, the trial court failed to explain how the master deed's 'authorization' negated any alleged breach committed by the Developer.

a common element, and it fails to consider whether Unit 74's status as a common element conflicts with the representations made by the Developer in its in Affidavit of Title.

The Defendants' opposition wholly adopts the trial court's conclusion that marketable title was conveyed simply because the transaction was contemplated by the Master Deed. See Db at 9; see also Db at 23 ("In addition, the [Plaintiff] has title to the Unit which paragraph 8(e) of the Master Deed specifically contemplated and provided for via purchase."). Aside from a fleeting mention that Unit 74 is actually a condominium unit, the opposition fails to reinforce the trial court's 'no fraud' conclusion with any legal authority or argument. Nor does it squarely address the Plaintiff's argument that Unit 74's status of a common element is at odds with the representations made by the Developer in its Affidavit of Title.

For example, the Defendants assert the trial court was correct to conclude the master deed authorized the sale of Unit 74 but summarily concludes 'marketable' title was conveyed based upon that authority. See Db at p. 23. The opposition does not buttress this conclusion with any additional argument. Similarly, the Defendants do not focus on whether the Developer's representations as to its quality of title were accurate in light of Unit 74 having been designated as a common element. Instead, it chooses to emphasize the fact

that Plaintiff subjectively believed it was acquiring the unit pursuant to Section 8(e) of the Master Deed. See Db at p. 6. The Defendants avoid addressing Plaintiff's arguments by casually dismissing them as an improper attempt to 'reinterpret' the Master Deed. See Db at pp. 1, 2, 7, 14.

As set forth herein, the record unquestionably demonstrates the Developer designated Unit 74 as a common element shortly after the Condominium was created in 1983. As a result of that designation, the owners of the condominium collectively held a 100% undivided interest in Unit 74; it cannot be sold like other parcels of real property. These unassailable facts are at odds with the Developer's representations that (1) it has done no act to create legal rights pertaining to the ownership and use of Unit 74; and (2) no other persons have a legal interest in the property. The Developer's misrepresentation as to its quality of title should have resulted in a finding that it committed an unlawful practice as defined by the CFA, i.e, 'consumer fraud.'

In this respect, the trial court and Defendants are incorrect to conclude that no consumer fraud occurred simply because the Condominium's master deed purportedly contemplated the sale of Unit 74 to the Association. Therefore, the trial court's dismissal of Count One should be reversed. And since the Court's erroneous 'no fraud' finding necessarily resulted in the dismissal of all

other causes of action asserted by the Plaintiff's Amended Counterclaim, this Court should similarly reverse the dismissal of those counts.

a. The Record Below Shows Unit 74 is a Common Element.

When the Condominium's Master Deed was originally recorded, Unit 74 was listed as one of the Condominium's 136 condominium units. In fact, it had an appurtenant .81% interest in Condominium's 'common elements.' However, Section 8(e)Master Deed required at one of the unsold condominium units be designated as a common element for purposes of housing the Condominium's Superintendent. See Plaintiff's Statement of Material Facts ("SOMF") at ¶ 12 (relying on allegation set forth in Amended Complaint and Defendants' failure to deny). Subsequently, and pursuant to Section 8(e), Unit #74 was designated as a common element reserved for the building's superintendent. See SOMF at ¶ 13 (relying on allegation set forth in Amended Complaint and Defendants' failure to deny). The Unit has been used to house the superintendent ever since its original designation as a common element. See SOMF at ¶¶ 14-15 (relying on allegations set forth in Amended Complaint and Defendants' failure to deny).

The uncontroverted facts established by the pleadings certainly shows that notwithstanding its original designation as a 'condominium unit,' Unit 74 was re-designated as a 'common element' for housing the Condominium's superintendent. This use also falls within the statutory definition of 'common

element.' For instance, the common elements include any improvements or appurtenances exclusively reserved for "…the management, operation or maintenance of the common elements or of the condominium property." See N.J.S.A. 46:8B-3d(iv). It also includes all other improvements necessary or convenient to the existence, management or operation of the condominium property. Id. at 8B-3d(vii). A housing unit reserved for the condominium's superintendent certainly falls within the scope of these definitions.

Finally, the common elements also include: "such other elements and facilities as are designated in the master deed as common elements." Id. at 8B-3d(viii). Although Section 8(e) of the Master Deed does not expressly designate Unit 74 as a common element, the uncontroverted facts show that: (1) Section 8(e) does require at least one condominium unit be designated as a common element; and (2) the Developer designated Unit 74 as a common element pursuant to Section 8(e).

All things considered, the record unquestionably demonstrates that Unit 74 is part of the Condominium's common elements.

b. Even if the Master Deed authorized the Sale of Unit 74, that 'authorization' has no bearing on whether the Developer truthfully represented its quality of title, i.e., committed an unlawful practice.

As set forth above, the record shows that Unit 74 is a common element. Its re-designation from a condominium unit to a common element is significant

because the former can be sold like any other parcel of real property. See N.J.S.A. 46:8B-4. The same is not true for the common elements. "The common elements shall remain undivided and shall not be the object of an action for partition or division." Id. at 46:8B-6. Each condominium unit has an inseparable proportionate undivided interest in the common elements. Id. In other words, the unit owners collectively hold a 100% undivided interest in the common elements.

Whether the master deed authorized the sale of Unit 74 has nothing to do with whether the Developer actually possessed clean title to Unit 74 as described by the Affidavit of Title. As a common element, the Developer does not have the sole right, claim or interest to Unit 74. There is also a statutory prohibition on dividing the common elements. The master deed's purported authorization does nothing to change these facts. Certainly, the Defendants have failed to present any legal authority suggesting otherwise.

Because the master deed's 'authorization' is immaterial to the issue of whether the Developer's Affidavit of Title accurately represented no other persons have a legal interest in Unit 74, the trial court erred by using this 'authorization' to conclude the Developer did not commit an unlawful practice under the CFA. Therefore, the dismissal of Count One should be reversed.

II. THE TRIAL COURT FAILED TO PROVIDE ANY REASONS SUPPORTINGS ITS DISMISSAL OF COUNT II, AND THE DEFENDANTS' STATUTE OF LIMITATIONS ARGUMENT IS LEGALLY INCORRECT.

Count Two alleges the Developer violated the CFA in connection with its leasing of Unit 74 to the Association from 1983 to 2016. Without any discussion, the trial court dismissed Count 2. Presumably, dismissal was entered based upon the court's conclusion that marketable title was conveyed pursuant to the master deed's 'authorization.' Not only is that conclusion incorrect, but Section 8(e)'s contemplation of the *sale* of Unit 74 does not speak to whether the Developer could *lease* Unit 74 to the Association. The opposition claims the trial court adequately explained its basis for dismissal, but it fails to cite any example from the motion transcript. See Db at p. 14.

Instead, the Defendants argue the dismissal of Count Two should not be reversed because the claim is barred by the statute of limitations (SOL)[4]. Id. at pp. 14-16. In short, they contend Plaintiff's claim accrued decades ago and the applicable 6-year statute of limitations has long since expired. The Plaintiff does not disagree the claim has a 6-year limitations period, but it disagrees with the

[4] The opposition makes the same argument in support of affirming the trial court's dismissal of Plaintiff's claim for breach of fiduciary duty. The Plaintiff similarly contends that Defendant's SOL argument is incorrect and that it should be reserved for the trial court to reconsider on remand.

remainder of Defendant's argument – including the notion that its CFA claim accrued decades ago. Irrespectively, it would be inappropriate for this Court to decide the issue for the first time on appeal.

Because the trial court determined there was no fraud, it did not address any statute of limitations arguments. It made no findings as to when Plaintiff's claims accrued or whether 'tolling' was applicable. Therefore, if the Court reverses the dismissal of Count Two, then the trial court should adjudicate Defendants' SOL argument to the extent it was raised by their opposition and/or cross-motion for summary judgment.

III. PLAINTIFF'S AMENDED COMPLAINT DOES NOT SEEK TO HOLD THE INDIVIDUAL DEFENDANTS LIABLE BY 'PIERCING THE CORPORATE VEIL.'

The Plaintiff is not seeking to 'pierce the corporate veil' in order impose liability against the individual Wilf defendants. Piercing the corporate veil allows for a corporation's shareholders to be held liable for the wrongs of the corporation. As the opposition correctly indicates, the corporate veil can only be pierced on limited occasions, such as when the shareholders are using the corporation to commit a fraud or injustice. But the Plaintiff is not seeking to impose liability upon the individual Wilf Defendants because they are shareholders of the Developer corporation.

The Amended Complaint seeks to hold the Wilfs directly liable for their own violations of the CFA. As set forth in Plaintiff's initial brief, a plaintiff may pursue CFA claims directly against a corporation's directors, officers or employees based upon the person's own violation of the CFA, albeit, committed while acting in the scope of his or her employment or duties. Allen v. V&A Bros., Inc., 208 N.J. 114, 131 (2011) (citing Gennari v. Weichert Co. Realtors, 148 N.J. 582, 608-10 (1997)). Our Supreme Court has stated a CFA claim can be brought against these individuals without having to pierce the corporate veil. See Allen, 208 N.J. at 131-132.

The opposition completely avoids this argument and emphasizes the trial court was correct for concluding there was no factual basis to pierce the corporate veil. But whether the corporate veil can be pierced is immaterial to the viability of Plaintiff's CFA claim against the individual Defendants for misrepresenting the Developer's quality of title in connection with the sale of Unit 74. The Plaintiff alleges the Wilf Defendants committed an unlawful practice under the CFA by misrepresenting no other persons held legal interests regarding the property. Pursuant to the Supreme Court's holding in Allen, the Plaintiffs can hold the individual Wilf Defendants directly liable for their own violations of the CFA even if the violation as committed while acting within the scope of the corporate duties.

CONCLUSION

The record below unquestionably demonstrates that Unit 74 is a common element. Whether the master deed 'authorized' the 2016 sale of Unit 74 has nothing to do with the whether the Developer misrepresented its quality of title. As the Plaintiff's briefs demonstrate, the Developer committed an unlawful practice by representing it had done nothing to create legal rights in Unit 74 and that no other persons had legal rights with respect to Unit 74. This misrepresentation is demonstrated by the fact the Developer designated Unit 74 as a common element.

Instead of finding the Developer committed an unlawful practice, it concluded there was no fraud. This 'no fraud' finding was not only erroneous, but it resulted in the dismissal of each and every cause of action asserted by the Plaintiff's Amended Complaint. Therefore, the Court should reverse the dismissal of Plaintiff's Amended Complaint.