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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3057-11T1

BRICK PROFESSIONAL, L.L.C.,

Plaintiff-Appellant/
Cross-Respondent,

v.

ESTATE OF ANTHONY NAPOLEON,
O.C.C. AND ASSOCIATES, INC.,
HAROLD HAYEK, SR., OCEAN
CONSTRUCTION SYSTEMS, INC.,
A.J.N., INC., and JUNE
CONSULTING, INC.,

Defendants,

and

THE PROVIDENT BANK and
ALFRED BOWERS,

Defendants-Respondents/
Cross-Appellants.

and

JAMES A.C. HEIDER and HEIDER
& ASSOCIATES, INC.,

Defendants-Respondents.

Argued March 18, 2014 – Decided April 11, 2014

Before Judges Fisher, Espinosa and O'Connor.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-895-05.

William J. Wolf argued the cause for appellant/cross-respondent (Bathgate, Wegener & Wolf, attorneys; Mr. Wolf and Christopher B. Healy, on the brief).

Arthur L. Raynes argued the cause for respondents/cross-appellants (Wiley Malehorn Sirota & Raynes, attorneys; Mr. Raynes, of counsel; Mr. Raynes and Kathleen Gallagher, on the brief).

Sherilyn Pastor argued the cause for respondents (McCarter & English, attorneys; Ms. Pastor, of counsel and on the brief; Stephanie Platzman-Diamant, on the brief).

PER CURIAM

In this appeal, we consider, among other things, the arguments of plaintiff Brick Professional, L.L.C. (Brick) regarding: (1) the denial of its motion for discovery from The Provident Bank (Provident), regarding the reasons for the departure of a loan officer, defendant Alfred Bowers, from Provident's employ; (2) the denial of its motion to file a third amended complaint to include fraud and racketeering allegations against Provident and Bowers and racketeering claims against defendants James A.C. Heider, and Heider & Associates, Inc. (hereafter sometimes collectively referred to as "the Heider defendants"); and (3) the dismissal and summary judgment entered in favor of Provident, Bowers, and the Heider defendants on

Brick's negligence, contract, fiduciary and special relationship claims. Provident has cross-appealed, arguing that the trial judge erred in denying its request for an award of counsel fees. We affirm the orders questioned by Brick in its appeal, but we vacate the order denying Provident's counsel fee motion and remand for further consideration.

I

In determining the sufficiency of the parties' arguments in the appeal and cross-appeal, it is first helpful to consider the following facts and circumstances that preceded the commencement of this lawsuit.

A

Neil Sorrentino was a businessman whose interests expanded into real estate in the 1980s. In approximately 1996 or 1997, he and his son, Joseph, as well as Joseph's father-in-law, Serafina Tomasetti, shared a fifty-percent interest in a large Hoboken project with a company owned by Herbert Sylvester. Anthony Napoleon had been Sylvester's minority partner.

In 1998, the Sorrentinos and Tomasetti were involved with Napoleon and Sylvester in another Hoboken project known as Observer Plaza. The Sorrentinos provided most of the money and personal guarantees; Napoleon and Sylvester were minority

owners. Initially, Sorrentino and Napoleon were not close, but eventually Sorrentino came to consider him a good friend. In fact, Sorrentino gave Napoleon money to buy a car and for a down payment on a house, among other things.

In 1999 or 2000, Napoleon approached Sorrentino about the prospect of building on property on Route 88 in Brick (the Brick project). According to Sorrentino, even as they were completing the Observer Plaza, Napoleon had been

> worried about getting something done because he had no money, he spent his money like he was a drunken sailor, he bought houses and boats and so he was broke, he needed to start a job again, he needed to earn a living . . . .

Napoleon proposed that the Brick project be developed and marketed for doctors' offices because of its proximity to a hospital.

At the time Napoleon presented the idea, Sorrentino was attending to a much larger development in New York and knew he would be unable to oversee a new project in Brick. Sorrentino considered including Sylvester as a partner in the Brick project, but Sylvester would not invest if Napoleon were involved. Still, Napoleon had worked on Hoboken projects with Sorrentino that had proceeded smoothly. According to Sorrentino, Napoleon "talked a pretty good game, so I figured he would be okay to handle this"; Sorrentino further explained that

because of his New York project:

> I wasn't going to Brick, [Napoleon] promoted this Brick deal to me and my son and we went along with it [be]cause I felt that he was a friend and everything would be all right and he was okay when he was under our wing . . . .

Consequently, Sorrentino put Napoleon in complete charge of the Brick project.

In August 2001, Sorrentino, his son, and Napoleon filed Brick's certificate of formation, designating all three as members and Napoleon as Brick's registered agent. Sorrentino and his son provided approximately $1,200,000 toward the Brick project; Napoleon invested $150,000. Brick decided to borrow money from Provident because it had previously borrowed $20,000,000 for the Observer Plaza project, and because, according to Sorrentino, Napoleon had worked with Bowers, a vice president in Provident's real estate department, and the two had become friendly. Brick decided to borrow $4,000,000 and submitted to Provident a statement created by Napoleon of anticipated expenses for the project. Napoleon also prepared an estimate of the project's value at completion. Bowers discussed the project with his superiors, who were pleased at the prospect of doing business with Brick based on Provident's prior experience with the Observer Plaza project.

B

On November 8, 2001, Provident issued Brick a commitment for $4,000,000. The commitment allocated the loan proceeds among a land draw ($600,000), site improvements ($200,000), and construction costs ($3,200,000). The building was to be completed in such a way that anticipated tenants could finish and outfit individual spaces to their needs.

Sorrentino, his son, and Napoleon were all required to personally guaranty the note and agreement. The parties also agreed that provisions in the commitment survived the closing unless inconsistent with other written terms. Loan advances were to be made as construction advanced in accordance with the loan, but money was to be advanced only if construction was in accordance with the plans and specifications Provident had approved and if, in Provident's sole judgment, the remaining funds available to Brick were sufficient to complete the project. The contract documents called for Provident's construction representative to make monthly inspections — at Brick's expense — but Brick and Provident also agreed that:

> [n]either the approval by [Provident] of any plans and specifications for the Project, nor any subsequent inspections or approvals by or for [Provident] during the course of construction, shall constitute a representation or warranty by [Provident] or any of its employees, agents or representatives as to any matter or fact with respect to or

> concerning the Project or any of its component parts.

The construction representative was also to review the plans and specifications submitted prior to construction. Brick was obligated to pay an initial $1000 toward review, and $250 to Provident for each subsequent inspection. And Brick agreed to hold Provident harmless for claims and costs that might arise in connection with Provident's approvals. On November 28, 2001, Sorrentino, his son, and Napoleon signed the commitment.

C

As a general matter, Heider & Associates, Inc. (HA) worked for lenders in the nature of evaluating borrowers' progress as they requested disbursements of loan proceeds on a project, and defendant James A.C. Heider (Heider), an architect, was on Provident's approved list. According to Bowers, Napoleon approved of HA's selection as Provident's representative on this project, and in December 2001, HA submitted a letter to Provident outlining the services that would be provided regarding Brick's project, including: review of plans, specifications, soil tests, cost budgets, contracts and "other related commitment requirements," and the making of site visits to observe the work, report findings and "process the properly executed [payment forms] prepared by the contractor and approved

by the borrower for the bank." HA's fees were specified in the letter, as was Brick's responsibility to pay. Pursuant to this written proposal, HA required from Provident, among other things, the cost schedule breakdown for the project; HA's proposal also included the following disclaimer:

> Please note that design work will not be performed within my scope of services, and any design concerns noted from my site observations will be resolved to the bank's satisfaction by the project's Architect/ Engineer(s) of Record. In addition, [HA] is not being engaged as a Construction Manager and will not perform those related functions.

Both Bowers and the Heider defendants understood the loan was for construction of a shell building only.

On January 29, 2002, HA submitted to Provident a limited plan and cost evaluation for the project. Heider understood from his early conversations with Bowers that Provident sought HA's input "to make sure that the building as described, a shell building, can be completed for the amount shown in this construction loan commitment." HA gave an opinion that, based on the project's plans, the building could be built as depicted for the estimated costs of completion. In this regard, HA again issued a disclaimer that its evaluation was provided for Provident's "exclusive use" and that no other party had the right to rely on the contents [of the report] without [HA's]

written permission."

On February 2, 2002, the same day the three members signed Brick's operating agreement, Sorrentino, as managing member, signed the loan agreement. Like the commitment, the loan agreement identified the improvements to include a three-story medical office building. It also provided a September 1, 2003 completion date and specified protocols governing all Provident's disbursements. For example, prior to the initial advance, Provident was to receive certain verifications. The article governing subsequent advances required that in making requisitions Brick provide certain information or documentation to Provident or HA. Brick promised to allow Provident and HA continuing access to the premises, plans and drawings as necessary for all inspections.

In addition, the loan agreement set forth a number of other provisions regarding advances. One stipulation was that a "[r]etainage [p]ercentage" or the actual "[r]etained [a]mounts" "specified on the Direct Cost Statement, if any" were to be withheld from each disbursement. The agreement's definitions section provided that the "'Direct Cost Statement'" was "[t]he statements of Direct Costs incurred and to be incurred by category, as annexed as Schedule A." Schedule A did not provide for retainage. The parties also acknowledged "that the Loan

Amount is insufficient to pay the Direct and Indirect Costs in full," and that Brick was responsible to pay deficiencies in the project costs. "Project Costs" were defined as the total of the direct and indirect costs.

Article 2.02 of the loan agreement addressed both HA's discretion to determine the monthly progress and to approve requisitions, as well as the restricted use of any such approvals:

> Verification of the monthly progress and Direct Costs and Indirect Costs, which have been incurred by Borrower from time to time, and the estimated total Project Costs, shall be conclusively determined by the Construction Consultant, except that Project Costs are also subject to the final approval and verification by Lender from time to time, that the work completed to the date of the Requisition has been performed to the reasonable satisfaction of the Lender in its sole discretion. Such approval shall not constitute an assumption of liability or warranty or representation of the Lender to either Borrower, the General Contractor, any Major Subcontractor or any subcontractor, materialman or laborer, or any present or future tenant, occupant or licensee, or purchaser, or any other person whatsoever.
>
> [Emphasis added.]

Article 4.02 governed the last advance "if retainage applies," and addressed the need for the construction consultant to advise on the status of improvements, necessary utilities and any applicable government approvals, including certificates of

occupancy. Article 7.07, which was entitled "Permanent Loan," provided that the construction loan would be converted if the consultant agreed construction had been timely completed, if there was no untimely uncorrected default, and if any tenants had signed acceptable estoppel letters.

D

Sorrentino, on Brick's behalf, signed the loan agreement, and he, his son, and Napoleon signed the guaranty, personally promising the full completion of the project in accordance with the plans and the loan agreement.

Provident made the initial advance of funds in February 2002. The project began, the foundation was completed and Sorrentino oversaw the construction of the steel framing, after which Napoleon took over. Napoleon had suggested that Brick hire O.C.C. & Associates as general contractor, and Brick maintained a construction trailer on site that Napoleon used as an office. According to Sorrentino, Napoleon assumed the role of Brick's "building partner" in charge of day-to-day operations:

> Napoleon did everything. That was his job. His job was to, we had approved plans. We had a bank loan. His job was to take the job and take it from beginning and finish it. And work with Provident Bank in getting it done. That was his job.

Provident thereafter dealt directly with Napoleon.

As the project progressed, Brick sought partial disbursements of the loan proceeds, submitting signed requisitions for draws as outlined in the contract documents. In this fashion, Brick submitted applications and certificates of payment to Provident that Provident then forwarded to HA. These applications — at times referred to, in light of the forms used, as AIA[1] applications — would typically include a running total of amounts already disbursed and those still available. Bowers explained that, on this project, money was to be disbursed by "line items," meaning that "if there was a line item for, for instance, plumbing money[,] [such funds] would be disbursed based on the level of completion of the plumbing until it got to the final level of disbursement." In other words, funds were not to be disbursed based on "a percentage of the whole completion."

Bowers recognized that HA's function was to review each Brick request, "analyze the numbers that [Brick] put on it," physically inspect the site and take pictures as necessary, and furnish Provident with a report "saying yes, what they're asking for is there." Sorrentino possessed a similar understanding of HA's role:

[1]The American Institute of Architects.

> [Provident] hired [HA] to look at the plans, look at the amount of money we put in to build this building and tell them that this building could be built for that amount of money and then afterwards he would then come on the job . . . and approve every penny that the bank gives to the building, that's what they do . . . .

Sorrentino understood that as construction progressed, and with each Brick representation that it had completed a certain level of construction, HA would inspect the progress to confirm that the work had been accomplished.

The Brick loan was ultimately disbursed in nine "fundings" between February 2002, and April 2003. During that period, HA responded to Brick's requests for disbursement, visited the site and authored reports. Each report included sections addressing topics such as site work, the building, the particular payment request, and general comments.

In addition to comments specific to a given inspection on a particular date, the reports routinely included a statement to the effect that while work had been completed in a satisfactory manner to the best of HA's knowledge, some "items were covered up before [the] visit" so that HA was unable to verify that all work was done "in strict accordance with acceptable construction standards." The disclaimer continued:

> I would like to note that the detailed design and pollution/contamination control of either the site or building, along with

> code compliance, is [sic] the function and responsibility of the Architect/ Engineer(s) of Record, which Heider & Associates cannot assume by my limited observations, comments or engagement. In addition, Heider & Associates has not been engaged as a Construction Manager, and any concerns noted in my site observation reports are to be resolved to the bank's satisfaction by the design professionals and/or contractors engaged by the borrower. Photographs provided with this report will give you an overview of work in progress as of my site visit.

Each report also included a disclaimer as to the report's use by anyone other than Provident or its assigns:

> This report, for mortgage lending purposes, has been prepared for the exclusive use of The Provident Bank, their successors and/or assigns, and no other party has the right to rely on the contents contained herein without my written authorization.

HA issued reports to Provident and provided copies to Napoleon. Sorrentino testified at his deposition that he never saw any of these reports.

E

The building was not finished by the anticipated completion date of September 1, 2003. Napoleon "gave [Sorrentino] all kinds of stories about the problems and this and that" regarding the delays. Napoleon, who Sorrentino described as being "terrific with the banks," was working on obtaining an extension. Sorrentino did not consider replacing Napoleon

because Joseph Sorrentino was not a builder and Sorrentino himself was working on larger and more lucrative projects. Sorrentino explained that he "just let it go which was foolish, I shouldn't have, I should have stopped the job and threw him out, but I didn't do it."

In September 2003, Provident's Gregory Haines recommended a ninety-day extension, during which interest, but not principal, would be paid. In December 2003 Sorrentino, his son, and Napoleon, on Brick's behalf, signed a loan modification agreement with Provident that extended repayment for nine months, to September 1, 2004.

In signing the loan modification agreement, Brick acknowledged its debt to Provident under the original $4,000,000 note, and represented there were "no set offs, rights, claims or causes of action of any nature whatsoever" that Brick could assert against Provident.

According to Sorrentino, at some later point, Napoleon negotiated a $4,500,000 loan from another bank to pay off the Provident loan.

F

Napoleon was murdered on May 7, 2004. See State v. O'Brien, 200 N.J. 520, 524-25 (2009). Sorrentino and his son visited Napoleon's office at the project site but found no

business records. They ultimately obtained some records with the assistance of the prosecutor's office, which was investigating Napoleon's murder. Based on his experience, Sorrentino determined from these records that the project was only 60% complete.

A few days later, the Sorrentinos toured the project. They were displeased with the stage of completion. John Lurvey, a contractor retained by Napoleon in May 2003 to help finish the project, agreed, describing it as "a mess." "[T]here was garbage all over the place. It hadn't been cleaned. There were wires hanging out from many different directions." Lurvey estimated that work was only sixty to seventy percent complete, explaining that the "building didn't reflect the plans."

Lurvey compiled a list of items for Sorrentino that were either incomplete or would require "retrofitting" — what Lurvey defined as the process of having to correct problems created when things were not done timely or in proper sequence. In Lurvey's estimation, the expenditure of almost $4,000,000 on a project that was only sixty to seventy percent completed revealed that the payments for the materials received were "overinflated somewhere," and that Provident should not have released so much of the proceeds. Referencing the AIA disbursement request forms, Lurvey said Provident had approved

items that "weren't completed."

According to a July 2005 preliminary report of Brick's forensic accountants, Napoleon had been embezzling funds in connection with the project. Although he could not pinpoint an exact date, Sorrentino acknowledged at his deposition that even during the project he had become skeptical about what Napoleon was telling him, and he realized this project was taking too long to complete. Nevertheless, when questioned why he had not involved himself sooner, Sorrentino replied:

> I allowed it because I wasn't there. I got stories from Anthony Napoleon and I had to take care of what I was doing because otherwise if anything went wrong here [on the larger projects he was personally overseeing] I wouldn't be able to supply the money I did later. So I took care of what I had to take care of.

Sorrentino, however, denied he had any responsibility to monitor the project's compliance with the plans, and instead he blamed Heider, whom he understood had a social relationship with Napoleon, and he blamed Provident, asserting that he did not understand why Provident would have allowed the delay. Although he admitted that "geographics or whatever" were among the reasons he had chosen not to oversee the job, Sorrentino insisted that he was relying on Provident and Heider to monitor progress:

> [I] also had Heider, I also had Bowers. I had Provident Bank who lent me 20 million dollars prior [on another project] and did everything 100 percent according to the contract. Yet on this job why was I not being able to rest my mind and say, I have these people now that we had before [in connection with that prior loan] with much more money. And I know how they worked. Heider wouldn't give us ten cents over on Observer Plaza which was [a] 20 million dollar [project]. Every penny he watched. Couldn't take him for a cup of coffee. And yet here we find now that Mr. Heider went for dinner, went for drinks, had work done in his house and was being paid for by my partner in cash. And people are willing to come and testify in court about this.

Walton Engineering Associates, Inc. (WEA), Brick's expert, relied in part on Lurvey's findings in coming to its conclusion that the project was only sixty to seventy percent complete as of April 2003. According to WEA, the project was not complete until receipt of a certificate of occupancy in 2004, after the infusion of an additional $700,000. WEA asserted that Provident, Bowers or the Heider defendants committed numerous errors that caused Brick's damages, including: failure to use the itemized schedule of values when evaluating requests for disbursements; use of the AIA forms without requiring the signature of the architect; failure to require a certification that the money was actually used for the completed work; failure to require a certificate of completion or temporary occupancy before disbursing the last payment; failure to require

retainage; and failure to make periodic site visits to compare observations to Heider's reports. WEA also concluded that meals Napoleon may have purchased for Bowers and Heider, along with Heider's purchase of doors through Napoleon,[2] demonstrated the two had failed to maintain the "professional separation" required by industry standards.

II

On March 17, 2005 — more than nine years ago — Brick filed its complaint in this action alleging, among other things, civil conspiracy, racketeering, fraud, negligence and breach of contract against the Estate of Anthony Napoleon, OCC, Harold Hayek, Sr., Ocean Construction Systems, Inc., A.J.N., Inc. (AJN), and the Heider defendants, in connection with the circumstances outlined above. Brick alleged that Napoleon, as its managing member, had entered into secret agreements and that

[2]Heider acknowledged that in the fall of 2002, while making a site inspection, he had asked Napoleon to recommend someone who could provide him, at a contractor's discount, several exterior doors. Napoleon responded that he (Napoleon) could purchase the doors, totaling approximately $1,187.20, through Brick, and arrange to have them installed by someone from Brick's supplier. Napoleon purchased the doors. The supplier's employee, working "off hours," installed two of them, and Heider gave Napoleon a $1600 check payable to Brick. On the check written against his business account, Heider added the word "consulting" on the check's memo line. Between November 2002 and June 2003, Heider purchased two more doors through the supplier's employee, who installed them at Heider's property. On June 13, 2003, Heider paid the employee $1,239.52.

Napoleon used his position with Brick, as well as his positions with Ocean Construction and AJN, to divert to his own use loan proceeds intended for the Brick project. According to the complaint, the Heider defendants, who issued the bank periodic progress reports on the project, falsely certified that work had been completed.

In 2008, Brick was permitted to file a second-amended complaint[3] against Provident and Bowers, asserting causes of action sounding in breach of contract, negligence and breach of fiduciary duty. This pleading alleged that Provident, through Bowers, wrongly disbursed periodic loan draws to Brick without ensuring that preconditions were met.

Provident and Bowers moved to dismiss. On July 18, 2008, the trial judge entered an order that dismissed the negligence and breach of fiduciary duty claims, but denied Provident and Bowers' motion with respect to the breach of contract claim.

Meanwhile, Provident and Bowers ended their relationship, and Brick moved to discover the reason. On December 17, 2008, the trial judge ordered an in camera review and two days later ordered a release of information to Brick on this subject.

On June 30, 2009, Brick again moved to amend the complaint,

[3]An earlier amended complaint included a claim against June Consulting, Inc., another company with which Napoleon was affiliated.

this time to assert its previously pleaded racketeering and fraud claims — which had been aimed at other defendants — against Provident and Bowers, and to also extend its racketeering allegations to the Heider defendants. On July 21, 2009, the judge denied that motion.

Provident moved for summary judgment, and Brick cross-moved for reconsideration of the earlier dismissal of the negligence claim against Provident and Bowers. On August 17, 2009, the judge granted Provident's motion and denied Brick's cross-motion.

The Heider defendants later moved for summary judgment, Brick cross-moved for summary judgment, and Provident moved for an award of counsel fees. On September 29, 2009, the judge granted the Heider defendants' summary judgment motion, and denied both Brick's cross-motion and Provident's motion for fees.

On January 18, 2012, Brick dismissed with prejudice all other claims against all other parties and filed a timely appeal of orders entered on July 18 and December 17, 2008, and July 21, August 17 and September 29, 2009. Provident filed a cross-appeal regarding the September 29, 2009 order that denied its application for counsel fees.

In its appeal brief, Brick presents the following

arguments[4]:

> I. PLAINTIFF'S REQUEST FOR DISCOVERY SHOULD HAVE BEEN GRANTED.
>
> II. PLAINTIFF'S REQUEST TO AMEND THE COMPLAINT SHOULD HAVE BEEN GRANTED.
>
> III. PROVIDENT BREACHED ITS CONTRACTUAL DUTY.
>
> IV. PROVIDENT HAD A "SPECIAL RELATIONSHIP" WITH PLAINTIFF.
>
> V. A FIDUCIARY RELATIONSHIP EXISTED BETWEEN PROVIDENT AND PLAINTIFF.
>
> VI. [PROVIDENT'S] MOTION TO DISMISS NEGLIGENCE CLAIM SHOULD HAVE [BEEN] DENIED.
>
> VII. HEIDER'S [SIC] MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BECAUSE IT WAS FOR[E]SEEABLE PLAINTIFF WOULD RELY ON HIS SERVICES.
>
> VIII. ISSUES OF MATERIAL FACT EXISTED REGARDING WHETHER HEIDER BREACHED CONTRACT WITH PLAINTIFF.
>
> IX. ISSUES OF MATERIAL FACT EXISTED REGARDING HEIDER'S FRAUDULENT CONDUCT.

In its cross-appeal, Provident argues:

> PROVIDENT HAS AN ENFORCEABLE CONTRACTUAL RIGHT TO ATTORNEYS' FEES RESULTING FROM BRICK PROFESSIONAL'S CLAIMS AGAINST IT AND ALFRED BOWERS.

We reject Brick's arguments, but we agree with Provident that

[4]For convenience, we have eliminated the subparts set forth by Brick and Provident regarding some of the points delineated here.

the judge erred in cursorily denying its claim for counsel fees from Brick, as to which we remand for further proceedings.

As for Brick's arguments, we first note there is insufficient merit in its Points I and II to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), except we observe that the determinations criticized in those points were matters left to the trial judge's discretion, which was not abused in these circumstances.

With regard to Point I, information concerning Bowers' departure from Provident was requested after the claims against Bowers had been dismissed. This information revealed that Bowers was not terminated but instead voluntarily left Provident's employ after receiving a negative review, which Bowers believed to be unfair; the judge ordered a turnover of that information to Brick after an in camera review. The judge did not abuse his discretion in denying Brick's request for further discovery. See Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559-60 (1997); Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div.), certif. denied, 185 N.J. 296 (2005).

And, as for Point II, although much has been argued about the applicable statute of limitations on the fraud and racketeering claims Brick sought to add against Provident and Bowers in 2009, we need not decide that issue because Brick's

request to file a third amended complaint to include those claims was urged so late in the litigation — four years after suit was commenced, fifteen months after Provident and Bowers were joined, and ten months after all claims against Bowers had been dismissed. The judge acted well within his discretion in denying the amendment at such a late date. See Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 457-58 (1998).

III

In its Points III, IV, V and VI, Brick argues that the trial judge erred in either dismissing or granting summary judgment on its claims that Provident breached the parties' contract, had and breached a "special relationship," had and breached a fiduciary relationship, and was negligent. We find insufficient merit in Brick's "special relationship" argument to warrant discussion in a written opinion.[5] R. 2:11-3(e)(1)(E).

[5]This novel argument is expressed only in a single page of Brick's appeal brief, and it has not been made clear how this alleged "special relationship" would differ from the fiduciary relationship or the negligence theories also asserted. It is true our Supreme Court has recognized that in certain circumstances a bank may be found to be in "a special relationship . . . from which a duty can be deemed to flow." City Check Cashing v. Mfrs. Hanover Trust Co., 166 N.J. 49, 59 (2001). But the Court's acknowledgement of such a special duty related to the potential for imposing liability — in an (continued)

We reject the other arguments for the reasons that follow.

A

Brick contends the trial judge erred in granting summary judgment on its breach of contract claim against Provident, arguing Provident's actions raised factual questions concerning the parties' intent and understanding of key provisions in the loan agreement. We disagree.

The parties' contract consisted of three documents: the commitment, the loan agreement and the modification agreement. Courts enforce contracts in accordance with the parties' intentions when considered in the context of the circumstances at the time of formation and in keeping with their expressed general purpose. Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 269 (2006); Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301-02 (1953). Where a contract's terms are clear and unambiguous, there is no room for interpretation and contracts will be enforced as written. Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960); B.D. v. Div. of Med. Assistance & Health Servs., 397 N.J. Super. 384, 391 (App. Div. 2007). Construction of a written contract normally presents a legal question, but

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(continued)
appropriate set of circumstances — in favor of a non-customer. Id. at 62-64. That circumstance is not present here.

where there is "uncertainty, ambiguity or the need for parol evidence in aid of interpretation, then the doubtful provision should be left to the jury." Great Atl. & Pac. Tea Co., Inc. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000).

Brick relies on several sections of the loan agreement in arguing that Provident had non-discretionary duties to review the construction progress and to reject improperly executed documents prior to releasing funds. In this regard, Brick cites: Article 2.01, which stated that advances were to be equal to the direct and indirect costs incurred by Brick; Article 2.02, which granted Provident the right to final approval and verification that the work had been performed; Articles 3 and 4, which dealt with conditions precedent to Provident's obligation to make advances; and Article 7.07, which listed the requirements for conversion to a permanent loan. Brick also contends that, in light of the warranty of good faith and fair dealing implied in all New Jersey contracts, see Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 109 (2007); Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997), Provident could not simply fail to follow through on any of these duties without assuming liability. Despite Brick's forceful argument that the contract documents suggest the imposition on Provident of an obligation in approving periodic

payments, we conclude that the thrust of the entire agreement, and the only plausible view of its specific provisions, militates otherwise.

First, Article 2, which governs loan advances, includes an express disclaimer of the right Brick seeks to vindicate. This article states that Provident's approval of project costs "shall not constitute an assumption of liability or warranty or representation of the Lender to either the Borrower, the General Contractor, any Major Subcontractor or any subcontractor, materialman or laborer, or any present or future tenant, occupant or licensee, or purchaser, or any other person whatsoever." This language unambiguously declares that in "approving" costs and permitting disbursements, Provident was making no warranty regarding the state of the project or the quality of construction.

In addition, under the heading "[l]oan [a]dvances," the commitment provided in part that Provident "will fund at its option requisitions on the basis of ninety percent (90%) of the amount requisitioned for work actually in place, based upon the approved trade cost breakdown." Likewise, prior to an advance, Provident reserved for itself the right to inspect the project, and that

> [a]n advance will be made only if the construction is in accordance with the plans

> and specifications approved by Lender, and if in the sole judgment of the Lender, the remaining funds available to the Mortgagor are sufficient to fully complete construction of the Project and pay all future soft costs.
>
> [Emphasis added.]

Elsewhere the contract documents declare that Provident's "obligation to make Loan advances . . . shall be subject to the satisfaction of the following conditions" (emphasis added), all of which involved particular requirements placed on Brick. What Brick casts as Provident's "non-discretionary duty" ignores what is simply Provident's reservation of the ability to protect itself and its collateral. See Conway, supra, 187 N.J. at 269 (recognizing that parties' intentions must viewed in context and interpreted consistently with the contract's purpose). The contract documents unmistakably reveal the parties' intent that Provident's right to inspect and approve was not for satisfying Brick's expectations but a means for satisfying the security of its loan.

Application of the modification agreement also requires dismissal of the breach of contract claim because it contains Brick's "represent[ation], warrant[y], and confirm[ation]" that there are "no set-offs, rights, claims or causes of action of any nature whatsoever which [Brick] has or may assert against [Provident] with respect to the Note or to [the] Mortgage and

the indebtedness secured thereby." Also, under a section labeled "[r]elease of [l]ender," the modification agreement contains Brick's acknowledgement that Provident had "fulfilled all its obligations" under the loan agreement. In fact, Brick "release[d] and discharge[d] [Provident] from any further liability or responsibilities thereunder."

These provisions clearly reveal the parties' intent that, in exchange for its receipt of the benefits provided by the modification agreement, Brick waived any claim it might have possessed in connection with Provident's performance of the original loan agreement.

The confluence of all three contract documents requires a rejection of Brick's breach of contract claim.

B

Brick also argues that Provident owed it a fiduciary duty, which it claims was breached when Provident disbursed proceeds without properly verifying the status of the work. Brick contends this duty arose from the fact that Provident, in Brick's view, held the construction loan proceeds in trust.

This particular claim was dismissed, pursuant to Rule 4:6-2(e), for failing to state a claim upon which relief could be granted. Application of this Rule required that the trial judge indulgently examine Brick's pleading. See Seidenberg v. Summit

Bank, 348 N.J. Super. 243, 249-50 (App. Div. 2002). That liberal standard, however, did not require that the motion be denied; dismissal was appropriate if the claim could not be sustained as a matter of law. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005).

In F.G. v. MacDonell, 150 N.J. 550, 563 (1997), the Court observed that the "essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position." Other than the fact that Provident might be viewed as the party with the dominant position, nothing else about the parties' relationship suggests a fiduciary intent. Provident expressly disclaimed any responsibility for the extent or quality of the construction, and its right to inspect before releasing further proceeds was solely for its own protection. Consequently, there was nothing alleged to suggest the parties intended that Provident's performance would be imbued with fiduciary obligations. See United Jersey Bank v. Kensey, 306 N.J. Super. 540, 552 (App. Div. 1997) (holding there "is no presumed fiduciary relationship between a bank and its customer"), certif. denied, 153 N.J. 402 (1998); see also First Nat'l State Bank of N.J. v. Carlyle House, Inc., 102 N.J. Super. 300, 321-22 (Ch. Div. 1968) (holding that construction loan mortgagee bank was under no duty

to disburse proceeds to general contractor in such a way as to protect interests of subcontractors, and was not liable to subcontractors for any failure to carefully disburse funds), aff'd o.b., 107 N.J. Super. 389 (App. Div. 1969), certif. denied, 55 N.J. 316 (1970).

C

Brick argues the trial judge erred in dismissing its negligence claims against Provident and Bowers — that the judge failed to consider "the elements of reliance and foreseeability" that are inherently factual. Brick claims it was foreseeable that it would rely on Provident and Bowers "to verify the accuracy of certain statements in the draw certifications and the true status of the construction project," from which an independent duty beyond any contractual ones arose and was then breached. We disagree largely for reasons already discussed regarding the contract documents. We add the following additional comments.

Where the question is one of a bank's negligence, a plaintiff must establish the same four elements as in any other negligence action, namely: a duty of care; a breach of that duty; proximate cause; and damages. Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 400 (2009). The "fundamental requisite for tort liability is the existence of a duty owing

from defendant to plaintiff." Pa. Nat'l Turf Club, Inc. v. Bank of W. Jersey, 158 N.J. Super. 196, 203 (App. Div.) (internal quotation and citation omitted), certif. denied, 77 N.J. 506 (1978). Whether a duty exists presents a question of law. Kernan, supra, 154 N.J. at 445. In making that determination, a court must apply a fairness analysis in light of the relationship of the parties, the nature of the risk, the opportunity and ability to exercise care, and the public interest. Id. at 445-46. Because the parties here so carefully outlined their relationship and the scope of their promises and obligations in their written agreements, we agree with the trial judge that no additional obligation was accepted or may be reasonably imposed upon Provident.

Indeed, to rule otherwise would directly contradict the parties' written agreement, adding a dimension to Provident's obligations it expressly contracted not to accept. Such a court-imposed obligation would substantially and needlessly complicate a bank's involvement in the means of construction itself, and, at worst, place it in the unenviable position of guaranteeing that a project was being completed to the borrower's subjective satisfaction or expectation, an elusive and unreasonable standard. In short, to endorse Brick's thesis would make banks the insurers of a borrower's negligence. We

reject the invitation to impose duties and obligations on a bank that are contrary to law, the facts here, and public policy.[6]

IV

We also reject Brick's contention that the trial judge erred in dismissing the breach of contract, negligence, and fraud claims asserted against the Heider defendants, all of which claims are lumped under a single point in Brick's appeal brief that "it was foreseeable" Brick "would rely on [the Heider defendants'] services." All these claims fail for one essential reason — Brick could not have reasonably relied on the actions of the Heider defendants in light of the contract documents.

That is, because Provident's agreement with HA clearly expresses that the latter's work was intended solely for Provident's benefit, it was not reasonable for Brick to believe or assume otherwise. See Rieder Cmties., Inc. v. Twp. of No. Brunswick, 227 N.J. Super. 214, 222-23 (App. Div.), certif. denied, 133 N.J. 638 (1988). Indeed, the factual basis for

[6]We also reject Brick's argument that Provident was in the best position to avoid the loss caused by Napoleon's alleged wrongdoing or lack of competence. Brick put one of its members, Napoleon, in charge of this project and was in the best position to avoid the consequences of his acts or omissions. The law clearly places the risk of loss on Brick in this circumstance. See Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 338 (1961). We reject the argument that the law ought to impose a duty of care on a party in Provident's position — when that party has contractually insisted on disclaiming any such duty.

Brick's claim of reliance is unclear since Sorrentino testified at his deposition that he never saw HA's reports. In any event, we repeat that in contracting with Provident, Brick stipulated that

> [n]either the approval by [Provident] of any plans and specifications for the Project, nor any subsequent inspections or approvals by or for [Provident] during the course of construction, shall constitute a representation or warranty by [Provident] or any of its employees, agents or representatives as to any matter or fact with respect to or concerning the Project or any of its component parts.

In light of these provisions, and others, as well as the only fair understanding of the parties' general undertaking, Brick could not have reasonably relied on what the Heider defendants did or did not do in connection with this project. See, e.g., Zielinski v. Prof'l Appraisal Assocs., 326 N.J. Super. 219, 226-27 (App. Div. 1999). Brick's negligence and fraud claims share the fate of the contract claims for largely the same reason — that the Heider defendants owed a duty to Provident, not Brick, and it was unreasonable for Brick to think otherwise.

We add only the following additional comments. In arguing that summary judgment was improvidently granted regarding the Heider defendants, Brick asserts there were numerous unresolved factual questions that cast doubt on the exact relationship between Heider and Napoleon — and, thus, Heider and Brick.

Brick refers to Heider's receipt of $750 per site report instead of $250, as stated in the loan agreement, implying the difference was a "disguised kickback." And Brick urges an inference to be drawn from the "consulting services" check Heider provided for his purchase of doors for his home. See footnote 2, supra.

As to the former, it is true the commitment included a stipulation that the inspection reports would cost $250, which was to be paid by Brick. HA's initial proposal to Provident to perform consulting services, however, clearly quoted the $750 figure, so it seems obvious that even before the project started HA expected to receive $750 per report and that it was not trying to squeeze an extra $500 from Brick. In fact, each HA report recited that amount as due, which Brick evidently paid without objection. The discrepancy between HA's agreement with Provident and Brick's agreement with Provident is simply too insignificant to pose an obstacle to summary judgment. See, e.g., Macfadden v. Macfadden, 49 N.J. Super. 356, 360 (App. Div.) (observing that "[w]here the parties to a contract have given it a practical construction by their conduct, such construction is entitled to great if not controlling weight in determining its interpretation"), certif. denied, 27 N.J. 155 (1958); see also VRG Corp. v. GKN Realty Corp., 135 N.J. 539,

548 (1994).

Our view of Heider's "door" check, and the "consulting fee" note on the check, is similar. The check was from Heider not to him, and it was made payable to Brick, not Napoleon. As a result, there is no reason to presume that this circumstance, which may have suggested a breach of industry standards or a breach of Heider's duty of loyalty to Provident, supports either a contractual, negligence, or fraud cause of action by Brick against the Heider defendants.

In opposing Heider's motion for summary judgment, Brick was required to show the existence of genuine questions of material fact, and its opposition based on speculation about the personal relationship between Napoleon and Heider was insufficient to defeat the motion. Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div.), certif. granted, 183 N.J. 592 (2005), appeal dismissed, Jan. 3, 2006. To defeat summary judgment, an opponent must establish more than simply "'some metaphysical doubt as to the material facts.'" O'Loughlin v. Nat'l Cmty. Bank, 338 N.J. Super. 592, 607 (App. Div.) (quoting Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S. Ct. 1262, 122 L. Ed. 2d 659 (1993)), certif. denied, 169 N.J. 606 (2001). Brick failed to sustain that burden.

V

After obtaining summary judgment, Provident moved for an award of counsel fees. In denying the motion, the trial judge briefly explained his interpretation of the cited contract provision and concluded it was limited to claims regarding the status of the construction and improvements, rather than disputes between the parties as to the meaning of their agreement.

In New Jersey, litigants usually bear their own counsel fees. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 554 (1993); Iannone v. McHale, 245 N.J. Super. 17, 27 (App. Div. 1990). As a result, "unless legal fees are authorized by statute, court [r]ule, or contract," they are not recoverable. Satellite Gateway Commc'ns., Inc v. Musi Dining Car Co., 110 N.J. 280, 285 (1988).

In arguing that the contract documents provided for an award of counsel fees, Provident relies on the commitment's fifteenth paragraph, which states:

> Neither the approval by Lender of any plans and specifications for the Project, nor any subsequent inspections or approvals by or for the Lender during the course of construction, shall constitute a representation or warranty by the Lender or any of its employees, agents or representatives as to any matter or fact with respect to or concerning the Project or any of its

> component parts. Mortgagor hereby agrees to indemnify and hold Lender harmless from and against any and all loss or expense (including reasonable attorneys' fees) resulting from any claim, action, settlement or liability for acts (or failure to act) in connection with such inspections and/or approvals by or for Lender. Such indemnification shall survive satisfaction of the Loan.

Provident argues that Brick asserted claims against both it and Bowers that "directly implicate" the "inspections and/or approvals by or for the Lender." We neither accept nor reject this contention but, instead, remand the matter to the trial court for further proceedings to examine the parties' intent regarding the applicability of this provision. We offer the following additional comments for guidance.

In passing on the request for fees, a court's initial inquiry is whether the subject of the litigation "falls within the purview of the contractual provision authorizing attorneys' fees and costs." Kellam Assocs., Inc. v. Angel Projects L.L.C., 357 N.J. Super. 132, 138 (App. Div. 2003). Among its claims, Brick alleged that, before disbursing proceeds, Provident was required — and failed — to verify that work was not only done but done in accordance with the plans; indeed, this allegation underlies most if not all Brick's claims. These claims — for a variety of reasons — were found lacking in merit or otherwise not actionable. But the broad language of the provision quoted

above does not foreclose an intent to include such claims within Brick's promise to indemnify Provident. On the other hand, the provision does not necessarily delineate whether it was meant to incorporate claims made by Brick against Provident. Contracts of indemnity are typically associated with a promise to protect the promisee against loss or liability to a third person. See Feigenbaum v. Guaracini, 402 N.J. Super. 7, 18 (App. Div. 2008).

In denying Provident's motion for fees, the trial judge never reached the question of whether the provision's scope was intended to include claims asserted by the same party who was required to indemnify Provident. Instead, the judge merely — and cursorily — found the provision inapplicable because he believed it was to be strictly construed.

Following today's decision, the trial judge should further consider the applicability of the fifteenth paragraph to Provident's claim for counsel fees from Brick.

VI

We find insufficient merit in any argument we have not already addressed to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

To summarize, we affirm all those orders questioned in this appeal by Brick. With regard to Provident's cross-appeal, we vacate the September 29, 2009 order that denied Provident's

motion for counsel fees, and we remand for further consideration of that claim.

Affirmed in part; vacated and remanded in part. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION