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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5421-11T3

SARATOGA AT TOMS RIVER
CONDOMINIUM ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

MENK CORPORATION, INC. and
H&H MASON CONTRACTORS,

Defendants-Respondents,

and

ADELE HOVNANIAN, CHRIS AIKENS,
ED DRESWICK, LOUISE GIOVINAZZO,
VROM YEGPARIAN, JAMES VALLE,
FRED PATERSON, MIKE CARPINO,
WRIGHT CONSTRUCTION CO., INC.,
LITTLE RASCALS CONCRETE CO.,
INC., R.W. THOMAS, INC., BIL-JIM
CONSTRUCTION CO., GREENSCAPE,
INC., ALL COUNTY ENTERPRISES,
INC., MATA GEN CONSTRUCTION,
DOMINGO SIERRA t/a BIRCHWOOD
CONSTRUCTION CO., BENITO'S
CONSTRUCTION, INDEPENDENT
CONSTRUCTION, F.G. CONSTRUCTION,
MARCOS SIDING, INC., JP SIDING,
CH CONSTRUCTION, COB SANANGO
CONSTRUCTION CO., KAZIMIERZ
GAWLINKOWSKI SIDING CARFER
CONSTRUCTION, INC., EAGLE
EXCAVATING, GEORGE C. MUELLER,
BILL RAPPLEVEA EXCAVATING,
SAMBOL CONSTRUCTION CORP.,
TBS CORP., TRAP ROCK INDUSTRIES,

ANCHOR FRAMING AND BUILDING, INC., MONMOUTH IRRIGATION CORP., R.B. CARPENTRY BUILDERS, INC., JOSE FUNEZ CONSTRUCTION, RIGO HERNANDEZ, JOE CARLOS GALLO, JOHN LUCIANO, ANTHONY CARD, HYMAN CONSTRUCTION, ANTONIO TORRES, LUIS GILBERTO LOPEZ-NEGRON, PELLA CONSTRUCTION COMPANY, MAX'S CONSTRUCTION COMPANY OF NEW JERSEY, GILES CONSTRUCTION COMPANY, ROBERT GORRELL, FRED LARSEN, ARAIS CONSTRUCTION, T.A.J. PURPURO CORP., JAVIER GONZALEZ, PRO CUT, MEYER & VENTA, GREATER NEW YORK MUTUAL INSURANCE GROUP, HARTFORD INSURANCE COMPANY, MERCER INSURANCE GROUP, FEDERAL INSURANCE COMPANY, WESTPORT INSURANCE COMPANY, and UNITED STATES LIABILITY INSURANCE COMPANY,

Defendants.

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MENK CORPORATION, INC. and K. HOVNANIAN INDUSTRIES, INC.,

Third-Party Plaintiffs,

v.

WRIGHT CONSTRUCTION CO., INC., LITTLE RASCALS CONCRETE CO., INC., R.W. THOMAS, INC., BIL-JIM CONSTRUCTION CO., GREENSCAPE, INC., SPRINKLER MASTER, ALL COUNTY ENTERPRISES, INC., STROBER-HADDONFIELD GROUP, INC., DANIELIAN ASSOCIATES, GEORGE K. HOPPE, O'DONNELL, STATON & ASSOCIATES, FRANK H. LEHR & ASSOCIATES, CHRISTIE-WERNER

ASSOCIATES, INC., MEYER & VENTA, EXECUTIVE PROPERTY MANAGEMENT, INC., PRIME MANAGEMENT COMPANY, ARTHUR EDWARDS, INC., FRANK CATANZARITE, RON MANCINI, DARREN MISA, STEVE DEL CUERCIO, ELAINE KAMINSKI, TONY FORANO, JOE PALAGONIA, DENNIS GOETTMAN, RUTH ANN MANZI, ED COX, FELICE CARRERO-SCHMIDT, JACK MCLACHLAN, LOUISE GIOVINAZZO, STEVE KISELICK, JOE FORESTIERI, LARRY FALCON, BILL BRIDA, and THE SARATOGA AT TOMS RIVER CONDOMINIUM ASSOCIATION, INC.,

Third-Party Defendants.

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MICHAEL J. WRIGHT CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

v.

R. B. CARPENTRY BUILDERS, INC., JOSE FUNEZ CONSTRUCTION, RIGO HERNANDEZ, JOE CARLOS GALLO, JOHN LUCIANO, ANTHONY CARD, HYMAN CONSTRUCTION, ANTONIO TORRES, LUIS GILBERTO LOPEZ-NEGRON, PELLA CONSTRUCTION COMPANY, MAX'S CONSTRUCTION COMPANY OF NEW JERSEY, GILES CONSTRUCTION COMPANY, ROBERT GORRELL, FRED LARSEN, ARAIS CONSTRUCTION T.A.J. PURPURO CORP., JAVIER GONZALEZ, PRO CUT,

Third-Party Defendants,

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ALL COUNTY ENTERPRISES, INC.,

Third-Party Plaintiff,

v.

MATA GEN CONSTRUCTION, DOMINGO SIERRA t/a BIRCHWOOD CONSTRUCTION CO., BENITO'S CONSTRUCTION, INDEPENDENT CONSTRUCTION, F.G. CONSTRUCTION, MARCOS SIDING, INC., JP SIDING, CH CONSTRUCTION, COB SANANGO CONSTRUCTION CO., and KAZIMIERZ GAWLINKOWSKI SIDING,

Third-Party Defendants.

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Argued March 24, 2014 – Decided July 17, 2014

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-23-04.

Gregg S. Sodini argued the cause for appellant (Law Offices of Gregg S. Sodini, LLC, attorneys; Mr. Sodini, on the briefs).

James G. O'Donohue argued the cause for respondent Menk Corporation, Inc. (Hill Wallack, LLP, attorneys; Mr. O'Donohue and Susan L. Swatski, of counsel and on the brief).

Francis X. Donnelly argued the cause for respondent H&H Mason Contractors (Mayfield Turner O'Mara & Donnelly, attorneys; Mr. Donnelly and Andrew A. Keith, on the brief).

PER CURIAM

Plaintiff Saratoga at Toms River Condominium Association, Inc. appeals from orders entered by the Law Division granting summary judgment in favor of Menk Corporation (Menk) and H&M Mason Contractors (H&H), and other orders entered by the trial court during the course of this litigation. For the reasons that follow, we affirm.

I.

Plaintiff brought this action against numerous defendants asserting claims arising from the construction of The Saratoga at Toms River, a 376-unit condominium townhouse development. Menk was the general contractor and developer of 232 of the 376 condominium units in the development. Among other things, plaintiff claimed that the units were experiencing water infiltration. H&H was the masonry subcontractor. Plaintiff resolved all of the claims in the case, with the exception of those asserted against Menk and H&H.

Plaintiff's claim against Menk pertained to the alleged unauthorized use of black building paper in the construction of the units, for which it sought $1.8 million in compensatory damages. Plaintiff also asserted claims against Menk and H&H for allegedly deficient masonry work, as to which plaintiff claimed $2.8 million in compensatory damages.

Vrom Yegparian was the president of Menk during the construction of those units. Menk hired the Danielian Group, a prominent architectural firm from California, to develop plans to construct those units. Those plans were provided to a local architect, George K. Hoppe, who prepared the necessary architectural drawings, which were used during construction. Hoppe completed the drawings in November 1995. Yegparian reviewed the architectural drawings and plans prior to beginning construction, and as needed throughout the construction.

Among other things, the drawings provided that the buildings be wrapped in "Tyvek Building Paper or equal." However, Tyvek was not used during construction. Rather, Vapor-x 14-pound black tar paper was used. It is undisputed that Tyvek is not referenced in the applicable building code, and that 14-pound black tar paper is a "code-compliant" building wrap.

Yegparian testified at his deposition that he made the decision not to use Tyvek on the project, and, notwithstanding the specification on the plan with respect to Tyvek, he said he would never have used Tyvek on the project, "[a]bsolutely not" "I did not even think of Tyvek for this project."

The drawings also required that a groundwater investigation be performed before any masonry work began. On March 2, 1995, Yegparian faxed Hoppe "Soil Boring Logs" that referred to

samples that had been taken at the development property on March 11, 1981. The Soil Boring Logs indicated that twelve twenty-foot borings had been drilled, and soil samples taken, at various locations throughout the development site. The logs also indicated that ten of the borings had dry soil at a depth of twenty feet; and water was detected at eighteen feet and fifteen-and-a-half feet deep in the other two borings.

Plaintiff's expert, Andrew Amorosi, from The Falcon Group, testified that the excavation area for each of the thirty-seven buildings constructed at The Saratoga was approximately 150 feet long, 50 feet wide, and 10 feet deep. The excavation for each building required the displacement of approximately 10,000 cubic feet of soil. There was no evidence of any groundwater surfacing as a result of the excavation.

By contract dated October 10, 1995, Menk retained H&H to perform the masonry work at the development, including laying the foundations and installing the basements, crawl spaces, and exterior steps. Most of the construction on the project occurred in 1996 and 1997, and the project was ultimately completed in 1999.

On December 8, 1995, Menk issued an amended public operating statement (POS), which included the original Master Deed. The amended POS stated that the "[c]onstruction of the

Units will be in accordance with the conceptual architectural plans . . . with the working drawings done by George Hoppe[.]"

Menk sold all the units using substantively identical Agreements of Sale, which stated that the "Seller [Menk] agrees to construct a Condominium Unit in accordance with applicable governmental codes and the building plans. . . ." The Agreements of Sale also provided that the "Seller has the right in its absolute and sole discretion . . . to make substitutions of comparable material or equipment which shall be in compliance with applicable building codes."

Plaintiff retained The Falcon Group, an engineering and architectural consulting firm, to inspect and evaluate the buildings. It performed site inspections at The Saratoga from May 2007 through October 2009, approximately ten years after construction had been completed, and prepared a report dated January 22, 2010.

The Falcon Group report does not address the original construction as it existed when the project was completed. Amorosi testified at his deposition that he could not say that any condition he observed in 2007-2008 at The Saratoga actually existed when the units were constructed or when the project was completed.

Amorosi testified at the Rule 104 hearing that the plans

did not specifically require waterproofing. Rather, the plans contained "a detail for dampproofing" and a note relating to investigation of the groundwater conditions to determine if waterproofing was required. The mason contractor was required to determine whether groundwater conditions at the property required waterproofing, and to communicate its findings to the architect. Amorosi did not know if the mason contractor had communicated its findings to the architect.

The applicable building codes required a subsurface soil investigation to determine the possibility of the groundwater table rising above the proposed elevation of the floor or floors below grade. The Building Officials and Code Administrators (BOCA) Code allowed for different methods of investigating the groundwater conditions and does not require more than a subsurface soil investigation.

One manner in which to accumulate data regarding the groundwater condition is excavation. Amorosi conceded that if H&H had dug the foundation and the construction official had approved it, then H&H had complied with the architect's note in the plans relating to the groundwater investigation. He also conceded that the 1981 soil boring was a sufficient subsurface soil investigation under the applicable building code. Because the Soil Boring Logs demonstrated dry soil between fifteen to

twenty feet deep, the applicable building code required only dampproofing to be applied to the foundation walls, not waterproofing.

Amorosi could cite no violation of any contract provision or the applicable building code as a result of Menk installing dampproofing as opposed to waterproofing in foundations, crawl spaces, and basements. Moreover, Amorosi's inspection revealed that the required dampproofing was installed at The Saratoga. The foundation walls were parge[1] coated and a bituminous tar-like material was applied over them.

The applicable building code also required installation of vapor barriers, which were essentially a sheet of plastic that covered the ground of the crawl space. While The Falcon Group's 2008 inspection revealed that some of the vapor barriers were missing, and others had been damaged, there was no way to determine whether the vapor barrier had been installed by H&H when the units were initially completed in the 1990s. Amorosi conceded that the vapor barriers are often damaged or removed, either intentionally or unintentionally, by the unit owners.

James Milito, another expert for plaintiff, testified that the Vapor-x 14-pound black tar paper used at The Saratoga was

[1] A parge coat is a thin coat of a cementitious or polymeric mortar applied to concrete or masonry.

not equal to Tyvek. He based his opinion on the perm rating, which he described as "the amount of water vapor that can escape through" the material. However, Milito did not measure the perm rating or perform any studies himself, and he could not point to any industry standard, code or publication to support his opinion.

Milito admitted that he had not performed an analysis of the weather resistant qualities of the Vapor-x 14-pound black tar paper versus Tyvek. He did not make any analysis of the permeability of the materials. He conceded that the Vapor-x 14-pound black tar paper was code compliant.

By order entered on April 11, 2005, the trial court granted partial summary judgment to Menk and dismissed plaintiff's claims under the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 to -56. The court determined that plaintiff did not qualify as a "purchaser" under PREDFDA. The court also dismissed plaintiff's negligence claims, finding that they were barred by the Economic Loss Doctrine. Thereafter, discovery continued and that matter was scheduled for trial in June 2012.

On February 16, 2012, plaintiff filed a motion seeking partial summary judgment on its claims against Menk. On March 19, 2012, Menk cross-moved for summary judgment on all claims

asserted against it. On April 12, 2012, H&H filed a motion seeking summary judgment on the claims against it.

On April 13, 2012, the court heard oral argument on the motions. The court denied plaintiff's motion but reserved its decision on Menk's and H&H's motions pending a Rule 104 hearing to allow examination of Amorosi and Milito.

On May 11, 2012, the court granted summary judgment to Menk and H&H, dismissing plaintiff's complaint in its entirety, and holding that "[t]here[] [was] no contractual violation by either Defendant." Concerning the sufficiency of the groundwater investigation, the court stated that the applicable building code was "vague at best, [and] did not require with any specificity as to the extent of [the] groundwater investigation"

The court found that the identification of the borings that had previously taken place on the site, together with the extensive excavation, provided more than ample opportunity to review the groundwater conditions and satisfied the requirements contained in the applicable building code. The court further noted that

> [t]here was also recognition by the engineers that prior to the pouring of any of the footings that they were required to be [inspected] by the township construction code official, that there was never any indication that the foundation or the footings were improperly located, or that there would have to be any remedial measures

> taken in order to provide for sound foundations in the basements.

On the issue of the installation of black tar paper versus Tyvek building wrap, the court determined that plaintiff had not presented an expert opinion indicating that the tar paper used at The Saratoga was not equivalent to Tyvek building wrap. The tar paper used by Menk complied in every respect with the building code, and aside from plaintiff's expert's personal opinion, there was nothing to suggest that Tyvek building wrap was superior.

The court stated, "[Plaintiff's expert] failed to supply any data, any analysis, any expert test results which would compel . . . the [c]ourt to find that there was at least a factual dispute as to whether or not they were equivalent." After finding that the black tar paper was "substantially equivalent" to the Tyvek building wrap, the court concluded that, without sufficient scientific or engineering data to the contrary, reasonable persons could not find that the two were not substantially equivalent.

II.

On appeal, plaintiff argues that the trial court erred by granting Menk's motion for partial summary judgment, dismissing its negligence claims and its claims under PREDFDA. We disagree.

Summary judgment shall be granted when there is no genuine

issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-41 (1995). Furthermore, "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

In reviewing an order granting summary judgment, we apply the standard that applies to the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010); Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). We note, however, that "'[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

A. Negligence Claims.

Plaintiff contends that the trial court erred by finding that its negligence claims are barred by the Economic Loss Doctrine. Plaintiff argues that the doctrine does not apply in this case. We do not agree.

In Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 579-80 (1985), our Supreme Court explained that the Economic Loss Doctrine is based on the principle that economic expectations between parties to a contract are not entitled to supplemental protection by negligence principles. The Court noted the difference in the policies underlying tort and contract remedies:

> The purpose of a tort duty of care is to protect society's interest in freedom from harm, i.e., the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises. Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.
>
> [Ibid.]

The Court stated that when addressing economic losses in commercial transactions, contract theories were better suited than were tort-based principles. Id. at 580-82.

Here, plaintiff asserted causes of action based on negligent construction, negligent design, and negligent misrepresentation. Even so, the claims are essentially breach-of-contract claims. See Wasserstein v. Kovatch, 261 N.J. Super.

277, 286 (App. Div.) ("Notwithstanding the language of the . . . complaint sounding in tort, the complaint essentially arises in contract rather than tort and is governed by the contract."), certif. denied, 133 N.J. 440 (1993). See also New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 494 (App. Div. 1985) (claim against principal of construction company for negligent supervision of construction sounds basically in contract, not in tort, despite the characterization of the claim as one for negligent supervision).

Plaintiff's cause of action is a breach of contract action, not a negligence action. When "there is no express contractual provision concerning workmanship, the law implies a covenant that the contract will be performed in a reasonably good and workmanlike manner." Aronsohn v. Mandara, 98 N.J. 92, 98 (1984). Indeed, a home buyer relies on a housing developer's "implied representation that the house will be erected in a reasonably workmanlike manner." Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 91 (1965)

In Aronsohn, the plaintiff homeowners sued the defendant contractors after they had discovered defects in the patio built before they purchased the home. Aronsohn, supra, 98 N.J. at 96-97. The plaintiffs' suit was based on strict liability, negligence, and breaches of express and implied warranties.

Ibid. Regarding the negligence claim, the Court noted that

> what is involved here is essentially a commercial transaction, and plaintiffs' claim [rests] on the violation of the implied contractual provision that the patio would be constructed in a workmanlike fashion. We do not intend to exclude the possibility that a cause of action in negligence would be maintainable. See Rosenau v. City of New Brunswick, 51 N.J. 130 (1968) (holding valid a negligence suit in which a consumer of water supplied by the city sued the manufacturer of a defective meter which allegedly caused water damage to the meter as well as to his home). However, we do not need to decide the validity of plaintiffs' negligence claim, since, as discussed above, the contractor's negligence would constitute a breach of the contractor's implied promise to construct the patio in a workmanlike manner.
>
> [Id. at 107.]

This case similarly involves commercial transactions between Menk and the unit owners. Their contracts required, among other things, construction of the units in accordance with applicable building codes and the seller's plans. The contracts also required that the units be fit for their intended use, and free of defects in materials and workmanship for a period of two years.

Plaintiff claimed that defendants performed the contract negligently, that is, that they did not complete the work in a workmanlike fashion, and/or in accordance with industry standards or accepted practices. Thus, if proven, defendants'

alleged negligence would constitute a breach of the express and implied promise to complete the construction in a workmanlike manner. Ibid.

We are therefore convinced that plaintiff's allegations essentially sound in contract, not tort. Notwithstanding plaintiff's arguments to the contrary, the Economic Loss Doctrine applies. We conclude that the trial court correctly determined that Menk was entitled to summary judgment on the negligence claims.

B. PREDFDA Claims.

The trial court found that plaintiff was not a "purchaser" as defined in N.J.S.A. 45:22A-23(d) and therefore could not pursue claims under PREDFDA. On appeal, plaintiff argues that PREDFDA should be interpreted so it can enforce the rights of unit owners to damages to the common elements of the condominium development. It is undisputed that the foundation walls and the building paper in the exterior walls are part of the common elements.

PREDFDA defines a "purchaser" as "any person or persons who acquires a legal or equitable interest in a unit, lot, or parcel in a planned real estate development." N.J.S.A. 45:22A-23(d). Plaintiff did not acquire a legal or equitable interest in any unit in The Saratoga. However, the New Jersey Condominium Act

(NJCA), N.J.S.A. 46:8B-1 to -38, authorizes plaintiff to pursue claims in a representative capacity on behalf of unit owners with regard to common elements in a condominium.

Under the NJCA, an association is "responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners." N.J.S.A. 46:8B-12. "Association" is defined as "the entity responsible for the administration of a condominium, which entity may be incorporated or unincorporated." N.J.S.A. 46:8B-3.

Furthermore, the "association shall be an entity which shall act through its officers and may enter into contracts, bring suit and be sued." N.J.S.A. 46:8B-15(a). An association also "may assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners individually." N.J.S.A. 46:8B-16(a) (emphasis added).

Recently, in Belmont Condominium Ass'n v. Geibel, 432 N.J. Super. 52, 72 (App. Div.), certif. denied, 216 N.J. 366 (2013), we explained that

> under the NJCA, a condominium association, acting in a representative capacity on behalf of the individual unit owner, has the exclusive right to sue a developer for construction defects related to the common elements, N.J.S.A. 46:8B-12, -15(a), -16(a),

> and although unit owners may sue the developer for defects pertaining to their units, individual unit owners are prohibited from repairing or altering common elements, N.J.S.A. 46:8B-18, and therefore generally lack standing to sue for damages to the common elements.

We therefore conclude that plaintiff, in its representative capacity, has standing to bring PREDFDA claims against Menk, the developer, on behalf of the unit owners for construction defects related to the common elements.

Menk argues, however, that even if plaintiff has standing to bring claims under PREDFDA, the claims are time-barred.

In this case, plaintiff alleged that Menk violated PREDFDA by breaching PREDFDA warranties. As to the breach of the PREDFDA warranties claims, plaintiff alleged:

> Menk breached its warranties under N.J.A.C. 5:26-7.1(c) and N.J.A.C. 5:26-7.2(b) (that all of the units were fit for their intended purpose as residential dwelling units and all of the common facilities are fit for their intended use) and N.J.A.C. 5:26-7.3 (that any unit or common element constructed by it would substantially conform to the model, description or plans used to induce the purchasers to enter into an agreement to purchase a unit unless otherwise noted in the Agreement of Sale) and has refused to repair or correct the defects in the construction, material or workmanship in the common areas installed by it within a reasonable time after notification of the defects in accordance with N.J.A.C. 5:26-7.2(c).

The statute of limitations under PREDFDA is six years

measured from the complaining party's "first payment of money to the developer in the contested transaction." N.J.S.A. 45:22A-37(d). However, the applicable regulations state that the warranties under N.J.A.C. 5:26-7.1 (developer warrants, among other things, that all lots, parcels, units or interests are fit for their intended use) expire after one year, and the warranties under N.J.A.C. 5:26-7.2 (developer warrants, among other things, that the common facilities are fit for their intended use) expire after two years. It is undisputed that plaintiff never made a warranty claim within the one and two-year warranty periods and, therefore, Menk cannot be liable for breach of said warranties in N.J.A.C. 5:26-7.1 and -7.2.

However, unlike N.J.A.C. 5:26-7.1 and -7.2, N.J.A.C. 5:26-7.3 (developer expressly warrants that any lot, parcel, unit, interest, or common facility will substantially conform to the model, description or plans unless noted otherwise in the contract) contains no express warranty period. Therefore, plaintiff's breach of warranty claims under N.J.A.C. 5:26-7.3 are governed by the PREDFDA six-year statute of limitations set forth in N.J.S.A. 45:22A-37(d), and were not time-barred.

Here, plaintiff's warranty claims pertain to the use of the Vapor-x black building paper, rather than Tyvek wrap, in the construction of the units, and certain alleged deficient masonry

work. As we explain further on in this opinion, those claims fail as a matter of law. Therefore, the dismissal of the related PREDFDA warranty claims was proper.

We also note that plaintiff also claimed that Menk violated PREDFDA by breaching its fiduciary duty but plaintiff did not address this claim in its brief. Accordingly, this issue is deemed waived. Pressler & Verniero, Current N.J. Court Rules, comment 4 on R. 2:6-2 (2014). See Weiss v. Cedar Park Cemetery, 240 N.J. Super. 86, 102 (App. Div. 1990) ("The failure to adequately brief the issues requires it to be dismissed as waived.").

Therefore, we affirm the trial court's order dismissing plaintiff's negligence claims and its claims under PREDFDA.

III.

Next, plaintiff argues that the trial court erred by granting summary judgment in favor of Menk on its claims related to the alleged improper use of Vapor-x black building paper instead of Tyvek in the construction of the units. We disagree.

A. Alleged Breach of Contract.

The architectural plans provided that in the construction of the units, "Tyvek Building Paper or equal" should be used. In addition, the Agreements of Sale provide that the purchasers acknowledge that Menk had "the right in its absolute and sole

discretion . . . to make substitutions of comparable materials or equipment which shall be in compliance with applicable building codes."

It is undisputed that the Vapor-x 14-pound black tar paper that Menk used in the construction was "code-compliant" building wrap. Nevertheless, Milito, plaintiff's expert, testified during the Rule 104 hearing that, in his opinion, the Vapor-x paper was not "equal" to the Tyvek paper and that the Tyvek paper was a superior product.

However, Milito admitted that in making this comparison, he did not conduct any analysis or calculation. He also did not compare the weather resistant qualities of Vapor-x paper and Tyvek. Furthermore, Milito's statement that Vapor-x paper was not equal to Tyvek was his personal opinion and not supported by any literature on the subject or the applicable building code.

Even so, plaintiff argues that it presented sufficient evidence to support this claim. Plaintiff relies upon the deposition testimony of Menk's president, Vrom Yegparian, who testified as follows:

> Q. And it would be your understanding that the felt paper would be an equal to Tyvek; correct?
>
> A. It would be equal . . . for purposes of damp proofing.

> It would not be its equal for purposes of air infiltration.
>
> Q. But for water-resistant barrier, it would be equal.
>
> A. Yes. And in my personal opinion, many people may disagree, even better for damp proofing, not for air infiltration.
>
> . . . .
>
> Q. If the plan . . . had just said "Tyvek," would the use of felt paper have been an equal substitute?
>
> A. It would have been an acceptable code substitute. As I said before, it would not be equal for air infiltration, but there is no code requirement for that, not for that type of building. And the other thing is for dampness and waterproofing. It would be equal, in my opinion. Some people will disagree with me.

However, Yegparian was not an expert and he conducted no analysis or comparison of the Vapor-x paper and the Tyvek material. Moreover, Yegparian was offering his personal opinion on this issue, and his testimony does not support the conclusion that the Vapor-x paper was not equal to Tyvek.

Therefore, plaintiff did not present sufficient credible, admissible evidence to support his claim that Menk breached the purchase agreements by using the Vapor-x paper rather than Tyvek as a building wrap. The trial court correctly determined that Menk was entitled to summary judgment on the breach-of-contract claims.

B. Consumer Fraud Act.

Plaintiff alleged that Menk violated the Consumer Fraud Act (CFA), N.J.S.A. 56:8-2 to -106, by inducing individuals to purchase the units through misrepresentation, concealment or omission of material facts regarding the common elements. Plaintiff alleged that Menk misrepresented to buyers that the common elements were constructed properly in accordance with the approved architectural plans. Plaintiff claimed that Menk ignored the plans by using the Vapor-x paper rather than Tyvek.

However, as we have explained, plaintiff did not present sufficient admissible, credible evidence to show that the Vapor-x paper was not the equal of the Tyvek material. Therefore, plaintiff did not present sufficient evidence to support its claim that Menk misrepresented, concealed or omitted any material fact related to use of the Vapor-x material in the construction of the units, and Menk was entitled to summary judgment on the CFA claims.

C. Breach of Express and Implied Warranties.

Plaintiff claimed that Menk breached the express and implied warranties in the Agreements of Sale and the public operating statement by failing to construct and install the common elements in good and workmanlike manner, free from defects and in accordance with the architectural plans. These

claims also were based on the alleged improper use of the Vapor-x paper instead of the Tyvek material.

As we stated previously, plaintiff failed to present sufficient admissible, credible evidence that Vapor-x was not "equal" to Tyvek. There also was no evidence showing that the Vapor-x paper was defective or not fit for its intended use. Therefore, the trial court correctly determined that Menk was entitled to summary judgment on these claims.

D. Breach of PREDFDA Warranty.

Plaintiff alleged that Menk breached the PREDFDA warranty under N.J.A.C. 5:26-7.3. The regulation provides that, "The developer shall expressly warrant that any lot, parcel, unit, interest, or common facility will substantially conform to the model, description or plans used to induce the purchaser to enter into a contract or agreement to purchase unless noted otherwise in the contract."

Plaintiff did not, however, present sufficient admissible, credible evidence that the use of the Vapor-x paper did not "substantially conform to the model, description or plans used." Accordingly, there was insufficient evidence to show that Menk breached the PREDFDA warranty contained in N.J.A.C. 5:26-7.3. We conclude that the trial court correctly determined that Menk was entitled to summary judgment on this claim.

IV.

Plaintiff further argues that "the trial court erred in precluding it from going to trial on its claims under the CFA, for breach of express and implied warranties, and for breach of contract" related to the masonry work. According to plaintiff, defendants failed to construct the foundations in a good and workmanlike manner, free from defects and in accordance with applicable governmental codes and the building plans. Again, we disagree.

A. Breach of Contracts and Building Code.

Plaintiff argues that waterproofing, not dampproofing, of the basement and crawl spaces was required. Plaintiff argues that Menk and/or H&H were required to undertake an appropriate subsurface groundwater investigation, and if they failed to do so, to waterproof the basements and crawl spaces.

It is undisputed that the basements and crawl spaces were not waterproofed. Plaintiff's expert, Amorosi, testified at the Rule 104 hearing that the applicable building code required only a subsurface soil investigation, and it allowed for different methods of investigating the groundwater conditions. One of the acceptable methods was excavation.

The excavation area for each of the thirty-seven buildings constructed at The Saratoga was approximately 150 feet long, 50

feet wide, and 10 feet deep. The excavation for each building required the displacement of approximately 10,000 cubic feet of soil. There was no evidence of any groundwater surfacing as a result of the excavation.

Amorosi testified that such excavation complied with the architect's note in the plans relating to the groundwater investigation. He acknowledged that there was nothing in the applicable building code which said the excavation performed at the property was not a sufficient subsurface soil investigation.

Furthermore, Amorosi conceded that the 1981 soil borings were sufficient subsurface soil investigations under the applicable building code. Indeed, because the soil boring logs demonstrated dry soil between fifteen to twenty feet deep, the building code required only dampproofing to be applied to the foundation walls, not waterproofing. Amorosi did not identify any violation of a contract provision or the building code as a result of Menk and/or H&H installing dampproofing as opposed to waterproofing in the foundations, crawl spaces, and basements.

Moreover, plaintiff presented no evidence that the vapor barriers, which are a required part of the dampproofing of the basements and crawl spaces, were not properly installed at the time of completion. Amorosi conceded that there was no way to determine if H&H had installed the vapor barriers since they are

often damaged or removed, either intentionally or unintentionally, by the unit owners.

Because plaintiff failed to present sufficient admissible, credible evidence that waterproofing, not dampproofing, was required, or that the dampproofing was not properly installed, there was no genuine issue of material fact regarding Menk's and H&H's compliance with the contracts and the applicable building codes. Accordingly, Menk and H&H were entitled to judgment on the breach-of-contract and building-code claims.

B. Other Masonry-Related Claims.

Plaintiff further alleged that Menk violated the CFA "by inducing homeowners to purchase their units by and through misrepresentation, concealment or omission of material facts regarding the common elements." Plaintiff claimed that Menk and H&H violated express and implied warranties in the purchase agreements and POS. In addition, plaintiff claimed that Menk breached its PREDFDA warranties.

We are convinced, however, that the trial court did not err in granting summary judgment to Menk and H&H on these claims. As indicated in plaintiff's brief, these claims were all premised on the alleged failure to perform an appropriate subsurface groundwater investigation and to install waterproofing in the basements and crawl spaces. As we have determined, plaintiff did

not present sufficient evidence to show that the groundwater investigation was inadequate, or that waterproofing was required. Thus, the related CFA and warranty claims failed as a matter of law.

Plaintiff's other arguments related to these claims are without sufficient merit to warrant comment. R. 2:11-3(e)(1)(E).

We therefore conclude that the trial court correctly granted summary judgment in favor of Menk and H&H on the masonry-related claims.

V.

Next, plaintiff argues that the trial court erred by limiting the proofs that plaintiff would have been permitted to present at trial. Plaintiff also argues that, in the event of a remand, it should not be precluded from presenting certain mold reports that were submitted after the discovery end date.

A trial court's evidentiary rulings are "entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Marrero, 148 N.J. 469, 484 (1997). See also Verdicchio v. Ricca, 179 N.J. 1, 34 (2004) (noting that the admissibility of evidence falls within the trial court's broad discretion). A trial court's evidentiary ruling must be upheld on appeal "unless it can be shown that the trial court palpably abused its discretion, that

is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

A. Witnesses Bergen and Finkelstein.

First, plaintiff contends that it should not have been precluded from calling Linda Bergen and Randy Finklestein as witnesses, or referencing the underlying facts of the prior two litigations relating to their units in building number 33. We conclude that, to the extent this ruling had any bearing on the summary judgment motions, the ruling was not a mistaken exercise of discretion.

The doctrine on invited error "operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996). Thus, a defendant cannot ask the trial court to take a certain course of action, and after the court has done so, claim it is error and prejudicial. State v. Pontery, 19 N.J. 457, 471 (1955).

On August 5, 2011, at the oral argument on Menk's motion, plaintiff's counsel agreed that it would not call either Bergen or Finkelstein at trial. Based on those representations and

assurances, the court granted Menk's application and precluded plaintiff from calling Bergen or Finkelstein as witnesses. Plaintiff cannot now argue on appeal that the court erred by doing so. See Brett, supra, 144 N.J. at 503; Pontery, supra, 19 N.J. at 471.

B. Other Evidence Related to Building Number 33.

Plaintiff further argues that the trial court erred by barring testimony and evidence related to problems with other units in Building 33. Contrary to plaintiff's contention, nothing in the court's order precluded plaintiff from calling witnesses other than Bergen or Finkelstein, related to the problems in building number 33.

The record shows that the parties and the court agreed that plaintiff would call one or more of the other unit owners living in building number 33 as trial witnesses. The court's August 5, 2011 order provided: "ORDERED that on or before August 20 Plaintiff shall name other unit 33 witnesses . . . and produce that witness(s) for deposition prior to Sept. 12, 2011[.]"

C. Units or Buildings Not Constructed by Menk.

Plaintiff also contends that the trial court erroneously barred it from presenting evidence about buildings at The Saratoga that Menk did not construct. Plaintiff contends that evidence that those buildings never experienced water

infiltration problems, while some of the buildings constructed by Menk have, is both probative and relevant.

Notwithstanding plaintiff's arguments to the contrary, evidence concerning units or buildings that Menk did not construct would not have been relevant to any of the issues at trial or at the summary judgment stage of the proceedings. Such evidence was not relevant to the issue of whether Menk breached its contract. N.J.R.E. 401. The trial court did not abuse its discretion by refusing to allow the introduction of such evidence.

D. The Mold Reports

Plaintiff asserts that its mold reports should not be barred on remand. Since we have determined that Menk and H&H were entitled to summary judgment on all of plaintiff's claims, there will be no remand. Thus, the issue is moot.

We note, however, that the reports in question were submitted in an amendment to interrogatory answers that plaintiff provided six weeks after the discovery end date. Plaintiff was apparently attempting to add a new claim to the case for property damage resulting from the presence of mold in certain units.

Plaintiff's amendment to its interrogatory answers, which contained the mold reports, was prohibited by Rule 4:17-7. The

amendment was provided after the discovery end date, and the information contained therein was reasonably available or discoverable prior to the discovery end date through the exercise of due diligence. Ibid.

Affirmed.