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WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

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: SUPERIOR COURT OF NEW JERSEY
JAMIE RIVAS AND CLARISSA RIVAS, :
Plaintiffs, :
:
: ESSEX COUNTY
v. : DOCKET NO.: ESX-L-1531-13
:
THE ESTATE OF THERESA MELILLO, :
LORENZO MELILLO, individually, and :
FAUSTO SIMOES, :
Defendants. :
:
_____ :

Decided: March 31, 2015
Clayton Giles, Esq.
Giles Law Firm, LLC
Attorney for Plaintiffs Jamie Rivas and Clarissa Rivas
Anthony G. Del Geurcio, Esq.
Gaccione Pomaco, PC
Attorney for Defendants, The Estate of Theresa Melillo and Lorenzo Melillo
By: Stephanie A. Mitterhoff, J.S.C.

BACKGROUND

This case arises from the sale of a three story building located at 239 Bloomfield Ave in Newark. On or about April 3, 1981, a first floor resident of the building murdered three family members and set the building on fire, causing damage to all three floors in the rear of the building. Defendant Lorenzo Melillo had resided at the property since the mid-1940's at the time of the fire, knew that it caused damage on all three floors, and testified that he moved out of 2

the property for 6 to 7 weeks while repairs were being made. Insurance proceeds were collected and some repairs were made, but apparently none of the witnesses who testified in this case were directly involved with the repairs Anthony Melillo, the individual who organized the repairs, however, is the brother of Defendant Lorenzo Melillo.

At the time of the sale, the building was property of the Estate of Theresa Melillo. Theresa Melillo died intestate and her son, Lorenzo Melillo, was appointed Aministrator of the Estate. In or about April or June of 2008, the estate entered into a contract with Plaintiffs Jamie and Clarissa Rivas to sell the building for $310,000. The contract recited that:

This Property is being sold 'As Is.' The Seller does not make any claims or promises about the condition or value of any of the property included in this sale. The Buyer has inspected the Property and relies on this inspection and any rights which may be provided for elsewhere in this Contract.

The contract gave Plaintiffs the right to conduct an inspection and cancel the contract if serious defects were found.

Between mid-2008 and the closing date in November 2010, Lorenzo met with the Plaintiffs several times to discuss the sale. Plaintiff Jamie Rivas testified that Lorenzo never made representations regarding the condition of the property during these conversations. In contrast, Plaintiff's answers to interrogatories assert that "In response to Jamie's specific questions regarding the property's condition, Administrator Melillo reiterated that he was unaware of anything that had happened to the Property that could affect its usability as a rental property."

On October 18, 2010, the Defendants provided Plaintiffs with a Certificate of Code Compliance issued by the City of Newark and the DCA Certificate of Inspection issued by the State of New Jersey Bureau of Housing Inspection. 3

Closing occurred on November 22, 2010. At the time of closing, Plaintiffs never had the building inspected and Defendants never told Plaintiffs about the fire and murder/arson that occurred in 1981. In January 2011, Plaintiff Jamie Rivas discovered fire damage after removing sheetrock as part of the renovation of the first floor apartment. Plaintiffs discovered charred wood and other damage throughout the building. Plaintiffs hired an engineer, Samuel Ruth, whose report found severe structural damage and recommended extensive construction work. Among the defects observed by Mr. Ruth were floors that were not level, cracked beams in the basement, depression of the third floor exterior stair into the rear wall, severe damage in rear bathrooms on all floors, and "charred wood framing" revealed by "[c]racks in the aluminum siding on the rear exterior wall." Plaintiffs obtained a quote from Open Eye Innovators of $300,865.95 to repair the fire damage. Plaintiff's architect Kenneth Stoyack found that the construction repair work had a minimum value of $193,838 and, on this basis, recommended that the building be entirely demolished. Plaintiff's appraiser, Michael Holenstein, found that, as of the closing date, the property had a market value of $310,000 if the defects were not factored in and a market value of $78,600 if the defects were factored in. Plaintiff filed a complaint on December 6, 2012. Count one alleges fraudulent misrepresentation. Count two alleges negligent misrepresentation. Count three alleges "Fraudulent Concealment." Count four alleges a breach of the covenant of good faith and fair dealing. Plaintiff seeks rescission of the contract.

Before the Court is Defendants' motion to dismiss counts one through four of Plaintiff's complaint. Defendants contend that count one and two are for affirmative misrepresentations and not a failure to disclose and, as admitted by Plaintiff Jamie Rivas, Defendants made no 4

affirmative misrepresentations as to the condition of the property. Defendants also argue that Plaintiffs could not have reasonably relied on any representations by Defendants because the contract contained an "as-is" clause. As to the claim for fraudulent concealment, Defendants contend that Lorenzo Melillo had no knowledge of structural damage caused by the fire. Defendants further argue that latency requires a showing that the defects in the house were not discoverable upon a reasonable professional inspection, which can only be established by expert testimony. Defendants contend that the relief sought by Plaintiffs is barred by the economic loss doctrine and Plaintiffs cannot make out a cause of action for breach of the covenant of good faith and fair dealing because the "as-is" clause expressly governs the condition of the property.

Plaintiffs argue that Defendants knowingly concealed the fire damage and that the structural defects were latent. Plaintiffs argue that the "as-is" clause is not dispositive of their claims and that they reasonably relied on Defendants' misrepresentations. Plaintiffs contend that the economic loss doctrine does not bar their claims for fraud and misrepresentation. Plaintiffs also argue that the covenant of good faith and fair dealing has been breached notwithstanding the "as-is" clause.

DISCUSSION

I. The Summary Judgment Standard

Defendants' motion for summary judgment is governed by Rule 4:46-2, which provides that summary judgment should be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2. In Brill, the Supreme Court explained that in determining whether a genuine issue of material fact exists, the question is whether "the 5

competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Brill explained that "[c]redibility determinations will continue to be made by a jury and not the judge," but "when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Ibid. (citations and internal quotation marks omitted).

II. Plaintiffs Create a Genuine Issue of Fact as to Their Claims for Common Law Fraud, Negligent Misrepresentation, and Fraudulent Concealment.

As explained above, Defendants move to dismiss Plaintiff's claims for common law fraud, negligent misrepresentation, and fraudulent concealment. To establish a claim for common law fraud, Plaintiffs must show "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). Similarly, negligent misrepresentation requires a showing of a material misstatement and reasonable reliance. Union Ink Co., Inc. v. AT&T Corp., 352 N.J. Super. 617, 645-46 (App. Div. 2002). Fraud must be established by clear and convincing evidence. Weil v. Expres Container Corp., 360 N.J. Super. 599, 612-13 (App. Div. 2003).

A. Defendant's Nondisclosure May Constitute a Misrepresentation.

Defendant's motion raises the question of when nondisclosure can support a cause of action for common law fraud, negligent misrepresentation, and fraudulent concealment. A seller's concealment or nondisclosure of a condition of real property satisfies the requirement of a misrepresentation when (1) the seller deliberately and knowingly fails to disclose (2) a latent 6

defect not observable or discoverable by the purchasers. Weintraub v. Krobatsch, 64 N.J. 445, 455 (1974); see Dalmazio v. Rosa, 2015 N.J. Super. Unpub. LEXIS 326, at 21 (App. Div. Feb. 20, 2015) (denying summary judgment on common law fraud claim based on sellers' failure to disclose a known latent defect). The fact that the contract contains an "as-is" clause does not preclude a fraud claim based on failure to disclose latent defects. Dalmazio, supra, 2015 N.J. Super. Unpub. LEXIS 326, at 20 ("it was error to relieve [seller] of any responsibility to disclose the condition of the property based on the 'as-is' provision").

Defendants concede that evidence of fraudulent nondisclosure as described in Weintraub, may form the basis of count three of Plaintiff's complaint, but argue that counts one and two require proof of an affirmative misrepresentation. Defendants' attempt to categorize counts one and two as pertaining only to affirmative misrepresentations ignores the language of the counts, which mention only misrepresentations and never use the term "affirmative misrepresentation." Further, the Appellate Division in Dalmazio explicitly held that nondisclosure could amount to a "sufficient misrepresentation" for a claim of "common law fraud." Id. at 18-19. Therefore count one can be based on a failure to disclose. Similarly, because Dalmazio couched its analysis in terms of a duty to disclose, the Court concludes that nondisclosure of latent defects can form the basis of Plaintiff's negligent misrepresentation claim in count two. Ibid.

1. Plaintiffs Have Made a Sufficient Showing that Defendants Knew of Structural Damage to the Home.

Defendants argue that Plaintiff's nondisclosure argument fails because Plaintiff cannot show that Lorenzo Melillo knew that the building had existing structural damage at the time of the sale. Proof of knowledge, however, does not require an inculpatory statement and knowledge can be inferred from circumstantial evidence. In re Johnson, 105 N.J. 249, 258 (1987). For example, in Newman v. Arenstein, 2006 N.J. Super. Unpub. LEXIS 323, at 15 (App. 7

Div. Mar. 9, 2006), the Appellate Division found that knowledge can be inferred from similar circumstantial evidence. There, as here, the sellers were aware that a fire had occurred on the property several decades before, some repairs were performed, some fire damage remained visible, the contract for the sale of a building contained an "as-is" clause, and the sellers never disclosed the fire or structural damage to the purchasers. The Law Division granted summary judgment to the sellers holding that although sellers knew of the fire, the plaintiff failed to show that the sellers had knowledge of the structural defects. The Appellate Division reversed, holding that a rational factfinder could infer knowledge based on the superficial repairs covering up fire damage. Id. at 16-17.

Here, there is circumstantial evidence that Lorenzo most likely knew of existing structural damage. As in Newman, Defendant knew of the fire, and there were superficial repairs that only covered up fire damage and did not address structural defects. For example, Plaintiff's expert report recites that "second floor wood framing in the rear of the building was observed to have been exposed to a fire in the past and was covered up." Jamie Rivas testified that sheetrock in the kitchen of the first floor apartment covered extensive fire damage and plywood and rugs covered charred wood on the other floors. Also relevant is the fact that Lorenzo was an adult at the time of the fire and resided in the building continuously until shortly before closing, and therefore was in a position to observe the structural deterioration of the building, including the depression of the exterior staircase into the rear wall. Finally, Lorenzo's status as the brother of the individual who arranged the repairs is circumstantial evidence from which a jury could infer that he knew structural defects existed notwithstanding the repairs. Viewing this evidence in the light most favorable to Plaintiffs, a rational jury could conclude that Lorenzo knew the building 8

had significant structural defects as a result of the fire and his brother simply had the damage "covered up" with superficial repairs.

2. Plaintiffs Have Made a Sufficient Showing that the Structural Damage Was Latent.

Defendants contend that Plaintiff's nondisclosure argument fails because Plaintiffs cannot establish latency. Latency requires a showing that the undisclosed defect was "not observable by the purchasers on their inspection." Weintraub, supra, 64 N.J. at 455. Defendants failed to provide any legal authority for the proposition that expert testimony is required as a predicate to this claim, or that a Plaintiff who did not hire a professional home inspection is barred from pursuing such an action For example, in Weintraub, the Supreme Court held that genuine issues of fact existed as to latency without discussing whether Plaintiffs had supported their claims with adequate expert testimony. Further, the Court explicitly held that the question is whether the defect is "observable by the purchasers on *their* inspection" (emphasis added), suggesting that latency is evaluated from the perspective of the purchasers and not a professional inspector. Similarly, the Appellate Division in Correa v. Maggiore, 196 N.J. Super. 273, 281 (App. Div. 1984) explained that the defect must not be "reasonably observable *to the purchaser*." (emphasis added). Thus, because the question is viewed from the perspective of the purchaser and not a professional inspector, the jury in Correa "could reasonably have found that the tilting of the house was not observable or readily apparent." Ibid. Applying this liberal standard, the Appellate Division in Newman explicitly held that even severe visible damage does not preclude a factual dispute as to latency so long as the full extent of damage is concealed from view:

However, there is a genuine issue of material fact as to whether the alleged structural flaws resulting from the 1971 fire were all readily observable at the time the property was sold. . . . There is evidence to support plaintiffs' claim that, 9

even if some fire damage was exposed, not all of the alleged structural damage was visible. For example, the MECE report notes that a new asphalt roof had been installed over the wooden shingles and sheathing damaged by the fire. Furthermore, according to the MECE report, the attic floor or ceiling on the second floor had to be removed so that attic joists could be inspected for structural damage. In addition, plywood had been installed over charred wood in the second story master bedroom. The floor was carpeted. Although a few floor joists were "partially visible" at the front side of the bedroom and these showed "severe" fire damage in some locations, the full extent of the damage to the second story was not visible.

Thus, even if some of the fire damage was observable, the record contains evidence which establishes that some of the structural damage may have been concealed from view. Some of the damage was beneath the new roof, under plywood, carpeted over or covered with sheetrock. [Newman, supra, 2006 N.J. Super. Unpub. LEXIS 323, at 15.]

In this case, as in Newman, although some fire damage may have been visible, the evidence indicates that the full extent of the damage was revealed only after layers of sheetrock and plywood had been removed. This is a sufficient showing to raise a genuine issue of fact as to latency and Plaintiffs are not required to introduce expert testimony as to what a professional inspection would have revealed. Plaintiffs have raised an issue of fact as to whether Defendants materially misrepresented the condition of the building by failing to disclose the fire and resulting structural defects. This evidence is sufficient to support the fraudulent concealment claim in count three and establish a misrepresentation, as alleged by counts one and two of Plaintiff's complaint.

B. Plaintiffs Have Made a Sufficient Showing of Reasonable Reliance.

Defendants do not seek to apply their reasonable reliance argument to Plaintiff's fraudulent concealment theory but move to dismiss counts one and two of the complaint on the grounds that Plaintiffs fail to show reasonable reliance. The fact that a contract contains an "as-is" clause and the buyers had an opportunity to conduct their own inspection is relevant to the 10

issue of reasonable reliance. Deangelo v. Exxon Corp., 1999 WL 34014043 (N.J. Super. App. Div. Oct. 15, 1999). However, the "as-is" clause and opportunity to inspect is not dispositive. Dalmazio, supra, 2015 N.J. Super. Unpub. LEXIS 326, at 23 (where contract contains an "as-is" clause and gave buyer the right to conduct an inspection, Appellate Division was convinced "that the evidence presented was sufficient to establish genuine issues of material fact as to the common law fraud claim"); see also Riche and Pat Bonvie Stables, Inc. v. Irving, 350 N.J. Super. 579, 589 (App. Div. 2002) ("as-is" clause not dispositive of reliance in allegedly fraudulent sale of horse).

The Court concludes that Plaintiffs have introduced sufficient evidence of reasonable reliance to survive summary judgment. The fact that Defendants furnished a Certificate of Code Compliance and a Certificate of Inspection while concealing that which they were duty-bound to disclose creates a jury question as to Plaintiff's reasonable reliance. See Dalmazio, supra, 2015 N.J. Super. Unpub. LEXIS 326, at 23.

In sum, the Court concludes that Plaintiffs have introduced sufficient evidence to support their claims of common law fraud, negligent misrepresentation, and fraudulent concealment.

II. The Relief Sought by Plaintiffs is Not Barred by the Economic Loss Doctrine.

Defendants move to dismiss counts one and two of Plaintiff's complaint on the grounds that they are barred by the economic loss doctrine. The economic loss doctrine demarcates tort and contract liability for economic losses on the basis that contract law is generally better suited to resolve claims for economic loss. Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555, 579-80 (1985). Defendants concede that the economic loss doctrine "does not bar claims for fraud in the inducement of a contract." Bracco Diagnostics Inc. v. Bergen Brunswig Drug Co., 226 F. Supp. 2d 557, 563-64 (D.N.J. 2002). Fraud in the inducement is fraud that induces the 11

other party to enter into the contract. Walid v. Yolanda for Irene Couture, 425 N.J. Super. 171, 186 (App. Div. 2012).

Here, Plaintiffs claim that they relied on Defendants nondisclosure in deciding to purchase the building. Because these claims are for fraud in the inducement, they do not implicate contractual duties and instead implicate an independent tort duty not to misrepresent the condition of the property. Therefore, the economic loss doctrine does not operate to bar Plaintiff's claims. See Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2002); Bracco Diagnostics, supra, 226 F. Supp. 2d at 563-64.

III. Covenant of Good Faith and Fair Dealing.

A covenant of good faith and fair dealing exists in the performance and enforcement of every contract, prohibiting either party from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997). The covenant of good faith and fair dealing cannot override an express term of the contract. Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001).

Here, the contract expressly provides that the property is being sold "as-is." Because the covenant of good faith and fair dealing does not override express contractual terms, Defendants could not have violated the covenant of good faith and fair dealing by delivering the property "as-is." Wilson, supra, 168 N.J. at 244. As explained above, Plaintiff's claims relate to misrepresentations in the formation of the contract, and not in its performance or enforcement. Plaintiffs cite to no law for the proposition that knowing nondisclosure of a latent defect can support a cause of action for breach of the covenant of good faith and fair dealing. Therefore, Plaintiffs' good faith and fair dealing claims fail as a matter of law. 12

IV. The Motion for Summary Judgment on Rescission is Denied Without Prejudice.

The Supreme Court described the remedy of rescission as follows:
Rescission remains a form of equitable relief in whatever setting its need arises, and courts wielding that remedy retain the discretion and judgment required to ensure that equity is done. In furtherance of that objective, a court may shape the rescission remedy in order to serve substantial justice. [Rutgers Cas. Ins. Co. v. LaCroix, 194 N.J. 515, 528-29 (2008).]
Contracts may be rescinded where there is "original invalidity, fraud, failure of consideration, or a material breach." Notch View Associates v. Smith, 260 N.J. Super. 190 (Law Div. 1991), citing 17A Am.Jur.2d, Contracts §539, 567 and Herbstman v. Eastman Kodak Co. 68 N.J.L. 9 (1975) (other citations omitted).
The general goal of rescission is to place the parties in the status quo ante. Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 612 (1989). However, it is well settled that "full and perfect restoration to the status quo is not always required." Russ v. Metropolitan Life Ins. Co., 112 N.J. Super. 265, 283 (Law Div. 1970). Because the Court retains discretion as to how to implement rescission and the remedy is equitable in nature, particular circumstances may justify some deviation from the status quo. For example, when an automobile insurance policy was rescinded because of the insured's fraud, the trial court erred in concluding that it lacked discretion to order that the insured's innocent daughter be given PIP benefits under the policy. LaCroix, supra, 194 N.J. at 531-32. Similarly, the inequitable conduct of one party may justify a failure to perfectly restore the status quo as to that party. Driscoll v. Burlington-Driscoll Bridge Co., 8 N.J. 433, 500 (1952).
The Court considers the briefs and certifications submitted by the parties inadequate to decide whether summary judgment is appropriate on rescission. Therefore, as to rescission, the motion for summary judgment is denied without prejudice. 13

CONCLUSION

For the foregoing reasons, summary judgment is denied as to Plaintiffs' claims for common law fraud, negligent misrepresentation, fraudulent concealment, but granted as to Plaintiffs' claims for breach of the covenant of good faith and fair dealing. The motion for summary judgment as to rescission is denied without prejudice.